TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1953

No. [redacted] 1

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL., APPELLANTS,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

FILED NOVEMBER 25, 1953

PROBABLE JURISDICTION NOTED JUNE 8, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 8

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Caption omitted]

OLIVER BROWN, Mrs. RICHARD LAWTON, Mrs. SADIE EMMANUEL, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and

LINDA CAROL BROWN, an infant, by Oliver Brown, her father and next friend,

VICTORIA JEAN LAWTON and CAROL KAY LAWTON, infants, by Mrs. Richard Lawton, their mother and next friend,

JAMES MELDON EMMANUEL, an infant, by Mrs. Sadie Emmanuel, his mother and next friend,

NANCY JANE TODD, an infant, by Mrs. Lucinda Todd, her mother and next friend,

RONALD DOUGLAS RICHARDSON, an infant, by Mrs. Iona Richardson, his mother and next friend,

KATHERINE LOUISE CARPER, an infant, by Mrs. Lena Carper, her mother and next friend,

CHARLES HODISON, an infant, by Mrs. Shirley Hodison, his mother and next friend,

[fol. b] THERON LEWIS, MARTHA JEAN LEWIS, ARTHUR LEWIS and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend,

SAUNDRIA DORSTELLA BROWN, an infant, by Mrs. Darlene Brown, her mother and next friend,

DUANE DEAN FLEMING and SILAS HARDRICK FLEMING, infants, by Mrs. Shirla Fleming, their mother and next friend,

DONALD ANDREW HENDERSON and VICKI ANN HENDERSON, infants, by Mrs. Andrew Henderson, their mother and next friend,

RUTH ANN SCALES, an infant, by Mrs. Vivian Scales, her mother and next friend,

CLAUDE ARTHUR EMMERSON and GEORGE ROBERT EMMERSON, infants, by Mrs. Marguerite Emmerson, their mother and next friend, Plaintiffs,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS; Kenneth McFarland, Superintendent of Schools of Topeka, Kansas; and Frank Wilson, Principal of Sumner Elementary School, Defendants,

and

THE STATE OF KANSAS, Intervening Defendant

No. T-316 Civil

[fol. 1] AMENDED COMPLAINT—Filed March 22, 1951

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, section 1, and the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00).

(b) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13 (Title 8, United States Code, section 43), to be commenced by any citizen of the United States or other persons within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, or rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, section 1, and by the Act of May 31, 1870, Chapter 114, section 16, 16 Stat. 144 (Title 8, United States Code, section 41), providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

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(c) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 2281. This is an action for an interlocutory injunction and a permanent injunction restraining the enforcement, operation and execution of statutes of the State of Kansas by restraining the action of defendants, officers of such state, in the enforcement and execution of such statutes.

2. This is a proceeding for a declaratory judgment and injunction under Title 28, United States Code, section 2201, for the purpose of determining questions in actual contro- [fol. 2] versy between the parties to wit:

(a) The question of whether the state statute, ch. 72-1724 of the General Statutes of Kansas 1935, is unconstitutional in that it gives to defendants the power to organize and maintain separate schools for the education of white and colored children in the City of Topeka, Kansas.

(b) The question of whether the customs and practices of the defendants operating under Ch. 72-1724 of the General Statutes of Kansas, 1935, are unconstitutional in that they deny infant plaintiffs the rights and privileges of enrolling in, attending and receiving instruction in public schools of the district within which they live while such rights and privileges are granted to white children similarly situated; where the basis of this refusal and grant is the race and color of the children, and that alone.

(c) The question of whether the denial to infant plaintiffs, solely because of race, of educational opportunities equal to those afforded white children is in contravention of the Fourteenth Amendment to the United States Constitution as being a denial of the equal protection of the laws.

3. (a) Infant plaintiffs are citizens of the United States, the State of Kansas, and Shawnee County, the City of Topeka, Kansas. They are among those classified as Negroes. They reside within various school districts in the City of Topeka, satisfy all requirements for admission to schools within the districts within which they live, have presented themselves for enrollment and registration at the proper times and places, and were denied the right to enroll therein, on account of their race and color. Instead, they

are required, solely because of race, to attend schools where they do not and cannot receive educational advantages, opportunities and facilities equal to those furnished white [fol. 3] children.

(b) Adult plaintiffs are citizens of the United States and the State of Kansas, are residents of and domiciled in Topeka, Shawnee County, Kansas, are taxpayers of said county, of the State of Kansas, and of the United States. They are the parents and natural guardians of infant plaintiffs named herein. By being compelled to send their children to schools outside the districts wherein they live rather than to schools within said districts, they must bear certain burdens and forego certain advantages, neither of which is suffered by parents of white children situated similarly to children of plaintiffs.

(c) Plaintiffs bring this action on their own behalf and also on behalf of all citizens similarly situated and affected, pursuant to Rule 23A of the Federal Rules of Civil Procedure, there being common questions of law and fact affecting the rights of all Negro citizens of the United States similarly situated who reside in cities in the State of Kansas in which separate public schools are maintained for white and Negro children of public school age, and who are so numerous as to make it impracticable to bring them all before the Court.

4. The State of Kansas has declared public education a state function in the Constitution of the State of Kansas, Article 6, Sections 1 and 2. Pursuant to this mandate, the Legislature of Kansas has established a system of free public schools in the State of Kansas, according to a plan set out in Chapter 72 of the General Statutes of Kansas, 1935, and supplements thereto. The establishment, maintenance, and administration of the public school system of Kansas is vested in a Superintendent of Public Instruction, County Superintendent of Schools, and City School Boards. (Constitution of Kansas, Article 6, section 1.)

[fol. 4] 5. The public schools of Topeka, Shawnee County, Kansas are under the control and supervision of the defendants.

BLEED THROUGH

(a) Defendant, Board of Education, is under a duty to enforce the school laws of the State of Kansas (General Statutes of Kansas, 1935, [and supplements thereto,] * section 72-1809); to maintain an efficient system of public schools in Topeka, Shawnee County, Kansas; to determine the studies pursued, the methods of teaching, and to establish such schools as may be necessary to the completeness and efficiency of the school system. It is an administrative department of the State of Kansas, which discharges governmental functions pursuant to the Constitution and the laws of the State of Kansas. (Constitution of Kansas, Article 6, sections 1 and 2, General Statutes, 1935, and supplements thereto of Kansas, section 72-1601). It is declared by law to be a body corporate and is sued in its governmental capacity.

6/22/51 amended at Pre-Trial A.J.M. 1949 72-1724

(b) Defendant Kenneth McFarland is Superintendent of Schools, and holds office pursuant to the Constitution and the laws of the State of Kansas, as an administrative officer of the free public school system of the State of Kansas. He has immediate control of the operation of public schools in Topeka, Shawnee County, Kansas. He is sued in his official capacity.

6. Defendant, Board of Education of Topeka, Shawnee County, Kansas, has established and at the present time maintains in the City of Topeka, State of Kansas, elementary schools for the education of the school children of the City of Topeka. They are located within different districts of the City of Topeka, whose boundaries are designated by the defendant, Board of Education.

7. White Children of elementary school age go to the school within the designated boundaries of the district in which they live.

[fol. 5] Infant plaintiffs live within the boundaries of these districts, but they are required to leave the districts within which they live and travel from one and one-half miles to

* Struck out in copy.

two miles to separate all-Negro schools, solely because of their race and color and in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

8. The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

9. Adult plaintiffs are required to send their children outside the school districts in which they reside to separate all-Negro schools, whereas parents of white children are permitted to send their children to schools close at hand within the district in which they live, solely because of race and color. Thus adult plaintiffs are being denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

10. Infant plaintiffs and adult plaintiffs are thereby being wilfully and unlawfully discriminated against by the defendants on account of their race and color, in that infant plaintiffs are compelled to attend schools outside the school districts in which they live, while white children similarly situated are not so compelled; infant plaintiffs and adult plaintiffs are being deprived of their rights guaranteed by the Constitution and laws of the United States.

11. Plaintiffs are suffering irreparable injury and face irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of, other than this suit for a declaration of rights [fol. 6] and an injunction. Any other remedy to which plaintiffs might be remitted would be attended by such uncertainties and delays as to deny substantial relief; would involve a multiplicity of suits; and would cause further irreparable injury not only to plaintiffs, but to defendants as governmental agencies.

Wherefore, plaintiffs respectfully pray that:

1. The Honorable Court, upon filing of this complaint, notify the Chief Judge of this Circuit as required by 28 U. S. C. A., section 2284, so that the Chief Judge may desig-

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nate two other judges to serve as members of a three-judge court as required by Title 28, U. S. C. A., section 2281, to hear and determine this action.

2. The Honorable Court enter a judgment or decree declaring that the General Statutes of Kansas, 1935, 72-1724, is unconstitutional insofar as it empowers defendants to set up separate schools for Negro and white school children.

3. The Honorable Court enter a judgment or decree declaring that the policy, custom, usage and practice of defendants in operating under Ch. 72-1724, General Statutes of Kansas, 1935, in denying plaintiffs and other Negro children residing in Topeka, Shawnee County, Kansas, solely because of race or color, the right and privilege of enrolling in, attending and receiving instruction in schools within the district within which they reside as is provided for white children of like qualifications, are denials of the equal protection clause of the United States Constitution and are therefore unconstitutional and void.

4. The Honorable Court issue a permanent injunction forever restraining and enjoining the defendants from executing so much of Ch. 72-1724, General Statutes of Kansas, 1935, as empowers them to set up separate schools for Negro and white school children.

[fol. 7] 5. The Honorable Court issue a permanent injunction forever restraining defendants from denying the Negro school children of Topeka, Shawnee County, Kansas, on account of their race or color, the right and privilege of attending public schools within the district wherein they live, and from making any distinction based upon race or color in the opportunities which the defendants provide for public education.

6. The Honorable Court will allow plaintiffs their costs herein, reasonable fees for attorneys, and such other and further relief as may appear to the Court to be equitable and just.

7. The Honorable Court retain jurisdiction of this cause after judgment to render such relief as may become necessary in the future.

Bledsoe, Scott, Scott & Scott, by Chas. E. Bledsoe, Charles S. Scott, John J. Scott, Attorneys for Plaintiffs.

Duly sworn to by Charles E. Bledsoe. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT AND TO STRIKE—Filed May 15, 1951

Defendants move the court for an order, as follows:

1. Requiring plaintiffs to amend their amended complaint, paragraph 3 (a), last sentence thereof, which reads as follows: "Instead, they are required, solely because of race, to attend schools where they do not and cannot receive educational advantages, opportunities and facilities equal to those furnished white children." by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion as to unequal advantages, opportunities and facilities, for the reason that the present statement is so vague or ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto.

2. Requiring plaintiffs to amend their amended complaint, paragraph 3 (b), last sentence thereof, which reads as follows:

> "By being compelled to send their children to schools outside the districts wherein they live rather than to schools within said districts, they must bear certain burdens and forego certain advantages, neither of which is suffered by parents of white children situated similarly to children of plaintiffs."

by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion that adult plaintiffs must bear certain burdens and forego certain benefits; for the reason that the present statement is so vague and ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto.

3. Requiring plaintiffs to strike from their amended complaint the following language in paragraph 7 thereof:

> "and in violation of their rights under the Fourteenth Amendment to the Constitution of the United States."

BLEED THROUGH

[fol. 9] for the reason that the same is a conclusion and is redundant.

4. Requiring plaintiffs to amend the eighth paragraph of their amended complaint, which reads as follows:

> "The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

by making a more definite statement therein setting forth the facts upon which plaintiffs base their conclusion that educational opportunities claimed therein are inferior to those provided for white children; for the reason that the present statement is so vague and ambiguous that defendants cannot reasonably be required to frame a responsive pleading thereto, and further requiring plaintiffs to strike from said paragraph 8, the following language:

> "in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

for the reason that the same is a conclusion and is redundant.

5. Requiring plaintiffs to strike from paragraph 9 of the amended complaint the last sentence thereof which reads as follows:

> "Thus adult plaintiffs are being denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

for the reason that the same is a conclusion and is redundant.

6. By requiring plaintiffs to amend their amended complaint by striking all of paragraph 10 thereof, which reads as follows:

> "Infant plaintiffs and adult plaintiffs are thereby being wilfully and unlawfully discriminated against by the defendants on account of their race and color, in

that infant plaintiffs are compelled to attend schoo
outside the school districts in which they live, whi
white children similarly situated are not so compelle
infant plaintiffs and adult plaintiffs are being depriv
[fol. 10] of their rights guaranteed by the Constituti
and laws of the United States."

for the reason that the same is a conclusion and is r
dundant.

Lester M. Goodell, George M. Brewster, 401 Colu
bian Building, Topeka, Kansas, Attorneys f
Defendants.

[fol. 11] IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

"May 25, 1951. At Topeka, before Huxman, Mellott, a
Hill, JJ.: Defendants' Motion for more definite stateme
and to Strike denied except as to paragraph 8 which is
be amended; plaintiffs given five days to amend paragra
8 and defendants to have five days to plead or ten days
answer."

[fol. 12] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PARAGRAPH EIGHT OF THE AMENDED COMPLAINT—Filed May 29, 1951

8. The educational opportunities provided by defendan
for infant plaintiffs in the separate all-Negro schools a
inferior to those provided for white school children sim
larly situated in violation of the equal protection clau
of the Fourteenth Amendment to the Constitution of t
United States. The respects in which these opportuniti
are inferior include the physical facilities, curricula, teac
ing, resources, student personnel services, access and a
other educational factors, tangible and intangible, offer
to school children in Topeka. Apart from all other factor
the racial segregation herein practiced in and of itself co
stitutes an inferiority in educational opportunity offer

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to Negroes, when compared to educational opportunity offered to whites.

Bledsoe, Scott, Scott & Scott, by Chas. E. Bledsoe.

Duly sworn to by Charles E. Bledsoe. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT AS AMENDED IN PARAGRAPH 8 THEREOF—Filed June 7, 1951

1. Defendants admit the allegations stated in paragraphs 4 and 6 of the Amended Complaint, except that defendants allege that the City of Topeka is one school district, as hereinafter set forth. Defendants deny all the allegations stated in Amendments to paragraph 8 of the Amended Complaint, and further deny all the allegations stated in paragraphs 9, 10 and 11 of the Amended Complaint.

2. Defendants admit the allegations stated in paragraph 1 (a) of the Amended Complaint, except defendants deny that the amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

3. Defendants admit the allegations stated in paragraph 2, except defendants deny that infant plaintiffs are denied rights and privileges of enrolling in, attending and receiving instruction in public schools within the district in which they live; and deny that they have denied infant plaintiffs educational opportunities equal to those afforded white children.

4. Defendants allege that the City of Topeka, Kansas, is in and of itself one school district; that acting pursuant to authority vested in it, defendants have designated and defined 22 separate territories within the City of Topeka and in each of said territories have established and maintain a public elementary school, and white children are required to attend the elementary school located in the territory in which they live; that defendants have also established and maintain four separate elementary schools for colored children within said district, and only colored children in the City of Topeka may attend said four schools. [fol. 14] Defendants further allege that the colored school

children, including infant plaintiffs, may attend any one of these four schools.

5. Defendants allege that said separate schools are established and maintained pursuant to the laws of the State of Kansas, G. S. 1949, 72-1724, and separate schools are provided only for elementary school children, to-wit, the first six grades.

6. Defendants allege that they have established and maintain junior high schools throughout the City of Topeka and have designated and defined territories for each of said schools; that both colored and white children may attend these schools and are required to attend the junior high school located within the territory in which they live.

7. Defendants allege that transportation facilities are provided for colored school children attending the four colored schools mentioned in paragraph 4 hereof, and said transportation facilities are furnished any colored school child attending elementary schools, upon request; that no transportation is furnished white children by the defendants.

8. Defendants admit the allegations stated in paragraph 3 (b) that adult plaintiffs are citizens of the United States, the State of Kansas, Shawnee County and the City of Topeka, Kansas, and deny the remainder of said paragraph. Defendants further deny that adult plaintiffs are compelled to send their children to schools outside the district wherein they live.

9. Defendants admit the allegations stated in paragraph 3 (a) that infant plaintiffs are citizens of the United States, State of Kansas, Shawnee County and the City of Topeka, Kansas, and that they are among those classified as negroes. [fol. 15] Defendants allege that infant plaintiffs have presented themselves for enrollment and registration in elementary schools for white children but were denied the right to enroll therein. Defendants allege that infant plaintiffs, because of race and color, do not satisfy the requirements for admission to schools for white children and by reason thereof they were denied admission. Defendants deny the remainder of paragraph 3 (a).

10. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations stated in paragraph 3 (c) of the Amended

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Complaint, or that adult plaintiffs are taxpayers of Shawnee County, the State of Kansas, and the United States, as stated in paragraph 3 (b).

11. Defendants admit the allegations stated in paragraph 5 of the Amended Complaint, but deny that they are governed by General Statutes 1935, and supplements thereto, section 72-1809, for the reason that said statute applies to public schools in cities of the second class and not to public schools in cities of the first class to which class the City of Topeka belongs.

12. Defendants deny the allegations stated in paragraph 7 of the Amended Complaint, and allege that white school children of elementary school age in the City of Topeka are required to go to the elementary schools within the designated boundaries of the territory in which they live, and that these schools are within the school district of the City of Topeka; that infant plaintiffs go to elementary schools within the district in which they live, namely, the school district of the City of Topeka, Kansas, and they may attend any of the colored elementary schools within the City of Topeka, as set forth in paragraph 4 hereof. Defendants further allege that the distance traveled by colored children [fol. 16] in reaching the schools they attend is not on the average greater than the distance white children are required to travel.

Wherefore, Defendants pray that plaintiffs take naught; and that defendants have judgment and costs.

Lester M. Goodell, George M. Brewster, Topeka, Kansas, Attorneys for Defendants.

Duly sworn to by Lester M. Goodell. Jurat omitted in printing.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ANSWER OF THE STATE OF KANSAS—Filed June 15, 1951

Comes now the State of Kansas, an intervening defendant, by Edward F. Arn, Governor of said State, and Harold R. Fatzer, the Attorney General thereof, and for its answer to the amended complaint herein alleges as follows:

I

That the amended complaint in said cause fails to state a claim or cause of action against this intervening defendant upon which relief may be granted to the plaintiffs.

II

This intervening defendant admits the allegations contained in paragraph 1 of the amended complaint except that it denies the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

III

This intervening defendant admits the allegations contained in paragraph 2 (a) of the amended complaint except that it expressly denies Chapter 72-1724 of the General Statutes of Kansas, 1935 (1949), is unconstitutional. This defendant is without knowledge or information to either admit or deny the truth or the allegations contained in paragraph 2 (b), (c), and paragraph 3 (a), (b) of the amended complaint.

[fol. 18] IV

This defendant admits the allegations contained in paragraphs 4 and 5 of the amended complaint, but denies that the defendant, Board of Education of Topeka, Shawnee County, Kansas, is governed by the General Statutes of Kansas, 1935, and supplements thereto, Section 72-1809, for the reason that said statute has no application to pub-

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lic schools in cities of the first class to which class the city of Topeka belongs.

V

For further answer herein this intervening defendant states it is without knowledge or information to either admit or deny the truth of the allegations contained in paragraphs 6, 7, 8 as amended, 9 or 10 of the amended complaint. All other allegations contained in the amended complaint which are not hereinbefore admitted or explained are hereby expressly denied.

Wherefore this intervening defendant prays that plaintiffs take naught by this action and that defendants have judgment for all costs herein expended.

Harold R. Fatzer, Attorney General for the State of Kansas; Willis H. McQueary, Assistant Attorney General for the State of Kansas; C. Harold Hughes, Assistant Attorney General of the State of Kansas.

[Verified by Willis H. McQueary.]

[fol. 19] In United States District Court

[Title omitted]

Transcript of Proceedings of Pre-Trial Conference—Filed October 30, 1951

Appearances:

Hon. Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit.

Hon. Arthur J. Mellott, Judge, United States District Court, District of Kansas.

Charles S. Scott, Topeka, Kansas; John Scott, Topeka, Kansas; Charles Bledsoe, Topeka, Kansas; Robert L. Carter, New York, New York, and Jack Greenberg, New York, New York. Appeared on behalf of Plaintiffs.

Lester M. Goodell, Topeka, Kansas, and George M. Brewster, Topeka, Kansas. Appeared on behalf of De-

fendants, Board of Education, Topeka, Shawnee County, Kansas, et al.

Harold R. Fatzer, Attorney General, State of Kansas, by Willis H. McQueary and Charles H. Hobart, Assistant Attorneys General, State of Kansas, Topeka, Kansas. Appeared on behalf of State of Kansas.

Harold Pittell, Official Reporter.

[fol. 20] Be it remembered, on this 22nd day of June, A.D. 1951, the above matter coming on for hearing before Honorable Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit and Honorable Arthur J. Mellott, Judge, United States District Court, District of Kansas, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

* * * * * * *

[fol. 21] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Mellott: Do you have the appearances, Mr. Reporter?

The Reporter: Yes, Your Honor.

Judge Huxman: Gentlemen, the purpose of this session this morning is to hold a pre-trial conference to see whether we can simplify the matters and what can be agreed to before we go to trial next Monday.

Judge Mellott has called my attention to Rule 16. It provides for conference to simplify the issues, whether there is any necessity for amendments to the pleadings and to inquire into the possibility of obtaining admissions of fact concerning which there can be no dispute, limitation of the number of expert witnesses, the advisability of a preliminary reference of the issues to a master for findings and any such other matters as may simplify the issues at the time of the trial.

All the parties have entered—are in court and have filed pleadings; that is true of the State of Kansas, is it not?

Mr. McQueary: It is, Your Honor.

Judge Huxman: Is there a desire on the part of anybody to amend the pleadings in any manner; any necessity for amendment of pleadings?

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Mr. Charles Scott: Yes, if the Court please. We have one amendment we desire to make.

[fol. 22] Judge Mellott: To what paragraph?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a) of the plaintiffs' amended complaint.

Mr. Goodell: What was that again?

Mr. Charles Scott: Paragraph 5, sub-paragraph (a).

Judge Huxman: Paragraph 5 what?

Mr. Charles Scott: Paragraph 5(a).

Judge Mellott: Let me orient myself and Judge Huxman. Did you file a complete amended complaint?

Mr. Charles Scott: No, sir.

Judge Mellott: You filed an original complaint.

Mr. Charles Scott: And an amended complaint and——

Judge Mellott: And then in the amended complaint—there was an amendment to the amended complaint.

Mr. Goodell: I interpret that they did file——

Judge Mellott: You did file an amended complaint on March 22nd, didn't you?

Mr. Charles Scott: Yes.

Judge Mellott: The motion to make more definite was addressed to that amended complaint.

[fol. 23] Mr. Charles Scott: That is correct.

Judge Mellott: And then you filed an amendment to the amended complaint, under date of May 29th, did you not?

Mr. Charles Scott: That is correct, sir.

Judge Huxman: What do you desire presently?

Mr. Charles Scott: We desire to correct the statute of 72-1809 of the General Statutes of 1935 and the supplements thereto.

Judge Mellott: Let me get this in the pleading here. You are now talking about your original amended complaint, aren't you?

Mr. Charles Scott: The original amended complaint.

Judge Mellott: And you say you want to refer to paragraph 5 of that.

Mr. Charles Scott: 5(a).

Judge Mellott: 5(a). Your amendment is what; you want to make reference to the General Statutes of '49 instead of 1935, is that what you are saying?

Mr. Charles Scott: We also want to make reference to the General Statutes of 1949 and also strike therefrom Section 72-1809 and insert therein 72-1724.

Judge Mellott: 72-1724.

Mr. Charles Scott: That is correct.

[fol. 24] Judge Mellott: And does that read, then, that that is the General Statutes of Kansas for 1949?

Mr. Charles Scott: That is correct.

Judge Mellott: You wish to leave out the words, "and supplements thereto."

Mr. Charles Scott: Yes, we can take that out, that's true.

Judge Mellott: Let me see if I understand what you are doing. Paragraph 5(a), as amended, now reads: "Defendant, Board of Education, is under a duty to enforce the school laws of the State of Kansas (General Statutes of Kansas, 1949, Section 72-1724)", is that the amendment you are making?

Mr. Charles Scott: That is correct, sir.

Judge Mellott: Any other amendments?

Mr. Charles Scott: That is all we have.

Judge Huxman: Any objections to that? No objections; the amendment will be——

Mr. Goodell: If I understand his point, he cited in his amended complaint, which he now desires to correct, a statute which applies to cities of second class, erroneously when he intended to use—so we have no objection.

Judge Huxman: All right; the amendment will be ordered.

Judge Mellott: The Court will make the amendment by [fol. 25] interlineation.

Judge Huxman: Any other amendment to the pleadings?

Mr. Goodell: We have none, Your Honor.

Judge Huxman: No further amendments to any of the pleadings.

Mr. Bledsoe: If the Court please, at this time I would like to inform the Court we have two attorneys who are interested in this case with the plaintiffs, and they are here now, and I would like to present them to the Court at this time.

Judge Huxman: I will ask Judge Mellott to handle that because he knows how that matter is handled.

Judge Mellott: Very well. You may introduce them, if you will, and tell me who they are.

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Mr. Bledsoe: They would like to be admitted for the purpose of this case only.

Judge Mellott: Present them.

Mr. Bledsoe: If the Court please, this gentleman here is Robert Carter, from New York. This, gentlemen, is Judge Huxman of the Tenth Circuit Court of Appeals; the gentleman over here is Jack Greenberg, of New York, and this is Judge Mellott of the District of Kansas Federal Court.

Judge Mellott: Are these gentlemen members of the bar?

[fol. 26] Mr. Bledsoe: They are.

Judge Mellott: In what state?

Mr. Bledsoe: New York.

Judge Mellott: In good standing?

Mr. Bledsoe: They are.

Judge Mellott: And are they admitted to practice in federal courts and courts such as this in their home jurisdiction?

Mr. Bledsoe: They are.

Judge Mellott: Never been disbarred. You vouch for them.

Mr. Bledsoe: I do.

Judge Mellott: Without further formality, then, they will be permitted to appear as counsel, along with the other gentlemen who presently appear as counsel in this case. Thank you, gentlemen; you may be seated.

Judge Huxman: Unless there is something else preliminary, we might——

Mr. Carter: Your Honor, if I may, I would like to raise one point. I don't think an amendment would be necessary to our pleadings, but we erroneously refer to school districts in Topeka, where it should be "territories", and we were going to make a stipulation with the defendants that they are territories rather than districts—and there is one school district.

[fol. 27] Judge Huxman: I think that is covered.

Mr. Carter: I just want to be sure.

Judge Mellott: I suppose, if necessary, for all proper purposes in this case, the Court can consider that where you use the word "district" in your pleading, that really what you are referring to is "territories." I believe I suggested that at an earlier proceeding here. It was my under-

standing Topeka was one school district, so you were referring to territories.

Judge Huxman: There is one other matter that might come up during the trial—at least I think the Court might want to make inquiry—will either or any of the parties to this litigation want to use expert witnesses?

Mr. Carter: Well, Your Honor——

Judge Huxman: For what purpose?

Mr. Carter: We want to use expert witnesses for the general purpose of showing that the segregation, which is the issue in the case, the segregation of the plaintiffs and of the class they represent in the negro schools is in fact a denial to them of their right to equal educational opportunities, that they are not getting equal educational opportunities by virtue of that. That is the purpose of our expert testimony.

Judge Huxman: Will there be any opposition to expert witnesses?

[fol. 28] Mr. Goodell: The——

Judge Huxman: —the use of expert witnesses by the plaintiffs?

Mr. Goodell: The way the question was stated, we will certainly object to that. We think that is a question of law. I, of course, don't know what turn it will take.

Judge Huxman: Well, the question of whether such testimony is competent, does not need to be decided at this time. The purpose of this inquiry is to ascertain how many such witnesses you will request and whether there shall be a limit. How many witnesses do you gentlemen desire on that question, assuming that the Court rules it is competent.

Mr. Carter: Well, Your Honor, I think that we were not certain of the exact number but approximately nine. We have approximately nine or ten people who we want to call who have made studies of this.

Judge Huxman: Well, the Court feels that nine witnesses on that one issue is too many witnesses. In other words, the issue is whether segregation itself, I presume, is not a denial of due process, irrespective of whether everything else is equal, to that furnished in the white schools, is that not your general contention?

Mr. Carter: Yes, sir.

Judge Huxman: Because of the effect it has upon the

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[fol. 29] mind, upon the student, upon his outlook; I presume that would be your position.

Mr. Carter: That is absolutely correct, Your Honor.

Judge Huxman: Could nine witnesses give different testimony, or would their testimony be largely the same?

Mr. Carter: I doubt that, Your Honor. Our testimony will not be cumulative. Our purpose of getting these people was in order to give a rounded picture with respect to the subject that we have just raised. Now, we will have some witnesses who will testify as to tangible and physical inequalities also among those people, so that I think that it would be a great hardship to us if we were limited. We have no intention of merely bringing on witnesses to be cumulative.

Judge Mellott: That is the thing the Court thinks it should avoid. We shouldn't hear nine witnesses testify cumulatively even as experts, it seems to me, on the same thing.

Mr. Carter: I agree, but, Your Honor, we have no—we are not going to have duplication. Each of the people that we are asking to come here to testify will handle a different phase of this.

Judge Mellott: Then we should not limit you if that is what you expect to do.

[fol. 30] Judge Huxman: The Court feels this way, that it's difficult for it at this time to see where nine witnesses could testify on this one subject, to nine different sets of facts, unrelated facts, but you may be right; we do not intend to deny you the right to fully present your case. The Court, however, feels that after it has heard five witnesses, expert witnesses, if the Court then feels that the witnesses that you are offering thereafter are merely duplicating what has been said, an objection to their testimony on that ground will be sustained. If, on the other hand, the testimony is clearly different from what has been given, why you then should have the right to present your nine witnesses. But at the end of five, the Court will certainly scrutinize the testimony of the other four quite carefully to see whether it is duplication or additional testimony.

Mr. Carter: All right, sir.

Judge Huxman: Do you gentlemen then stipulate that, in any event, the expert witnesses which you request will be limited in number to nine.

Mr. Carter: Your Honor, frankly, our difficulty in making any stipulation like that is that Mr. Greenberg and I have just gotten here from New York this morning about——

Judge Huxman: This isn't the first case of this kind you were in. You were in the South Carolina case, weren't [fol. 31] you?

Mr. Carter: Yes, sir; but the thing is we haven't really had an opportunity to go over this. I would not want to make that stipulation. What I will say and what Your Honor has ruled is that after five, you will scrutinize whatever testimony we present for duplication, and we will certainly attempt to avoid that, but I wouldn't want to say that we would only have nine.

Judge Huxman: That was your statement in response.

Mr. Carter: I said approximately; I didn't want to be tied down to that number at all.

Judge Mellott: How much leeway do you want?

Mr. Carter: Well, I frankly think that we won't have more than nine, but I just would prefer not to be tied down. I am not going to, believe me, Your Honor, we are not going to parade a lot of witnesses here merely to keep you tied down.

Mr. Goodell: It would be under ninety, wouldn't it?

Mr. Carter: It will be under fifteen.

Mr. Goodell: Nine to ninety.

Judge Huxman: It would be the order of the Court that expert witnesses on behalf of the plaintiff, in the first [fol. 32] instance, will be limited to five, but if at that point the plaintiffs have additional witnesses which they feel have testimony to offer which has not been covered by these five, they will not be denied the right to present that testimony, is that correct, judge?

Judge Mellott: Yes, at this time, I think.

Judge Huxman: But that after five have been heard, the Court will reserve the right to reject any further evidence if it should feel that the evidence that is being offered is cumulative and not additional to what the first five have testified, is that fair to you boys?

In view of the fact that there has been a statement that plaintiffs will offer expert witnesses on this subject, assuming that the testimony will be received, will the de-

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fendants, or any of them, want to on their part offer expert testimony along this same line?

Mr. Goodell: Well, I am a little at a handicap of knowing exactly what their line is. They mention there is to be testimony from experts, as I understood it, on some physical facts which, of course, I don't know what they are referring to except I take it to mean that inferiority to—as to some —something relating to the school system and, of course, if that comes up, we will probably want to rebut that, not with experts, I don't think.

[fol. 33] Judge Huxman: Judge Mellott——

Mr. Goodell: As to the other phase which I understand is the psychological aspect and sociological, until I have heard their testimony, I am at a loss to know whether we will want to rebut it or attempt to rebut it.

Judge Mellott: Well, would it not be proper if the Court thought in terms of the same basic premise that in the event you do decide to offer experts rebutting the testimony of the plaintiffs' experts, that a limitation somewhat along the line suggested by Judge Huxman to the plaintiff should, likewise, apply to you.

Mr. Goodell: I certainly think so.

Judge Huxman: All right; that will be the order of the Court at this time.

Now, is there anything else, gentlemen, as to preliminary matters that we want to discuss before we go into these requests for admissions. Anything else that might be helpful in shaping the issues, shortening this trial.

I may state for myself, as a member of this court, that it would certainly be my purpose to afford the parties a full and complete hearing and an opportunity to present the issues fully and completely but, on the other hand, I would be very loathe to just permit the introduction of a great mass of testimony for any purpose whatever that has no bearing upon the issues; it merely prolongs and drags out [fol. 34] this trial.

Anything else preliminary? Do you care to say anything more?

Judge Mellott: I am quite sure Judge Hill and I concur entirely as to what you have just said, though my authority, of course, to speak is only to speak for myself.

Judge Huxman: In a preliminary conference, Judge

Mellott, to bring you up to date, purely informal, with attorneys for the plaintiffs and the defendants, I suggested that, as a preliminary to this pre-trial conference, each side prepare requested admissions of fact and serve them on the other side.

Judge Mellott: I am sure that was quite helpful.

Judge Huxman: We have that here this morning and, if there is nothing further, suppose, gentlemen, we proceed to see how many of these requests we can agree upon.

We will take up the defendants' requests for stipulations first.

No. 1 is a request for an agreement that the City of Topeka, Kansas, constitutes one school district.

Mr. Carter: We agree.

Judge Huxman: That is agreed to.

Judge Mellott: Thank you, gentlemen.

[fol. 35] Judge Huxman: Request No. 2:

"That defendants have designated within the City of Topeka, Kansas, eighteen territories and in each of these territories have established and maintain a public elementary school for white children only; in addition thereto defendants have established and maintain in the City of Topeka, Kansas, four separate elementary schools for colored children and attendance at these four schools is restricted to colored children. Exhibit A, which is made a part hereof by reference, is a map of the City of Topeka and adjacent territories attached to Topeka School District for school purposes only. Said Exhibit A correctly designates the school territory for white schools for the City of Topeka, Kansas. Said map also designates the four colored schools, which are Buchanan, McKinley, Monroe and Washington. Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents. The territory colored blue on Exhibit A represents areas not within the City of Topeka except for school purposes, and children residing in said areas attend schools in the City of Topeka, Kansas."

Now, before you make any request, Judge Mellott has not seen Exhibit "A". As a preliminary question, may I ask, Mr. Goodell, who prepared that exhibit?

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[fol. 36] Mr. Goodell: The clerk of the Topeka Board of Education.

Judge Huxman: Do you vouch for its territorial correctness and integrity?

Mr. Goodell: Absolutely.

Judge Huxman: All right. With that preliminary statement, is there any objection to the admission requested in request No. 2?

Mr. Carter: Well, Your Honor, this is the first—I think we have no objection on Exhibit "A", but going over on to page 2—about the fifth line from the top——

Judge Huxman: Fifth line from the top on page 2.

Mr. Carter: "and the choice of schools is made by the colored school children or their parents." I should think we have to get more information on that before we could agree. With that exception, we will agree.

Mr. Goodell: For clarity, what is meant there, of course, is choice of which of the four colored schools. It doesn't mean to say——

Mr. Carter: It is a question in our minds as to whether that is true.

Judge Huxman: Do you have testimony to the effect that that is not true?

Mr. Carter: We may.

[fol. 37] Judge Huxman: You may.

Mr. Carter: Yes, sir.

Judge Huxman: Well, do you have reasons to believe that it is not true?

Mr. Carter: Well, the only thing I can say at this time, Your Honor, is that up to—as far as this is concerned, we have to know—we would have to make a little further investigation on this ourselves. We might stipulate, agree, that this is true by Monday, but I don't think we can do it today.

Judge Huxman: All right. I just feel this way, that there ought to be a perfect willingness on the part of both parties to freely and frankly agree to facts concerning which there just can't be any dispute. Now, if there is a question about a fact, that should not be agreed to, of course, but you have local colored counsel here who no doubt went to schools here, these segregated schools.

Mr. Carter: That is——

Judge Huxman: Do you agree to the request with the exception of that portion starting—with this exception: "Colored school children in the City of Topeka, Kansas, may attend any one of these four colored schools, and the choice of schools is made by the colored school children or their parents."

Mr. Carter: All we reject is of the choice.

[fol. 38] Judge Huxman: Do you agree to everything but that?

Mr. Carter: We agree with the first part of the statement. All we don't know about is the choice.

Judge Huxman: I am just taking the one sentence. I don't like to divide a sentence. You want to reserve the agreement to that until Monday.

Mr. Carter: Yes, sir.

Judge Huxman: And, in the meantime, you will make an investigation and if you find that that is a fact——

Mr. Carter: We will agree to it.

Judge Huxman: Mr. Scott, you have been a resident of Topeka all your life.

Mr. Charles Scott: Yes, sir.

Judge Huxman: Are you able to say whether that is or is not a fact as the schools are administered.

Mr. Charles Scott: Qualified, Your Honor. We are allowed to go to the schools that are closest to our home. Now, whether or not the school board has any control over that or not, I don't know, but, as a practical matter, naturally, the colored students go to the school closest to their home.

Judge Huxman: I tell you what I wish you would do with your New York counsel. I wish you would have a confer-

[fol. 39] ence with the members of the school board between now and Monday and ask them if a colored student wants to attend any one of these four schools whether there is any restriction upon his right to do so.

Mr. Charles Scott: I will do that, Your Honor.

Judge Huxman: And then come in Monday morning——

Mr. Goodell: Of course, my information came from the board and the administrative officers on all these matters.

Judge Huxman: They should have the right to get that information themselves.

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It is agreed, then, that request for admission No. 2 is argeed to with the exception of that portion which has just been read by the Court and, as to that portion, inquiry will be made by Monday and a statement by counsel for plaintiffs will be made then as to whether they agree to that portion which is presently eliminated.

We will take up No. 3:

"That the same curriculum is used in the elementary colored schools in the City of Topeka, Kansas, as is used in the elementary white schools in said city."

Mr. Carter: After conference, Your Honor, we cannot stipulate to that.

[fol. 40] Judge Huxman: Do you claim that that is not so?

Mr. Carter: We would change in the first sentence where it reads, "That the same curricula is used", we would change that to "prescribed" as long as curricula is understood to mean courses of study.

Judge Huxman: That is what the curricula means, isn't it, courses of study.

Mr. Goodell: That is what I intended by it.

Mr. Carter: I am not sure.

Judge Huxman: Do you have a different meaning of curricula?

Mr. Carter: Yes, sir.

Judge Huxman: Is there any objection to the elimination of the word "curricula" and the substitution of the "studies are used"?

Mr. Carter: "Prescribed" is what we want to use.

Judge Huxman: That wouldn't be any admission. The question is, is it actually used, that is the test.

Mr. Carter: We are advised that that is not true, Your Honor.

Judge Huxman: How?

[fol. 41] Mr. Carter: We at this table don't feel that we can stipulate to that at this time.

Judge Huxman: Well, do you intend to offer evidence to show that that is not so?

Mr. Carter: Yes, sir.

Judge Huxman: In what respect do you contend that there is a difference?

Mr. Carter: Well, there are several things that I have

right now at my fingertips that I can indicate. One is that there is a difference in terms of the special teachers and the special—there are special teachers that are used at the White schools. No special teachers or special courses for certain classes of the student body are at the Negro School.

Judge Huxman: The teachers have nothing to do with the courses of study?

Mr. Carter: Yes, sir. They have set up, as we understand it, Your Honor, set up at the White school a special course of study for children who are somewhat retarded who are not able to come up to the part of their class. Now, no such course is available at the Negro school. We also have a question right now as to whether even though the same courses of study are prescribed, and we think that we have evidence to show that it is not used, that this is not followed out at the Negro school generally.

[fol. 42] Judge Huxman: Mr. Goodell, what do you say with regard to the statement that special courses prescribed in white schools for sub-normal children are not in colored schools?

Mr. Goodell: I don't think that is curricula that is special —that comes under a heading later in our brief about special services which they cover in paragraph 8, which I don't think is embraced in the question of curricula.

Judge Mellott: I am wondering if you gentlemen perhaps are in dispute primarily about the definition of the word "curricula." I wonder if that is your difficulty.

Mr. Goodell: I think—my interpretation of it and the use I intended is the—as meaning the subjects taught, programs used in the school and the subjects taught, courses of study.

Judge Mellott: Well, do you wish to rephrase it so that it does limit it to those particular terms? Maybe your adversary will agree if you rephrase it.

Mr. Goodell: I am willing to change it, Your Honor, by striking out the word "curricula" and substituting therefor "that the same course of study"—"courses of study".

Judge Mellott: I suggest that counsel for the plaintiff give attention to what is being said.

[fol. 43] Mr. Carter: Yes, sir.

Judge Huxman: He is suggesting that perhaps a change in the word "curricula" might make this understandable

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so you do agree upon its meaning and perhaps get closer to a stipulation.

Mr. Goodell: "That the same course of study is used in the elementary colored schools in the City of Topeka as is used in the elementary white schools." It will read, Your Honor, my suggested amendment.

Judge Huxman: Also keep in mind, gentlemen, that under Mr. Goodell's explanation this special matter which you mentioned for abnormal children is not meant to be included in here, and the agreement to this stipulation would not bar you from showing that some special services are rendered to white children that are not rendered to colored children. With that statement, are you willing to agree with this?

Mr. Charles Scott: At this time, Your Honor, I don't think we are inclined to accept it.

Judge Mellott: Your associates think they are. They say if you limit it to simply saying that the same course of study is used, that they don't have any objection.

Mr. Charles Scott: Well, this is the reason, Your Honor: We have examined a greater portion of the curricula, as prescribed by the school board, and we have found that [fol. 44] there are some differences, certain course of studies are offered in some schools and are not offered in some of the colored schools, and so I don't think we are inclined to accept it on those basis.

Judge Huxman: Can you name a specific instance?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right, let's have it.

Mr. Charles Scott: They have a course entitled "Literature Appreciation" that is offered in the fifth and sixth grades in several of the white schools, and it is not offered in one or two of the colored schools. Then you have——

Judge Huxman: Is that shown by the exhibits?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right. What would you say to this: Would you agree that the courses of study as outlined in these exhibits—what are the exhibits?

Mr. Charles Scott: If the Court please, now they label——

Judge Huxman: Are the courses of studies that are used.

Mr. Charles Scott: They call it the school program, but it appears to be the course of study.

[fol. 45] Judge Huxman: That is quibbling about words, isn't it?

Mr. Charles Scott: Well——

Mr. Goodell: I am willing to limit that again. I am not familiar with that matter he points out—to have it read, "That the same course of study required by the Kansas"—by law—"by the Kansas statute is given." I think what he is talking about is some extra-curricular subject that some teachers of their own volition give, like outside reading, reference texts, and so forth, rather than a prescribed course of study.

Mr. Charles Scott: No, I beg to differ with counsel. This is prescribed by the school board and sent down.

Mr. Goodell: I am talking about what the state law requires to be taught in our Kansas elementary public school system.

(Colloquy was here had between counsel off the record.)

Mr. Goodell: If we are going to have a lawsuit here and pursue factual inquiry as to—as to school by school, of which there are twenty-two, we will be chasing down each textbook for outside reading that Miss Jones may prescribe at Randolph which Miss Baker at another school doesn't like, and she prescribes another text for outside [fol. 46] reading. Suppose they are taking history; one likes this for outside reading and another teacher likes another. That will frequently occur.

Judge Mellott: Do you have a printed course of study?

Mr. Goodell: Absolutely.

Judge Mellott: Do you have one?

Mr. Goodell: I have it attached as an exhibit here. And what I meant to convey and what I mean by this stipulation and will reframe it——

Judge Mellott: Where is it attached?

Mr. Brewster: Exhibit "F".

Mr. Goodell: That the course of study required by our Kansas statute is followed in all of the schools without any distinction between the white and colored elementary schools.

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(Colloquy was here had between counsel off the record.)

Judge Huxman: Shall we then eliminate request No. 3?

Mr. Goodell: Let's pass that, Your Honor.

Judge Huxman: We will pass request No. 3 and take up No. 4:

"That the same school books are used in the elementary colored schools in the City of Topeka, Kansas, as are used in [fol. 47] the elementary white schools in said city."

Is that not related to 3 and also covered by your exhibits?

Mr. Goodell: Yes.

Judge Huxman: Shall we pass it?

Mr. Goodell: Yes, that is satisfactory.

Mr. Carter: Your Honor, we are having one of our expert witnesses, that is going to be a librarian, who is at the present time checking the holdings of all the schools.

Judge Huxman: Is what?

Mr. Carter: The holdings, the library holdings of all of the schools, and we therefore are not—we can't——

Judge Huxman: We passed 4.

Mr. Goodell: I would like to amend, in view of his remarks, I would like to amend that to read, "The same textbooks"—"school textbooks"—so that it doesn't——

Judge Huxman: All right, that will be permitted.

Judge Mellott: Do you agree that the same textbooks are used?

Mr. Carter: I think we will agree.

Judge Mellott: Very well.

Judge Huxman: Did you, Mr. Reporter, get request No. [fol. 48] 4, as amended?

The Reporter: Yes, Your Honor.

Judge Huxman: We will take No. 5:

"That each of the four colored elementary schools in the City of Topeka, Kansas, is situated in neighborhoods where the population is predominantly colored."

Mr. John Scott: That is agreeable, Your Honor.

Judge Huxman: That is agreed to.

Judge Huxman: No. 6:

"That transportation to and from school is furnished colored children in the elementary schools of the City of

Topeka, Kansas, without cost to said children or their parents. No such transportation is furnished white children in the elementary schools of the City of Topeka."

It would seem to me that is either a fact or isn't a fact.

Mr. Charles Scott: We will agree to that.

Judge Huxman: All right. No. 6 is agreed to.

No. 7:

"That the same services are offered to colored and white elementary schools by the school authorities of the City of Topeka, Kansas, except in the case of transportation, as [fol. 49] set out in the preceding paragraph hereof."

Now, before you speak on that, I would like to ask a preliminary question: I am not sure that I understand, Mr. Goodell, what you mean by the "same services."

Mr. Goddell: I mean services like supervised play of the children at recess and noon period; I mean services of public health, nursing, which is furnished the elementary schools, both white and colored alike; I mean services that are entailed in departmental heads calling on the elementary school system, such as music department, and giving supervision and advice to the teachers. That is what I mean.

Judge Huxman: Is there anything else that you include in services?

Mr. Goodell: No, that is what I mean.

Judge Huxman: All right. And your request, requested admission, that these services which you have mentioned are furnished both in the colored schools and in the white schools.

Mr. Goodell: That is correct.

Mr. John Scott: We don't accept that, if Your Honor please. I think that is a little too indefinite; we need a little more definite and certain——

Judge Huxman: That is the reason I asked you to state [fol. 50] specifically the kind of services he had in mind.

Mr. John Scott: Yes, Your Honor, I understand that, but, as it stands in the stipulation at the present time, we wouldn't have a way of knowing.

Judge Huxman: The stipulation as it reads in the printed record isn't going to be the record. The record

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that is made is as modified by the statements of Mr. Goodell. They are the ones that go into the record.

All right; is that agreed to, then?

Mr. Carter: That is agreeable, Your Honor.

Judge Huxman: That is agreeable.

Judge Mellott: Well, are there any other services that either side thinks should be incorporated. Now, I have in my mind some three or four services. Now, in order to make that complete, do you wish to give us a more detailed or do you wish to add anything to the services which Mr. Goodell has referred to?

Mr. Carter: No, sir. We have one item that I think I spoke of before. I think that Mr. Goodell indicated that it was a service, but he doesn't include that in his special statements. The statement is satisfactory to us.

Judge Mellott: The word "services" is rather big and broad and all-inclusive.

Judge Huxman: Of course, it—all right, that is agreed [fol. 51] to, then, as modified by the explanation; the furnishing of services as stated is agreed to.

We will take up No. 8:

"That the distance traveled by colored children in reaching the schools they attend is not on the average greater than the distance white children are required to travel to reach the schools they attend."

Mr. Carter: Well, Your Honor, I don't think we want to stipulate on this. I don't think it has anything to do with the case. I think it's irrelevant.

Mr. Goodell: If the Court please, on that point, it is merely a mathematical proposition. That map, Exhibit "A", shows the whole City of Topeka and territory outside of the city is in blue, which is in Topeka for school purposes. We have marked on the map, Exhibit "A", each school territory. It shows, of course, the physical facts of distances which appear on this city map and can be computed. Children, in other words, living, for example—taking Exhibit "A"—in the blue territory over here in the corner (indicating) their school that they would have to go to, white children, would be Randolph, and all of that. Of course the matter of various school distances are written in

on the map—are identified. Of course to get at it any more accurately, which would be almost an intolerable job, would be to get each child that went to the city schools and get the [fol. 52] actual distance travelled divided by the number of children, and then you would get the average, and then get each colored child and get the actual distance divided by number of children, and then you would have the average.

Judge Huxman: Mr. Goodell, I doubt whether the Court would want that kind of a stipulation agreed to. That might be mathematically correct when you take an outlying territory. Now, to reach that result, you take territory that is not in the city limits and that——

Mr. Goodell: I have done some computing with a ruler, and I have taken the school population of the various schools, and I have taken distances in various different territories, and I know that as a matter of fact, it's a conservative statement, it's on the conservative side.

Judge Huxman: Well, now you may be right, but I wouldn't want this, as far as I am concerned; I wouldn't be content to have it established by stipulation that you can have four schools in the City of Topeka for one group of people and eighteen for another in that same territorial limit and yet those in the four schools would not be required to travel greater distances than the children that have eighteen schools. Now maybe it's a fact, I don't know.

Mr. Goodell: Keep in mind, Your Honor, that the colored schools have been, and that is covered by prior stipulation which is admitted, are located in neighborhoods in each case [fol. 53] which are predominantly colored neighborhoods; consequently, you don't have a situation in the case of where four colored schools have children living blocks—thirty some blocks—away from the nearest school which we—which does obtain in the case of many of our white schools—several of them—because of the population trends in the southwest part of our city in the last few years, particularly since the war. We have had great population trends out toward the west and southwest which has caused the territory to be taken in for school purposes and, in some cases, annexed territory, and has brought about that situation.

Furthermore, I—except for paragraph 8, when they make that as one of their grounds for inequality, is the matter

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of distance travelled or inaccessibility of their schools. I can't see where that is too important because we do transport them in every case where they ask to be transported.

Judge Huxman: Now that is a conclusion which flows from what is done, and you might be right on that, but the fact is a different thing, and Judge Mellott and I are in agreement that the Court does not want the stipulation as an admitted fact in this case.

Mr. Goodell: Would it add anything to it for me to have some witness get on the stand and testify as to just what the map shows and testify that the children do come from [fol. 54] the territories as shown by the map, to the various schools. Now, to make anything——

Judge Huxman: Speaking for myself alone, Mr. Goodell, as I get—if I understand the effect of what you are trying to say, is that the average distances travelled by the white children are as great as the average distance travelled by the colored children.

Mr. Goodell: That's right.

Judge Huxman: I wouldn't be impressed with that in the case at all. If the fact remained that a colored child over here had to travel two miles and a number of colored children had to travel two miles by virtue of the fact that there weren't so many of them and you had an outlying district of white children which brought their average travelled distance to as great as the colored children had to travel, I still think it might be an imposition upon a colored child if it had to travel two miles whereas a white child did not have to travel two miles.

Mr. Goodell: We will have an isolated case. When I talk about travel, I say again, in the stipulations, have already been admitted on that; that they are furnished transportation so that travel doesn't seem to me as a very significant issue.

Judge Huxman: That is a different matter.

Mr. Goodell: But, be that as it may, you still have iso- [fol. 55] lated cases where a colored child may go twenty-four blocks by bus.

Judge Huxman: The Court is of the view that the request for stipulation No. 8 might be eliminated, so we might as well pass it for the time being.

Mr. Goodell: As I understand the Court, I have to prove

the distance all the white children go to school and the distance the colored children go to school, is that my understanding, is that correct? We would be here for days and days on that.

Judge Mellott: You have your map here, and I think you can demonstrate—you already have indicated what you think your demonstration would consist of. What Judge Huxman, as I understand, is suggesting, and I am in accord with his views, is a mere mathematical calculation out of which flows an average allocated in one instance to the colored pupils and in another instance to the white pupils, wouldn't be particularly helpful.

Mr. Goodell: Of course there is inequality within the white structure. You have some white kids living next door and half a block away from the schoolhouse and others living thirty-six blocks away. To cure that we would have to have a schoolhouse on every corner. There always has to be that disparity.

Judge Huxman: But, as Judge Mellott has just stated, [fol. 56] an average distance travelled arrived upon the composite of a great number, has very little weight with me.

Mr. Goodell: I admit that fallacies in it, of course. I have to prove that because they have injected that as an issue.

Judge Huxman: They might be willing to concede that you having arrived at this by average, that the total distance travelled by all the white children and the total distance travelled by the colored children would produce this result; that is a different matter. But, anyhow, it wouldn't take you very long to prove that, how this computation was arrived at.

Mr. Goodell: Your Honor, I am not trying to say that I proved that on a school attendance record. I took—arbitrarily—distances and assume there would be children going to school in some of *their* territory. Now, that was an assumption. To get at that on a factual basis, I would have to get the school attendance from each and every one of these schools, look up the records where each kid lives, put those altogether, those children and distances, divided by the number of children to get at the average distance, and I would be all summer doing that.

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Judge Mellott: I don't think we would ever ask you to do that or permit you to do it.

Judge Huxman: Request No. 8 is omitted.

[fol. 57] Mr. Brewster: One statement, judge. Plaintiffs' objection to this stipulation was the fact that distance travelled was immaterial. If that is what he meant, are you willing to stipulate, then, that the distance the students are required to travel is not an issue in the lawsuit.

Mr. Carter: No; I didn't say that. I said that the stipulation was immaterial.

Judge Huxman: No use or purpose would be served by pursuing the inquiry further because the Court itself has eliminated request No. 8.

Mr. Brewster: The point was——

Judge Huxman: We will come to No. 9:

"That Exhibits B-1 to B-22, inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

"1. Name of elementary school.

"2. Name of principal.

"3. Class-room units.

"4. Enrollment.

"5. Kindergarten units.

"6. Kindergarten enrollment.

"7. Names of teachers, grades taught, enrollment for each grade, and average daily attendance."

[fol. 58] Now, before we go to that, I think I would like to clear up in my mind a matter that is somewhat cloudy. I want to be sure that I understand these designations. "SP" means what?

Mr. Goodell: Special.

Judge Huxman: Special teacher. What does "K" mean?

Mr. Goodell: Kindergarten.

Judge Huxman: And the figures appearing after "K" is the number of kindergarten students, or what is that? For instance, in Buchanan, you have this: "Teacher, SP K 1 1-2 2 2-3".

Judge Mellott: I suppose those are first grades.

(Colloquy was here had between Court and Counsel off the record.)

Judge Mellott: Do you stipulate, gentlemen, that these exhibits are correct and reflect those various matters?

Mr. Charles Scott: If the Court please, we agree to everything. I think there is a typographical error in the name of Mildred Starnes, as appears on Exhibit "B-1." The name should be changed to Myrtle. It isn't material.

Judge Mellott: Any correction such as that is not very material, but if you want them corrected——

[fol. 59] Judge Huxman: Do plaintiffs agree to request for admissions as contained in No. 9, then.

Mr. Carter: Yes, sir.

Judge Huxman: No. 9 is agreed to.

No. 10:

"That Exhibits C-1 to C-22 inclusive, attached hereto and made a part hereof, are correct compilations for each of the elementary public schools in the City of Topeka, Kansas, and correctly state for the 1950-1951 school period the following as to each school designated:

"1. Name of teacher or principal.

"2. Total service.

"3. Degree or hours credit.

"4. 1950-1951 salary.

"5. 1951-1952 salary."

Is there any objection to agreeing to that?

Mr. Charles Scott: No, sir.

Judge Huxman: All right. Request No. 10 is agreed to in toto.

No. 11:

"That in arriving at the salary to be paid teachers in the elementary public schools of Topeka, Kansas, the determining factors are the same for colored teachers as for white teachers, and the application of these factors is the [fol. 60] same."

Mr. Carter: Well, Your Honor, we can't say that this is a fact. We don't think it's important.

Judge Huxman: That's rather a conclusion, isn't it?

Mr. Goodell: Maybe it is, except what is meant by it, the

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clear implication of it, what I meant to say, if it can be made plainer, I will amend it to say it. No distinction is made in the matter of payment of salaries between white and colored teachers.

Judge Huxman: Well, Mr. Goodell——

Mr. Goodell: ——because of color.

Judge Huxman: The Court is of the view that No. 11 perhaps would serve no useful purpose if agreed to, and it is of such a nature that the plaintiffs perhaps shouldn't be required to agree to it. I doubt if they make an issue of that.

Mr. Goodell: If the Court please——

Judge Mellott: They have covered it in the preceding paragraph admitting what the salaries are, haven't they?

Mr. Goodell: That admits salaries, yes. That shows the physical facts of what the salaries being paid are, yes.

(Colloquy was here had off the record.)

[fol. 61] Judge Huxman: What is it you state?

Mr. Goodell: The amendment to the amended complaint which is amending paragraph 8 of the amended complaint filed in this case makes blanket allegations. They don't go into particularity, but they make blanket allegations of disparities that exist between the white and the colored elementary schools. Now one of the disparities covered by that pleading in amendment to paragraph 8 of the original —of the amended complaint, is teaching. Now I take it that under that allegation it would be fair—it would be a fair line of proof for them to admit—to introduce evidence that we are treating the teacher differently with respect to their contracts and their salary and so forth. So of course you don't get as good work and their children are suffering because they are not getting the benefit of a well-paid teacher.

Judge Huxman: Speaking for myself, Mr. Goodell, I am still of the opinion that even if that is so, if that is their position, it's a matter that you can't very well reduce to an absolute agreement. They may not——

Mr. Goodell: I see the Court's point about that.

Judge Huxman: ——they may not contend that. If they do, it's their burden to establish. If they fail to establish

it, it's out of the case. If they make the contention it's a very simple matter for you to prove that it isn't so.

[fol. 62] Mr. Goodell: Of course they know that whether it's a fact or not. I say that it's a fact, but I agree with you that they may not care to admit it and perhaps shouldn't be required to.

Judge Huxman: No. 11 is out. All right. No. 12:

"That Exhibit D, attached hereto and made a part hereof, is a correct compilation of statistics of the transportation costs for the colored elementary schools in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: That is shown by our records, the treasurer's office.

Judge Mellott: Do you contend that that is not an accurate compilation, gentlemen?

Mr. Charles Scott: We agree to it.

Mr. John Scott: That is admitted.

Judge Huxman: No. 13:

"That Exhibits E-1 to E-5 inclusive, attached hereto and made a part hereof, are correct compilations of statistics relating to public school nurses in the City of Topeka, Kansas, and correctly set forth statistics relating to public health nurses in the City of Topeka for the 1950-1951 school period."

Mr. Goodell: Now all that exhibit is is to show the num-

[fol. 63] ber of persons or children served by the various public school nurses over the city as reflecting on the question of whether there are enough nurses to give adequate service to the colored schools. In other words, it shows the load per pupil for the nurses.

Mr. Carter: Your Honor, there again is one of the things that we don't know. We are not going to controvert it.

Mr. Goodell. Our records show it.

Judge Huxman: If the records show it, could you not agree to the exhibit without agreeing to the matter which they intend to establish by it. You don't have to agree to that. You could agree that this is a fact or the facts shown by this exhibit are correct. You don't have to agree to the conclusion that flows from that.

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Mr. Carter: All right.

Judge Huxman: All right. It is then agreed that Exhibits "E-1" to "E-5", as attached to the request for stipulations, are correct.

Mr. Carter: Yes, sir.

Mr. Goodell: The record is correct.

Judge Huxman: And the facts therein reflected are the facts.

Mr. Carter: All right.

Judge Huxman: All right.

[fol. 64] No, No. 14:

"That Exhibits F-1 to F-22 inclusive, attached hereto and made a part hereof, are correct compilations of the elementary public school program for each of the designated elementary schools in the City of Topeka, Kansas, for the 1950-1951 school period."

Any objections to that?

Mr. Carter: No, sir. We agree to that.

Judge Huxman: You agree.

Mr. Carter: Yes, sir.

Judge Huxman: All right. Request for admission No. 14, as read, is agreed.

Judge Mellott: Let me be on the record for just a moment.

I believe that if I have understood correctly what Judge Huxman has accomplished so far in the pre-trial, it has resulted in the receipt in evidence of all of these exhibits here, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: I am wondering if we shouldn't just turn these exhibits over to the clerk and let him mark them as exhibits admitted in evidence for all purposes, and then they constitute a part of the formal record.

Mr. Brewster: We have additional ones, supplemental requests.

[fol. 65] Judge Huxman: I think that is a good suggestion, Judge Mellott, and the parties have agreed to it.

Mr. Goodell: If Your Honor please, we were going back to the preceding paragraphs which were passed for the moment in the light of this last exhibit.

I am willing to amend paragraph 3 by substituting for "curricula" the words, "course of study."

Judge Huxman: Mr. Goodell, let me ask you, for my information, these exhibits, I forget what the numbers of them are, set out the courses of study.

Mr. Goodell: "F-1."

Judge Huxman: The "F" series of exhibits sets out the actual courses of study that are taught in all of these schools.

Mr. Goodell: That's right.

Judge Huxman: What does your request for admission No. 3 add to what those exhibits actually show?

Mr. Brewster: How would it be if on 14 we just added, "And said program includes all courses of study prescribed by the law of the State of Kansas." Is that what you are getting at?

Mr. Goodell: I wanted to make that plan that we were following the prescribed course of study.

Judge Huxman: You have actually set out the courses of study that you say are taught.

[fol. 66] Mr. Goodell: All it takes to pick it up and make it complete——

Judge Huxman: There is no contention made that they don't conform to the state requirements. If they want to claim it, let them prove it. You say those are the courses of study.

Mr. Goodell: I don't care to belabor the point.

Judge Huxman: What would 3 add?

Mr. Goodell: Three supplements 14 only in respect, that it ties up and shows that it's a legal course of study being followed or taught.

Judge Mellott: May I suggest that the reporter read what Mr. Brewster interpolated and see if, perhaps, his interpolation may not be added as a part of your admission with reference to Exhibit "F".

(Portion referred to by Judge Mellott read aloud by the reporter.)

Judge Mellott: Is there any reason why you couldn't supplement No.——

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Mr. Carter: I think, if I may, Your Honor——

Judge Mellott: Any reason why you couldn't supplement No. XI which you have agreed to, by the addition of what Mr. Brewster just said.

[fol. 67] Mr. Carter: I frankly am unable to see where it adds anything. We have admitted the facts.

Judge Mellott: I don't think it adds much. You are not contending that Topeka in the operation of its school system is refusing to abide by the statutes of Kansas and the orders of the state superintendent of public instruction with reference to courses of study, are you; you are not making that contention.

Mr. Carter: I would prefer, however, Your Honor, if the exhibit which sets out the courses and they are admitted in the record, I think they speak for themselves.

Judge Mellott: You haven't answered my question. I think you should answer it. Do you contend that the board of education of the City of Topeka, Kansas, is not complying with the state law and the regulations and the orders of the state superintendent of public instruction?

Mr. Carter: That is not our contention, no.

Judge Mellott: All right.

Judge Huxman: Then why do you object to this addition? The only reason you could object to it is that you claim they aren't complying.

Mr. Carter: Well, Your Honor, the point is that we have admitted the courses of study. These are facts which [fol. 68] they have set forth in the record; these are the courses of study which are taught.

Judge Mellott: Well, I think we would take his statement as an admission that of course he is not contending that the Board of Education of Topeka is doing other than complying with the Kansas statutes so far as course of study is concerned. I would certainly spell that out of counsel's statement.

Judge Huxman: With that statement by counsel perhaps the addition isn't necessary.

Judge Mellott: I don't think so.

Judge Huxman: Let's take up the supplemental requests for stipulations which have been filed by the defendants.

No. 15:

"That Exhibit G, attached hereto and made a part hereof, is a correct statement taken from the records of the Board of Education of the City of Topeka, Kansas, pertaining to bus schedules for colored elementary school children for transportation furnished said children by the said Board of Education for the 1950-1951 school year."

Is there any objection to agreeing to that stipulation?

Mr. Carter: We agree to that, Your Honor, with the exception of line 9.

[fol. 69] Judge Huxman: Line 9?

Mr. Carter: Line 2 under "Monroe"; that is on the exhibit itself.

Judge Mellott: That is on the exhibit.

Mr. Carter: Line 2 under "Monroe."

Judge Huxman: Which says, "8:10—First and Kansas." You don't agree to that.

Mr. Goodell: You mean that is erroneous? What should it be?

Mr. Charles Scott: Should be First and Quincy.

Mr. Goodell: Is that correct, First and Quincy?

Judge Mellott: Let's change it to First and Quincy, then.

Mr. Goodell: I am writing that in as an amendment then.

Judge Huxman: And, as amended, plaintiffs agree to request 15 for admissions.

Mr. Carter: Your Honor, Mr. Scott brought something to our attention. This addendum down here, "Bus picks up students also anywhere along route."

Judge Mellott: You haven't gotten to that yet, have you?

Mr. Carter: That is on the same exhibit—on the exhibit.

[fol. 70] Judge Huxman: "Bus picks up students also anywhere along route." You don't agree to that?

Mr. Carter: I understand that they picked them up at these various stops.

Mr. Goodell: They do and, in addition, along the way at not designated stops they will pick them up. That is what they tell me; I don't know. That is what the clerk's office tells me has been the practice for years.

Judge Mellott: Well, do you Topeka lawyers especially, do you know whether that is a fact or not?

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Mr. Charles Scott: No, sir.

Judge Mellott: Suppose we admit the exhibit, then, eliminating from it the parenthetical clause and let that remain as an item requiring proof, if that is required.

Judge Huxman: If requested. As so modified, do you agree to the admission?

Mr. Charles Scott: Yes, sir.

Judge Huxman: All right.

No. 16:

"That Exhibit H attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to teacher load in the kindergartens of the Topeka public schools for [fol. 71] the 1950-1951 school year."

Any objection to agreeing to that?

Mr. Carter: Our witness informs us that this is not correct.

Judge Mellott: Who is your witness?

Mr. Carter: Dr. Speer.

Judge Mellott: What does he know about it; has he checked the records?

Mr. Carter: Yes, sir.

Judge Mellott: Is he here now?

Mr. Carter: No, he isn't.

Judge Mellott: How much of that is covered here in exhibits which are already in evidence.

Mr. Carter: I don't know.

Judge Mellott: You have stipulated with refere, I believe it was "E" or "F", has already been covered. Let me refer back here.

Mr. Brewster: Series "B", I imagine.

Judge Mellott: You have shown here what the number of kindergarten children were in each of the schools, and you have shown what the average daily attendance of the kindergarten was. I don't know what is shown by "H".

Mr. Carter: Isn't this the teacher load? These are facts taken from that other report, isn't it, Mr. Goodell?

[fol. 72] Mr. Goodell: Sure. It's a breakdown of each school in the City of Topeka showing the teaching load per teacher. In other words, children each teacher has under her for particular grades starting with kindergarten.

Judge Mellott: What I am asking is simply this: Isn't Exhibit "H" a mere assembling of the data which is already in Exhibit "B"?

Mr. Goodell: It's calculations drawn therefrom from that other data; it's a mathematical, in other words, reduction of what the other exhibits show. I can prove that; I don't care to argue it.

Judge Huxman: Now, gentlemen, the Court is of this view, that this exhibit is just a compilation of the other exhibits already in there.

Mr. Carter: But, Your Honor, Mr. Goodell himself says it's a calculation based upon it which is entirely different.

Judge Huxman: That is what I mean, a compilation made from data already in. It's a simple calculation, and it's either right or it's wrong.

Mr. Goodell: Calculation—it's a reduction of the figures used down to teaching load.

Judge Huxman: The Court is of this view, that we will not ask for an admission at this time, and we will give both parties an opportunity to check this exhibit again, against [fol. 73] the basic data which is contained in these other exhibits, and then, before we start into the trial Monday morning, we will again ask Mr. Goodell whether he is satisfied with the correctness, and we will also ask plaintiff- then if they still contend that this computation is not correct, to have for the benefit of the Court your computation in which you point out the manner and respect in which this is not correct. Now if it is not correct, it shouldn't go in. If it is correct, I know both parties want to agree to it.

Now, that is 16, isn't it?

Mr. Goodell: Yes.

Judge Huxman: That will be passed until Monday morning.

Both parties here have shown a spirit of fairness and cooperation and I see no reason in the world why you shouldn't get together on the question of whether this exhibit is or is not correct.

No. 17:

"That Exhibit I attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to

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teacher load in the first six grades of the elementary schools of the Topeka public school system for the 1950-1951 school year."

[fol. 74] Mr. Carter: We could shorten this, Your Honor, if we might have the same ruling as you made on the last one apply to this one.

Judge Huxman: All right. We pass No. 17 to Monday.

Mr. Brewster: As I understand it, their claim is, using the first series of exhibits, we haven't computed correctly, is that what they mean?

Mr. Goodell: No, they are challenging the reductions we made there.

Judge Huxman: No. 18:

"That Exhibit J attached hereto and made a part hereof is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to auditoriums and gymnasiums in the elementary schools of the City of Topeka, Kansas."

Mr. Goodell: I think there is a typographical error in that which I would like to correct.

Judge Huxman: All right. Where is that.

Mr. Goodell: Exhibit "J". On the Monroe School where I have in my exhibit "combination", meaning that they have combination auditorium and gymnasium, that is erroneous, according to my later information, that they do not have a gymnasium, only an auditorium.

Judge Huxman: Only an auditorium.

[fol. 75] Judge Mellott: What do you want to do, strike out the word "combination" and put in the word "yes" under "Auditorium."

Mr. Goodell: That's right and "no" under "Gymnasium."

Judge Huxman: And "no" under "Gymnasium", all right. That correction will be made.

Mr. Carter: Your Honor, we don't feel that we can accept this at this time. We are today, as of today, our experts are now checking these items, and we cannot say whether they are true or not, so we are not willing to accept them as of now.

Judge Huxman: We will pass that as we have some of these others until Monday morning.

Judge Mellott: May I inquire if counsel understand that we are expecting you to tell us Monday morning whether these are correct and, if they are not, you will give us what you say the correct data is.

Mr. Carter: I understand that completely.

Judge Huxman: No. 19:

"That no distinction is shown by the Board of Education of the City of Topeka in school plant facilities and equipment, because of race or color. Instead, the same factors are considered and applied by said Board of Education as to plant facilities and equipment in both white and colored [fol. 76] elementary schools."

Mr. Carter: We can't agree to that.

Judge Huxman: All right, plaintiffs will not be required to agree to No. 19.

No. 20:

"That Exhibit K attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to original cost of school buildings in the City of Topeka, Kansas, and correctly states the following:

"1. Name of building or school.
"2. Year of construction.
"3. Structural cost.
"4. Land cost.
"5. Equipment cost."

Mr. Carter: We agree.

Judge Huxman: 20 is agreed to.

No. 21:

"That Exhibit L attached hereto and made a part hereof, is a correct statement from the records of the Board of Education of the City of Topeka pertaining to the present appraised value of the school buildings and equipment, for both white and colored elementary schools; that said appraised value is the appraised value furnished by the appraisers for the insurance underwriters for the purpose of

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[fol. 77] fixing values of said buildings and equipment for issuing insurance thereon."

Mr. Carter: We agree to that.

Judge Huxman: No. 21 is agreed to.

Now, that completes the defendants' request for agreement.

Judge Mellott: In the light of what has just been gone through, the Exhibits "G" and "K" and "L" seem now to be ready for admission formally, is not that correct, gentlemen?

Mr. Charles Scott: That is correct.

Judge Mellott: The clerk, then, will mark them as admitted in evidence. The others just covered, namely, the others, "H", "I" and "J" may be handed to the clerk and marked for identification only.

How has the map been marked, if at all.

Mr. Goodell: Exhibit "A", Your Honor.

Judge Mellott: Exhibit "A". It may be marked and admitted in evidence, subject to any corrections that counsel may desire to call to the Court's attention based upon the draftsmanship of the map.

Mr. Goodell: I do think this, Your Honor, I want to recheck it. I think since this map was prepared, the copy prepared which came from the map that the Board of Education clerk's office keeps, that there is a segment of that southwest territory that may have been annexed so it wouldn't be correctly outside of the city now.

[fol. 78] Judge Huxman: Yes.

Judge Mellott: Well, I believe we all know and can take judicial notice of the fact that under the statutes of Kansas pertaining to cities of the first class, schools within and adjoining cities of the first class, that the statutes contemplate, and most of the cities of Kansas do, attach to the cities for school purposes territory which is outside of the city, and that is what you refer to as property attached to the city for school purposes.

Mr. Goodell: Yes.

Judge Mellott: Now since your map indicates that certain of that territory has been attached for school purposes but that there may be some inaccuracies in that, you have not

checked to see if subsequently some of the territory has actually been annexed to and brought into the city for all purposes.

Mr. Goodell: I will reconcile that with all the later annexations.

Judge Huxman: Let me ask you this, Mr. Goodell, is it your understanding that this map is accurate and correct as to the close of the school year?

Mr. Goodell: Yes.

Judge Huxman: Then it would seem to me, that is, on the questions which we have, that what has taken place in the last three or four months or as to the annexation of [fol. 79] additional territory, would not be any factor in determining the constitutionality — the questions before us in this case, do you gentlemen agree with that?

Mr. Charles Scott: Yes.

Judge Huxman: And if this map is correct as drawn, any changes since would not need to be shown.

(A brief recess was here had at the conclusion of which the following further proceedings were had:)

Judge Huxman: Let me address this remark to attorneys for plaintiffs: Has your request for admission No. 1 not already been met by defendants' request for admission 1. There is no difference in them, is there?

Mr. John Scott: Except for the latter part, Your Honor, "That Negro children of elementary school age are compelled to attend one of the four Negro schools aforementioned because of their race and color, pursuant to the custom and usage provided in General Statutes 1949, 72-1724."

Judge Huxman: That is a fact, isn't it?

Mr. John Scott: Yes, sir.

Judge Huxman: I am asking Mr. Goodell now. That latter part is a fact now, isn't it?

Mr. Goodell: I think it's embraced in our stipulation.

Judge Huxman: You do not have that—you do not have [fol. 80] in your request the statement, "Negro children of elementary school age are compelled to attend one of the four negro schools because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724." You do not have that in your——

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Mr. Goodell: We don't use the statute; we say they are required to attend instead of compelled.

Judge Huxman: That is a fact that it is because of their——

Mr. Goodell: That's right.

Judge Huxman: All right, then—is it then agreed, gentlemen, that it is a fact and so stipulated for the purpose of this trial that negro children of elementary school age are compelled to attend one of the four negro schools provided for in Topeka because of their race and color pursuant to the custom and usage provided in G. S. 1949, 72-1724.

Mr. Goodell: Well, that is a fact. I don't think the "custom and usage" is provided by the statute. It's simply an authorization, but we won't quibble about that.

Judge Huxman: Suppose we eliminate "custom and usage" as authorized.

Mr. Goodell: That is all right.

Judge Mellott: I understand there isn't any dispute.

[fol. 81] Mr. Goodell: We will admit it.

Judge Mellott: —that they are, you say, required—the word "required" connotes about the same thing as compelled.

Judge Huxman: He objected to the words "custom and usage" provided by the statute. The statute doesn't perhaps provide a custom.

Mr. Goodell: I would say pursuant to the statute.

Judge Huxman: All right. We will put in the word "pursuant", is that agreed to?

Mr. Goodell: Yes.

Judge Huxman: All right.

Now, we will take up No. 2:

"2. That the distance be computed based on city blocks from given points of residence of infant plaintiffs and other Negro children similarly situated, to the designated Negro schools where they must attend as outlined on the official map of the City of Topeka."

Judge Mellott: Since we did not require you to go into that average one, it seems to me that you wouldn't want to insist upon this, would you, Mr. Scott?

Mr. John Scott: Well, if Your Honor please——

Judge Huxman: In other words, do you want to go back [fol. 82] now to the defendants' request No. 8 and add to it what you now have, is that what you want to do?

Mr. John Scott: No, sir. We will withdraw that.

Judge Huxman: You will withdraw request No. 2.

Mr. Carter: No, sir. We are talking about an entirely different point there, Your Honor.

Judge Mellott: I don't understand what you are talking about.

Mr. Carter: I will try to explain it for a moment. When the defendants are talking about averages, insofar as we are concerned, we feel that that is irrelevant because it has nothing to do with the individual disadvantage. When we speak here of a distance which is travelled by individual plaintiffs we are attempting to show an individual disadvantage which these plaintiffs have in making the trip. We are not talking about general averages; we are talking about what affects the individual plaintiff, and I think that is entirely a different point.

Judge Huxman: Mr. Counsel, we didn't permit the defendants to commit you to a yardstick of measuring distances and why should we——

Mr. Carter: We will put on proof to that effect.

[fol. 83] Judge Huxman: Let me just finish my sentence for the record so it doesn't stand up there in the air. Why should we permit you to commit them to a yardstick of measurement?

Request for admission No. 2 is withdrawn.

Request No. 3:

"Infant plaintiffs and other Negro children similarly situated are transported by buses to the Negro schools where they attend and are picked up by said buses at designated points along prescribed routes in accordance with schedules and designated pick-up points outlined by the School Board or its agents. A copy of the schedule of routes is hereto attached marked Exhibit 'A' and made a part hereof."

That schedule has already been agreed to, hasn't it, and request No. 3 will therefore, I presume, be withdrawn.

Judge Mellott: That is Exhibit "G" which has been ad-

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mitted in evidence with the parenthetical clause, "Bus picks up students also anywhere along the route." eliminated.

Now you gentlemen did tell us, did you not, that you would make inquiry and find out, if you can, by Monday morning whether the parenthetical clause is or is not applicable, can you not do that?

[fol. 84] Mr. John Scott: Yes, sir.

Judge Huxman: That's right.

Judge Mellott: Then that probably covers everything that you have. Now you have a copy of the schedule of routes.

Mr. John Scott: Yes, sir.

Judge Huxman: Is it any different from Exhibit "G"?

Mr. Charles Scott: No.

Mr. John Scott: No, it's exactly the same.

Judge Mellott: Do you propose to offer it in evidence as an additional exhibit?

Mr. John Scott: No, sir. The one that the defendants offered——

Judge Huxman: The entire request No. 3 is withdrawn in view of the admissions already made.

Mr. John Scott: That's right, sir.

Judge Huxman: Request for admission No. 4:

"That no provision made for shelter or protection against inclement weather conditions or safety regulations at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses."

[fol. 85] What do the attorneys for the defendant say as to that request?

Mr. Goodell: We don't have shelter-houses, so I would say we do admit that. "Safety regulations" is pretty broad. I don't know what they mean by that.

Judge Huxman: Well, what would you say to this: Safety regulations other than those provided for traffic generally.

Mr. Brewster: The board of education doesn't provide the lights anyway.

Mr. Goodell: In Topeka the Police Department and the

traffic control division have jurisdiction over those matters.

Judge Huxman: Don't you gentlemen feel that the question of safety regulations could be deleted? What value is there to——

Mr. John Scott: Well, if Your Honor please——

Judge Huxman: Now you can show, if you want to, that there are no added regulations or precautions. Of course the Court will take knowledge, in the absence of anything else, that the usual conditions with respect to traffic and travel in the city obtains, and no other, unless it's shown.

Mr. John Scott: Yes, I think that is sufficient, don't [fol. 86] you?

Mr. Carter: Yes.

Mr. John Scott: I think that is sufficient.

Judge Huxman: Then is it agreed that request for admission No. 4, as follows, is agreed to:

"That no provision made for shelter or protection against inclement weather"—"That no provision is made for shelter or protection against inclement weather conditions."

Do the defendants agree to that?

Mr. Goodell: That is correct.

Judge Huxman: And we will omit from your request the reference to any additional safety regulations.

Mr. John Scott: Yes, sir.

Judge Huxman: I didn't go quite far enough, Mr. Reporter. The admission should read as follows:

"That no provision is made for shelter or protection against inclement weather conditions at designated pick-up points for infant plaintiffs and other Negro children similarly situated while waiting for the arrival of their respective buses."

That is the admission as it is agreed to.

Judge Mellott: The affirmative answer was made by counsel for the School Board.

Mr. Goodell: Yes.

[fol. 87] Judge Huxman: No. 5:

"That said buses make only two trips a day to and fro to the respective all Negro schools in the morning as prescribed"——

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Judge Mellott: We don't have the exhibit, so I suppose——

Judge Huxman: Would you object if we substituted for your Exhibit "A" the number of their exhibit to which——

Judge Mellott: Exhibit "G".

Mr. John Scott: That will be perfectly all right.

Judge Huxman: "in the morning as prescribed in Defendants' Exhibit 'G' admitted in the record and in the evening at the close of school."

Judge Mellott: I understand that is admitted.

Mr. John Scott: Yes, sir.

Judge Mellott: Correct, Mr. Goodell?

Mr. Goodell: Yes.

Judge Huxman: I wanted to stop there purposely; so far you admit that much of the request of No. 5.

Mr. Goodell: The schedule shows that they are taken to the school in the morning and returned at night.

[fol. 88] Judge Huxman: Now, we will take up the rest of the request because we might run into trouble there. The further request is made for an admission, "As a result, infant plaintiffs and other Negro children similarly situated are required to spend the entire day at their respective school without the opportunity and benefit of seeing their parents during the noon hour and are required to eat cold lunches which are prepared by their parents before leaving home in the morning."

Mr. Goodell: We are not prepared to admit. It's a conclusion.

Judge Huxman: That is a conclusion, isn't it, that flows from the admission.

Mr. John Scott: We can prove that, Your Honor.

Judge Huxman: That portion of the request will be denied.

Mr. Goodell: I don't think it's a proper issue in the case because they are treated no differently than white children. If they want to go home for lunch, they go, and if they don't, they stay and eat lunch.

Judge Huxman: That is argumentative, in any event.

Request No. 6:

"That the respective buses are without any supervisor other than the driver to exercise disciplinary measures [fol. 89] and control of said children."

Is that agreed to?

Mr. Goodell: I don't think we send a guard along; I believe that is accurate; we just have a driver.

Judge Huxman: You agree to that, then.

Mr. Goodell: I would like to check it. I think it's correct.

Judge Huxman: Let's put it this way, you agree to that, subject to your right to check and withdraw your agreement if your further investigation shows otherwise.

Mr. Goodell: Yes.

Judge Huxman: No. 7:

"That Buchanan School does not have an auditorium or gymnasium; such facilities are available at Sumner,"—before we go further, gentlemen, we have already covered the question of auditoriums and gymnasiums in the series of exhibits designated "J".

Mr. John Scott: Yes, sir.

Judge Mellott: We have not yet admitted "J", but you were to——

Mr. John Scott: —check it.

Judge Mellott: —check it and give us any corrections on Monday morning.

Mr. John Scott: That's right.

Judge Huxman: Then we should not agree to request [fol. 90] No. 7 here and that can be ironed out on your investigation as to Exhibit "J", as proffered by the defendant.

Mr. John Scott: Yes. We will withdraw that.

Judge Huxman: Request for admission No. 7 is withdrawn because of these other matters in the record.

No. 8:

"That Monroe School's playground or a portion thereof is separated by a public thoroughfare adjacent to the building and located on the easterly side of said playground is the A. T. S. F. Railroad right-of-way and track."

Is that a fact, Mr. Goodell?

Mr. Goodell: I believe that is accurate, yes.

Judge Huxman: Then you admit request No. 8 as read.

Mr. Goodell: Yes.

Judge Huxman: All right.

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No. 9:

"That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools and no safety measures are provided for Infant Plaintiffs and other Negro children similarly situated who are required to cross the intersection of First and Kansas [fol. 91] Avenue at a time when the vehicular traffic is dense, while they are enroute to the designated bus pick-up points and at other busy intersections throughout the City of Topeka where Infant Plaintiffs and other Negro children similarly situated are required to cross enroute to designated bus pick-up points."

Mr. Goodell: We can't admit that because it isn't an accurate statement. Furthermore, we have no control over traffic lights, electric devices. The City of Topeka Police Department takes traffic counts at various points in town and, from their determination, decide that a designated point should have school blinker signs, and we have several cases, the evidence will show if we get in that point,—in several cases requested signs which they on the traffic count didn't think it was justified and wouldn't put them in. We don't have any control over it.

Mr. John Scott: If Your Honor please——

Judge Huxman: Didn't we, when we had up defendants' request for agreement, agree that there were no extra safety or traffic regulations provided at these places.

Mr. Goodell: I don't think so. There are some——

Judge Mellott: Let me ask this question: You agree, do you not, Mr. Scott and counsel for the plaintiffs, that Mr. [fol. 91a] Goodell is correct in his statement that the Board of Education has nothing whatever to do with putting in blinker lights and safety devices for school children and others to cross the public streets, but at best, can only request that the traffic department of the state and the city police department take care of those matters; do you not agree that that is a fact?

Mr. John Scott: We agree that that is a fact and also, to extend that, Your Honor, I think the first part of that request is a fact, that there are no——

Judge Mellott: Well, I suppose that if you divide the

request, there may be some merit, "That no provisions are made for electrically operated school stop signs and safety signals at any of the Negro schools." Now, I suppose——

Mr. Goodell: If the Court please, that is not accurate.

Judge Mellott: Then you should not agree upon it.

Mr. John Scott: It is accurate.

Mr. Goodell: No, it isn't accurate.

Mr. John Scott: We can prove it, Your Honor.

Judge Huxman: The Court feels that that is a very minor matter, whatever the electrical arrangements are or aren't, and, if you can't agree on it, it will take only fif-[fol. 92] teen minutes of evidence to establish what the fact is.

Mr. Goodell: They make a broad statement, as I understand it, no safety devices in any of the areas traversed by the colored children to go to their schools——

Judge Huxman: They don't say that at all.

(Colloquy was here had off the record.)

Mr. Goodell: For example, on 10th Street, you have Parkdale School and Washington School in very close proximity. The negro children who have to cross 10th Street to get to Washington School that walk and don't ride, they use that traffic sign—I mean there is a designated crossing for school children where they cross over 10th there for Parkdale. Now it's splitting hairs to say that is solely for Parkdale and no benefit to Washington.

Judge Huxman: Well, the Court feels that is a minor matter.

Mr. Goodell: We have got that situation in other parts of town.

Judge Huxman: It's a simple matter, and we will not require the parties to agree on that—request No. 9.

Mr. John Scott: We can prove it very easily, Your Honor.

[fol. 93] Judge Huxman: I believe the attorneys for the plaintiffs will agree that this case, the outcome, doesn't hinge upon that one little factor; I doubt whether it's going to be determinative too much.

Now, does that conclude plaintiffs' requests for admissions?

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Mr. John Scott: Yes, sir.

Judge Huxman: We want to ask at this point counsel for the State of Kansas whether they have at this time any requests for admissions of fact in addition to what has been agreed to and, if not, whether they go along with, and agree to, these admissions which have been made by the respective parties to this litigation.

Mr. McQueary: If Your Honor please, the position of the State of Kansas, insofar as this lawsuit or this controversy is concerned, is going to be to endeavor to uphold the constitutionality of the statute in question, and our participation will be limited to that field, and so far as equal facilities or the conditions provided by the Board of Education of the City of Topeka or the facilities enjoyed by the negro, by the plaintiffs, we are not going to make that a matter of issue insofar as we are concerned. We have no knowledge as to that; we haven't investigated it. That will be left solely to the other parties in this matter.

Judge Huxman: Then I understand your position is that you have no request for admissions of fact.

[fol. 94] Mr. McQueary: We have none, Your Honor.

Judge Huxman: And that the state has no interest in these admissions which have been made by the parties, the plaintiff and defendant, other than the state, because you do not think that they touch the state's phase of this case.

Mr. McQueary: That is a correct statement.

Judge Huxman: All right.

Mr. Goodell: I have one more matter. I would like to request a stipulation that the—as an exhibit, that seventeen cites, first and second class cities of the State of Kansas, operate separate colored and white schools in the elementary grades, and I have an exhibit.

Judge Huxman: I am not sure that I understand that, Mr. Goodell.

Mr. Goodell: I have an exhibit with the names of the cities showing that seventeen cities in the State of Kansas are operating their elementary school systems similar to Topeka—strike that—operating separate white and colored schools in the elementary grades pursuant to the same statute.

Judge Huxman: Is there any objection to that admission?

Mr. Greenberg: Yes, Your Honor. We object on the [fol. 95] ground that what may happen in any other city in the State of Kansas is not relevant to the rights of our particular plaintiffs who operate in this school system here and now.

Judge Huxman: Since there is one member of the Court not here, in any event we will—and since this is the trial court, we will receive it. You have no objection to the correctness of the statement.

Mr. Greenberg: We don't know, as a matter fact; we haven't——

Judge Huxman: You have no reason to doubt the correctness of the statement.

Mr. Greenberg: We have had no occasion to investigate it because we haven't thought it pertinent.

Judge Huxman: The exhibit will be received subject to its materiality.

Judge Mellott: It will be marked as Exhibit "M", Defendants' Exhibit "M".

Judge Huxman: Also subject to the right of counsel before trial, if he so desires, to attack it as to its correctness.

Mr. Greenberg: That is agreeable.

Judge Huxman: Is there anything else?

Judge Mellott: That may be taken up Monday also.

[fol. 96] Judge Huxman: Is there anything else now, gentlemen?

Judge Mellott has a matter that he would like to inquire about. Go ahead, judge.

Judge Mellott: I was only going to suggest to my associates on the bench that we may not have covered categorically sub-division (6) of Rule 16 which says that it's proper for us at a pre-trial to give consideration to such other matters as may aid in the disposition of the action. That is, of course, only a general statement. Does either side care to suggest, in line with that sub-section, any other matters which you think might be taken up with the Court at this time which would aid in the disposition of the action.

Mr. Goodell: I think of none, Your Honor.

Judge Mellott: Very well. The concluding sentences of the rule under which we are now functioning provides that, "The court shall make an order which recites the action taken at the conference, the amendments allowed to the

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pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel;''.

Now, where a pre-trial is handled as intelligently and as expeditiously as this has been handled by reason of the [fol. 97] preliminary requests for admissions having been made and secured to some extent, it seems to me that perhaps it is wholly unnecessary for this tribunal to make any order because your record itself shows just what disposition has been made.

Counsel may desire to secure from the reporter copies of what has been accomplished, but I believe that the way in which this has been handled that everybody has it pretty well in mind, and I am suggesting that perhaps it would be mere supererogation and wholly unnecessary for the Court in this particular instance to dictate into the record a lengthy order inasmuch as Judge Huxman has pretty well covered that as we have proceeded.

Do you think this Court should make a separate order or not?

Mr. Goodell: No, I think not.

Judge Huxman: All right. Anything else that anyone has to suggest which might tend to expedite this hearing before we recess. If not, the pre-trial conference will be recessed until 10:00 o'clock Monday morning when we will take up for final disposition the matters that we have left here in abeyance and which you gentlemen on your respective parts will investigate and see if you can satisfy yourselves, and we will then make final disposition of that and immediately go into the trial of this case at the conclusion —final conclusion of the pre-trial conference.

* * * * * * *

[fol. 98] (Reporter's Note:) The further proceedings in the pre-trial conference had on June 25, 1951, are contained in the transcript of proceedings of the hearing proper.

* * * * * * *

Reporter's Certificate (omitted in printing).

[fol. 99] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CORRECTING TRANSCRIPT OF RECORD—Filed August 27, 1951

It has been called to the attention of the Court that certain minor typographical errors exist in the certified record filed in the Court in the above entitled cause. The Court Reporter has checked the record and confirms the existence of these minor typographical errors.

So that the record may speak the truth, it is considered, ordered and adjudged that it be corrected in the following respects:

That on Page 10, Line 4, the name "Dr. Spee" be corrected to read "Dr. Speer"; that on Page 56, Line 2, the phrase "Hold are they" be corrected to read "How old are they?"; that on Page 115 in the last two lines the word "depredations" be changed to read "deprevations"; that on Page 119, Line 2, the sentence there should be made [fols. 100-103] to read ". . . United States *there* are . . ."; that the index record be corrected to correctly reflect the name of Horace B. English as it appears on Page 145 of the record; that at Page 162, Line 4, the phrase "minor groups" be changed to read "minority groups"; that on Page 164 in Line 7 from the bottom the word "roll" be changed to "role"; that at Page 169 the record be corrected to show "direct examination was by Mr. Carter"; that at Page 173 in the third line of the paragraph marked "Q" the last word "them" be deleted; that at Page 212 in Line 9 from the bottom the word "minitors" be changed to "monitors"; that at Page 219, 11 Lines from the top, the sentence should read "of the entire school system?"; that at Page 248, 6 Lines from the bottom, the semi-colon after the word "individual" be changed to a comma; that at Page 249, 12 Lines from the top the word "disadvantages" be changed to "disadvantaged"; that at Page 251 and 255 where the case name McLawrin appears the record be changed to show the name of the case to be "McLaurin".

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It is by the Court further considered, ordered and adjudged that a filing of this order constitute the correction of the record and that copies of this order be furnished to the parties requesting or now having a copy of the record.

(S.) Walter A. Huxman, United States Circuit Judge.

[fol. 104] In United States District Court

[Title omitted]

[fol. 105] Transcript of Proceedings—Filed October 16, 1951

[fol. 106] Be it remembered, on this 25th day of June, A.D. 1951, the above matter coming on for hearing before Honorable Walter A. Huxman, Judge, United States Court of Appeals, Tenth Circuit; Honorable Arthur J. Mellott, Judge, United States District Court, District of Kansas, and Honorable Delmas C. Hill, Judge, United States District Court, District of Kansas, duly constituted as a Three-Judge Court under Chap. 155, Title 28, U.S.C., and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

[fol. 107] Colloquy Between Court and Counsel

Judge Huxman: I take it there are no additional parties to be entered of record. All of that was done the other day, was it? Anyone else to be entered as an attorney of record?

Mr. Goodell: If the Court please, this is Mr. Bannon, attorney for the Board of Education of Leavenworth, Kansas.

Judge Huxman: Do you desire to have your name entered as——

Mr. Bannon: As appearing, Your Honor, but I do not know whether or not the Board might ask for authority to file a brief at some later stage of the proceeding.

Judge Huxman: All right.

Mr. Goodell: The attorney for the Board of Education at Coffeyville.

Judge Mellott: I suppose he should be admitted only as amicus curiae at this time since he filed no pleading.

Mr. Goodell: I suppose so.

Mr. Dallas Knapp, attorney for the Board of Education at Coffeyville called me and asked to have his name entered and wanted to be allowed to participate for filing a brief.

Judge Huxman: Well, we will have his name entered at this time, and we will determine——

[fol. 108] Mr. Goodell: The same is true of Mr. Hal Harlan, of Manhattan, Kansas, who is attorney for the Board of Education there.

Judge Huxman: What do they desire?

Mr. Goodell: To have his name entered and be permitted to file a brief.

Judge Huxman: His name will be entered, and the question of filing of briefs amicus curiae will be determined at the conclusion of the hearing.

Mr. Goodell: Surely.

Judge Huxman: Now, at the conclusion of our pre-trial conference Friday there were certain matters that were passed for final determination this morning. The first one I have noted is Stipulation 16, which reads as follows: "That Exhibit "H", attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka, pertaining to teacher load in the kindergarten of the Topeka public schools for the 1950 and 1951 school years." Attorneys for plaintiff wanted opportunity to check into that. What do you say this morning?

Mr. Carter: We are willing to accept that.

OFFERS IN EVIDENCE

Judge Mellott: Let the record show Exhibit "H" is formally admitted then in evidence.

Defendants' Exhibit "H", having been offered and
[fol. 109] *received in evidence,* is contained in the case file.

Judge Huxman: All right. Request 17; "That Exhibit 'I', attached hereto and made a part hereof, is a correct statement of facts from the Board of Education of the City of Topeka, pertaining to teacher load in the first

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six grades of the elementary schools of the Topeka public school system for the school years 1950 and 1951."

Mr. Carter: We will accept that, too.

Judge Huxman: The record may show that their request No. 17 is agreed to, stipulated, and that Exhibit "I" is admitted.

Defendants' Exhibit "I", having been offered and received in evidence, is contained in the case file.

Judge Huxman: Request No. 18, "That Exhibit 'J', attached hereto and made a part hereof, is a correct statement of facts from the records of the Board of Education of the City of Topeka pertaining to auditoriums and gymnasiums in the elementary schools of the City of Topeka, Kansas."

Mr. Carter: On that we have a question, Your Honor; definition, I suppose. Our investigation reveals——

Judge Huxman: I didn't understand.

Mr. Carter: We have a question. I suppose it's one of definition and——

Judge Huxman: Let's look at Exhibit "J". Is that in [fol. 110] the original exhibits?

Mr. Carter: That is in the supplement attached to the supplement that you were reading; pertains to auditoriums and gymnasiums.

Mr. Goodell: Which one are you talking about now?

Mr. Carter: Exhibit "J".

Mr. Goodell: Any particular part of Exhibit "J"?

Judge Huxman: All right. Now what is it?

Mr. Carter: We are unable to accept the definition under "Buchanan" "Yes", as having an auditorium because our investigation shows that there are two rooms, makeshift rooms, that have been thrown together in which there are chairs. Now we think that is totally different from the feeling of an auditorium which has been built in the school. With that reservation, we will accept that part.

Judge Huxman: If we eliminated "Buchanan" do you accept the statements in Exhibit "J" as to the auditorium and gymnasium in Central Park, Clay—what are the three colored schools?

Mr. Goodell: Monroe.

Judge Huxman: Do you accept the rest of the exhibit with the exception of that pertaining to Buchanan?

Mr. Carter: Well, just three items, Your Honor. If you [fol. 111] read down there to Lafayette——

Judge Huxman: Is that a colored school?

Mr. Carter: No, sir; that is not. It is shown here "yes" an auditorium, "no" gymnasium. We have found that there is a playroom in the school building which is ample, and we think that that should be entered on the record.

Mr. Goodell: We say "yes" it has an auditorium.

Judge Huxman: Suppose we change the "no" to "playroom", what do you say, Mr. Goodell?

Mr. Goodell: I don't think it's accurate; neither is his statement accurate about Buchanan. We will offer evidence on it.

Judge Huxman: All right. If you can't agree, we will eliminate Lafayette from the exhibit.

Mr. Carter: And we have the same——

Judge Huxman: Just a minute. How about Buchanan? You won't agree to Buchanan as stated in the exhibit?

Mr. Carter: No, sir.

Judge Huxman: We will eliminate Buchanan.

Mr. Carter: We agree with everything else on the exhibit with the exception of Polk and Potwin and in both of those schools there are playrooms, even though there is no gymnasiums.

Judge Huxman: Polk and Potwin. All right. We will [fol. 112] eliminate Polk and Potwin. With Buchanan, Lafayette, Polk and Potwin eliminated, do you agree to Exhibit "J" as it now remains?

Mr. Carter: Yes, sir.

Judge Huxman: The record will then shown that it is agreed that Exhibit "J", with Buchanan, Lafayette, Polk and Potwin eliminated therefrom, will be admitted and received in the record as evidence.

Defendants' Exhibit "J", as agreed to above, having been offered and received in evidence, is contained in the case file.

Judge Huxman: Now, that is all that I have marked that was left for consideration today. Have I omitted anything?

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Mr. Carter: No, sir, not that I know of.

Judge Huxman: Any other stipulations that the parties wish or can agree to as to evidence?

Mr. John Scott: If the Court please, we have prepared a map of the City of Topeka for the purpose of showing valuations of the buildings that are located within the City of Topeka school district.

Judge Huxman: That is a- evaluation of the school buildings?

Mr. John Scott: The school buildings; that is correct, sir, and we would like to enter this as a stipulation in this [fol. 113] particular case.

Mr. Goodell: I couldn't agree to that without knowing something about it. Who appraised it?

Mr. John Scott: Dr. Speer.

Mr. Goodell: I wouldn't agree to such a thing as that. It's some school teacher that gave an expert opinion about——

Mr. John Scott: It's no such a thing.

Judge Huxman: Now, gentlemen, don't get to quarreling with each other before the real trial starts.

Mr. John Scott: This was taken from your exhibits.

Judge Huxman: Now, just a minute; you address your remarks to the Court, please. If you can't agree to it, why you can offer it in the due course of time, and we will then rule on it at that time.

Judge Mellott makes this suggestion, and I agree with him: This case to the Court is just another burden that we have in a trial to be decided by us and approached by us just as any other case that comes before the Court. It will be the endeavor of the Court to decide this case according to the law and the evidence. We realize that, of course, there is considerable sentiment in this case that you can't get away from. We trust that, first, there will be no quarreling or bickering among counsel; it's not [fol. 114] called for; it isn't necessary; doesn't add anying to the value of the case. We trust that counsel will keep that in mind. Also, there will be no demonstration on the part of the audience or spectators in any way. This, of course, is a public trial. We want all those who are interested to be here; but the decorum that is main-

tained in federal courts must be maintained throughout the trial.

Is there anything else before we proceed to the trial of the case? If not, the Court is ready to proceed with the trial of case No. T-316, Orville Brown and others vs. Board of Education of Topeka, Shawnee County, Kansas.

Mr. Carter: If Your Honor please, plaintiffs would like to invoke Rule 43(b) of the Federal Rules of Civil Procedure and call as the first witness the president of the Board of Education, Mr. Kelsey Petry.

Judge Mellott: That is what, calling your adversary as a hostile witness?

Mr. Carter: Yes, sir.

Judge Mellott: "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent" and so forth. Proceed.

Judge Huxman: You may proceed.

Judge Mellott: The witness that was called come forward; Mr. Speer, was that his name?

[fol. 115] Mr. Goodell: It is my understanding that this witness was out of the city.

Judge Huxman: Who is the witness?

Mr. Goodell: Mr. Petry, who is president of the board.

Judge Huxman: Is he here? Is Mr. Petry here?

Mr. Goodell: He was out of the city, I think, when the subpoena was issued, in Colorado.

Mr. Carter: Then we will call Mr. Saville.

Judge Huxman: Mr. Saville present? Come forward and be sworn.

ARTHUR H. SAVILLE, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. Saville, how long have you been a member of the Board of Education of Topeka?

A. About twelve years.

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Judge Mellott: May I have the witness' name?
The Witness: Arthur H. Saville.

By Mr. Carter:

Q. What are your duties and responsibilities as a member of the Board of Education?
[fol. 116] A. To adopt policies that are carried out by the school administration, build a budget and various things of that sort.

Q. Does the Board of Education promulgate rules and regulations governing the entire school system of Topeka?
A. Yes, sir.

Q. You maintain, do you not, eighteen schools, elementary schools, in Topeka that are located in eighteen territories, is that correct?
A. Elementary schools? I think there are twenty-two.

Judge Huxman: Isn't that all stipulated to, the number of schools that are maintained.
Mr. Carter: Yes, sir; it's stipulated to, but I am leading up to a question.
Judge Huxman: All right.

By Mr. Carter:

Q. Well, you maintain a total of twenty-two.
A. I believe so, yes, that is correct.

Q. Eighteen are for white children and four for negro children.
A. That's right.

Q. Now, why is it that the Board of Education requires negro children to attend the four separate schools in Topeka?

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial and invading the province of the Court. The pleadings show the issues are joined, that they are doing it, [fol. 117] and they are doing it under a permissive statute, 72-1724. The personal feelings of a board member has nothing to do——
Judge Huxman: I think the objection will be sustained.
Mr. Carter: I think, if I may——

Judge Huxman: It's agreed they are doing it under statute and the ordinance of the City of Topeka.

Mr. Carter: I know that, Your Honor, but I think that I would be entitled to inquire as to whether there are any rules and regulations that the board adopted.

Judge Huxman: You did inquire that and you ask him now why they maintain them. The objection is sustained.

By Mr. Carter:

Q. In your opinion, as a member of the Board of Education, would the board—wouldn't the board have a much simpler problem, since it must maintain the high schools on an unsegregated basis, to integrate negro and white children at the elementary school level?

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial, not having any probative force on the issues in this case.

Judge Huxman: The objection will be sustained.

By Mr. Carter:

Q. Mr. Saville, are you familiar with the document known [fol. 118] as the comprehensive plan of the City of Topeka and Shawnee County, Kansas. I might add that this was—this document was sponsored jointly by the Board of City Commissioners, the Board of County Commissioners and the Board of Education of Topeka and, at the time of the sponsorship, your name, A. H. Saville, is listed as being on the board.

A. Yes.

Q. You are familiar with this.

A. Is that the Bartholomew plan?

Q. Yes, sir.

A. I believe I remember it.

Q. Can you tell me whether or not this plan has been adopted, is being followed at the present time by the Board of Education.

Mr. Goodell: Object to that as incompetent, irrelevant and immaterial; has to do with a long-range view building plan; outside the issues of the case.

Judge Huxman: The objection will be overruled. He may answer.

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The Witness: Frankly, I don't remember. What was the date of that?

By Mr. Carter:

Q. The document was published May, 1945.

A. I couldn't tell you; I couldn't answer that yes or no.

Q. You can't say whether before this document was [fol. 119] published you looked at it as a member of the Board of Education and approved it.

A. Yes, I looked at it—I am familiar to some extent with the contents of the document, but I have no recollection at this time what's contained in it.

Q. Well, if I may, I would like to address your attention to several extracts from the document and find whether this is the policy of the board or whether you approved of it. The document reads as follows, under Schools, Chapter 7. "Schools and Recreational Facilities. No city affords satisfactory living facilities unless adequate parks and schools are available to all persons living therein. Just as the economic welfare of the community is largely dependent upon the extent and diversity of its commerce and industry, the mental and physical wellbeing of the population are largely dependent upon the educational and recreational facilities available. The vital role which public education plays in democracy has long been recognized." Would you subscribe to that statement?

Mr. Goodell: We object to that as pursuit here of an academic matter of a report prepared by Bartholomew which this witness didn't prepare.

Judge Huxman: What's the purpose of this line of questioning?

Mr. Carter: This is a document, Your Honor, which was [fol. 120] sponsored by the Board of Education. It is true that it sets up a long-range plan. The document was prepared by Harlan Bartholomew, but it is indicated in the document that changes were made in it, and so forth, at the suggestion of the various people here listed, the members of the Board of Education. I think that I am entitled to attempt to find out whether or not this witness, as a member of the Board of Education, either had anything to do with the preparation of the document, whether he agrees with the

statements, some of the statements which are listed here and whether they are being followed. Now, Mr. Saville indicates he does not know whether this plan is now being followed by the Board of Education.

Judge Huxman: Mr. Counsel, the question before the Court in this case is not what the viewpoint of anyone is or might be as to the future, the present or the past; but it seems to me the question in this case turns upon what the City of Topeka has and is doing, and what they may think about it is immaterial, if they are furnishing adequate facilities. If they are doing that, then what they are thinking about is immaterial. The objection to this line of questioning is sustained.

Mr. Carter: Your Honor, I don't want to press this point too much, but I think the Court is being unduly severe. [fol. 121] There are statements in here which have to do with a question of the adequacy of facilities.

Judge Huxman: That is a long-range program laid down by a man, Bartholomew, who is not even a member of the Board of Education. It has nothing to do with what the City of Topeka is doing or is not doing with regard to its school system. No, the objection will be sustained. That line of questioning will not be pursued.

Mr. Carter: All right, Your Honor. I think that is all.

Judge Huxman: Any questions?

Mr. Goodell: No questions.

Judge Huxman: Any need for this witness remaining longer or may he be excused from attendance?

Mr. Carter: We have no further need for him.

Judge Huxman: You are not required to attend further upon the Court.

(Witness excused.)

KENNETH MCFARLAND, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Mr. McFarland, you are at present the superintendent [fol. 122] of schools of Topeka, Kansas?

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A. Correct.

Q. How long have you been superintendent?

A. Nine years.

Q. Are there any rules and regulations that you know of that are in force with regard to the choice of schools by negro pupils in the school system, among the four that are set aside for them?

A. Well, we have administered the schools as they were organized at the time this administration took over in 1942. The four negro districts were established at that time.

Q. What I am driving at is what determines, in terms of the place in the city where a negro child lives, what determines what school that child will attend?

A. Those districts were drawn prior to 1942 and adopted by the Board of Education, and we have administered them in essentially the same form.

Q. Well, may I have what they are?

A. Well, you have a map.

Judge Huxman: Doctor, what he asks is what determines the location, if you know. Is that what you want?

Mr. Carter: I am trying to ask—there are four negro schools—the white schools—the school system is divided into territories. That apparently is not true of the negro [fol. 123] schools. Now a negro who lives—out let's say—let's say the Randolph area, what determines what school, what colored school, he or she will attend? That is what I am trying to find out. Are there any rules about that? ered by the admitted state of facts.

Mr. Goodell: Object to this as already having been covered by the admitted state of facts.

Judge Huxman: I am sorry; repeat that question.

(The last preceding question was here read by the reporter.)

Mr. Goodell: The objection is that this is in conflict with the admitted statement of facts.

Judge Mellott: Was it admitted? I have overlooked it, and that is what I was asking Judge Huxman, is the reason he didn't hear you. In paragraph 2, I believe, of your original stipulation——

Mr. Goodell: On Page 2, Your Honor, there was that—that portion was not agreed to.

Judge Mellott: That is what I thought.

Mr. Goodell: I withdraw my objection.

Mr. Carter: That is what I am trying to find out.

Mr. Goodell: Our pleadings allege that a colored child may attend any one of the four colored schools based upon [fol. 124] the selection of his parents.

Judge Mellott: As I recollect it, counsel did not agree upon that Friday, so I think he should pursue it.

Judge Huxman: The witness may answer.

The Witness: Theoretically, the plan would be to give the best coverage possible with four buildings in relationship to where children live and with relationship to bus routes, and so forth.

By Mr. Carter:

Q. Now, Mr. McFarland, the defendants have introduced a series of exhibits relating to school program, teacher salaries, bus schedules and transportation costs. Are you familiar with those exhibits?

A. Not in detail. I am familiar with the fact that the exhibits were prepared and delivered to the counsel.

Q. They were prepared in your office.

A. By my office, yes.

Mr. Carter: If I may get the exhibit "F"(1) to "F"(22).

Mr. Goodell: You have copies of that.

Mr. Carter: All right.

By Mr. Carter:

Q. I want to direct your attention—these are the exhibits. Now, those exhibits "F"(1) to (22) relate to the school schedule program for the school year in each of the schools. [fol. 125] Judge Mellott: You said "F"(22).

Mr. Carter: "F"(1) to (22) covering the twenty-two schools.

By Mr. Carter:

Q. That is the school program for each of the schools. What I want to know, we do not have any information as

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to the hours that school is in session. Would you have that at your fingertips?

A. Well, 9:00 o'clock until 4:00 o'clock is the general hour for elementary schools.

Q. Is there any difference with respect to—does that apply from the first grade through the sixth grade?

A. No, first grades convene a little later, adjourn a little earlier, so do kindergartens. They also have different schedules for the first few weeks of school than they do later.

Q. Without regard for the first few weeks of school, I would like to get the accurate figures on that, if available. When does kindergarten convene and when does it let out?

A. Well, we have let the kindergartens out at 11:30.

Q. They convene at 9:00?

A. And convene at 9:00.

Q. Do you have any in the afternoons?

A. 1:30 and 3:30.

Q. 1:30 and 3:30.

A. I think most of those——

[fol. 126] Q. What about the first year, the first grade?

A. We usually, during warm weather, when the schools first start, we are more lenient on those; we will start about fifteen minutes later.

Q. That would be 9:15.

A. 9:15. We will let them out at 11:30 and sometimes 11:45.

Q. 11:30, 11:45. They reconvene at what time?

A. 1:30, 1:15.

Q. Until 4:00. What about the second through sixth?

A. 1:15 to 4:00.

Q. What about the morning schedule?

A. 9:00 to 12:00.

Q. 9:00 to 12:00. An hour for lunch.

A. Right; an hour *or* a half or an hour and fifteen minutes, depending.

Q. In order that I may be absolutely correct on this, you have half session of kindergarten, half day of kindergarten from 9:00 to 11:30 or from 1:30 to 3:30.

Judge Huxman: Answer, doctor.

The Witness: Yes.

By Mr. Carter:

Q. You have in the first grade, you convene at approximately 9:00 or 9:15; you let out at approximately 11:30, 11:45.

A. Right.

Q. And reconvene at 1:15 to 4:00.

[fol. 127] A. That's right; those are approximately right. There are some variations in that. We have a schedule here, if you want it, admitted in evidence.

Q. If you have the schedule.

A. We have a complete schedule of that and will be glad to get it.

Q. Well, I think it would be—if it's here I would like to see it because I am going to ask some questions.

Mr. Goodell: If the Court please, we introduced, and it's admitted, the program. I don't understand—do you claim they don't get as many hours of instruction?

Mr. Carter: What I am trying to find out is the hours of the classes. You have introduced the program but not the hours of the school.

Mr. Goodell: If the Court please, we submit it would be immaterial unless he claims there is disparity between the two schools as to hours of instruction.

Judge Huxman: I don't see much probative value to that unless there is discrimination, if you will not pursue it too far——

Mr. Carter: I am going to ask some questions on it, Your Honor, and I think the questions will be germane. I wanted [fol. 128] to be certain that Mr. McFarland is certain of his hours. I don't want to have an approximation, and I am not trying to lead you or trap you. I merely want to get the facts. I think it's important for us to know the school schedule.

The Witness: We should prepare a schedule and hand it to you for every school, in that case.

By Mr. Carter:

Q. You mean there are differences?

A. And differences in season, difference in time.

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Judge Huxman: Does counsel contend there is a discrimination in those hours between colored schools and white schools?

Mr. Carter: We are trying to find out something which we think is—affects the school program with regard to a particular school in terms of—that would—it would be important for us to know what hours the classes are in session, and it is for that reason I am particularly anxious to find that out.

Judge Huxman: Do you contend there is any discrimination between the hours in the colored schools and in the white schools?

Mr. Carter: That is not what we are directing it to, Your Honor. We would contend there is discrimination if certain facts occur with regard to the hours that the school operates. For example, I would be interested chiefly in [fol. 129] Washington School. I am chiefly interested in what the schedule is in Washington School, particularly the first grade, kindergarten and the second to sixth grade.

Judge Huxman: Mr. Counsel, the Court feels that this is purely a fishing expedition at this time. You don't make an allegation that there is discrimination in the hours of school in colored schools as against the white schools. You are just, by your frank admission, you are stating that you are trying to see whether there is or not. The Court is going to sustain this objection; going to sustain an objection to this line of questioning at this time. You have an opportunity at recess to get this schedule and go over it. If you can find anything material in it, why you may then pursue this line of examination and Dr. McFarland will be available. But just to go into a fishing expedition in all of this line of testimony, the Court doesn't think it's proper. The objection will be sustained at this time.

Doctor, you will make available to counsel those schedules for their examination, if you have them.

The Witness: We have them.

Judge Huxman: Then if you want to renew your request for this examination later on, you may pursue it, but at this time the objection is sustained.

[fol. 130] Mr. Carter: The thing I want to find out, I think I can find out.

By Mr. Carter:

Q. Now, I would like to direct your attention to Exhibit "G", which is the morning schedule, bus schedule, to take the negro children to school, is that correct?

A. Yes.

Judge Mellott: What is your——

Mr. Carter: Exhibit "G".

Judge Mellott: Exhibit "G".

By Mr. Carter:

Q. I understand that from—from Mr. Goodell that there was not submitted a schedule for taking the children home, but he has advised me that that would be available. Now, I would also like to address your attention to Exhibit "D" and then we can take "D" and "G" together.

Mr. Goodell: Exhibit what?

Mr. Carter: "D".

Judge Huxman: "D" like in dog.

Mr. Carter: "D" like in dog.

By Mr. Carter:

Q. Now, I am directing your attention to both of those schedules, both of those exhibits. I note that you—the Board of Education paid a Miss Washington for transportation of negro pupils in 1950-1951. Can you tell me what part of the schedule on Exhibit "G" Miss Washington [fol. 131] handled?

Judge Huxman: What is the materiality of that?

Mr. Carter: I want to find out, Your Honor—I want to find out the bus schedule for each—who is handling each of the bus schedules because we think it's material.

Mr. Goodell: We object to this as being outside——

Judge Huxman: Will you state in what respect it's material.

Mr. Carter: Well, for example, I want to find out whether Mr. Grimes handles both the schedule which is listed at the top to Washington and the one listed at Monroe; whether Mr. Grimes handles the 8:00 o'clock pick-up to

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8:29 and then—I think I want to find out how that operates. I want to find out what bus—which of these people handles the taking of the children to McKinley and which handles the taking of the children to Buchanan.

Mr. Goodell: I object to this as incompetent, irrelevant and immaterial, and outside the scope of the issues made up by the pleadings and the admitted stipulation of facts. The two exhibits that he's asked to compare with, one of them is [fol. 132] a regularly maintained bus; the other he has called attention to are some teachers, an isolated case of a teacher or two in the kindergarten who has taken her private car and taken children home, which ordinarily would be done by taxi cabs or by the bus, but to let the teacher make a little extra money, at their request voluntarily, she has taken them home and has been paid by the Board of Education.

Judge Huxman: Mr. Counsel, the Court fails to see any materiality in the question as to who drove the bus. The Court can't see how it makes any difference.

Mr. Carter: Let me pursue it for a moment; I won't take up your time, Your Honor.

By Mr. Carter:

Q. The bus schedule, as listed here, indicates that with regard to Monroe School, children are taken to Monroe; they begin at 8:00 o'clock; they are let off at Monroe School at 8:29. Now, it's my understanding—I would like to have it cleared up—that this same bus driver and this same bus then has a pick-up at 6th and Brannan at 8:30. Now I—the only way I can find that out——

Judge Huxman: Ask the witness if he knows whether that is a fact or not.

Mr. Carter: That is what I asked, Your Honor, whether Mr. Grimes handled both of these schedules. Mr. Grimes is the one who is involved in this.

[fol. 133] Mr. Goodell: Do I understand it that you challenge the accurateness of that exhibit now? You want to inquire into its accuracy, is that what you are getting at?

Mr. Carter: I would like to find out whether Mr. Grimes handles both of these and, therefore, I have a right to, of course, inquire into that.

Mr. Goodell: If the Court please, we renew our objection. They have admitted the bus schedule as being accurate excepting only that they stop at additional places other than the scheduled bus stops.

Judge Huxman: The doctor may answer, if he knows. I fail to see the materiality of it.

The Witness: I don't know.

Mr. Carter: All right, that's okay.

By Mr. Carter:

Q. Now, Mr. McFarland, in your schools are there anything that you call special rooms that you have set aside for white children in your public school system?

A. Yes.

Q. Are there any such special rooms for negro children in the public schools?

A. We have no special rooms for negro children. We have health rooms for both, but not special rooms.

Q. What is the nature of these special rooms?

A. Special rooms are for groups that are, for one reason [fol. 134] or another, unable to fit into regular classroom, do regular work and still we would consider as public school people.

Q. If you know, can you tell us why there are no special rooms for negro children?

A. We haven't had the need. We haven't had, we felt, sufficient numbers of them who were far enough out of line from the regular group to warrant special rooms.

Q. Are any provisions made in the school system for hot lunches, aside from the health rooms? I understand the health rooms are for undernourished children.

A. That's right.

Q. Aside from that, are any provisions made for hot lunches?

A. Not in elementary schools.

Q. I see. Now that would apply to the negro children regardless of the fact that whether they were too far to go home to lunch, you make no provisions for hot lunches for them, is that right?

A. Outside the health rooms, no provision. You understand we have two health rooms for four colored schools,

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where we have only two health rooms for eighteen white schools.

Q. I understand. Can you tell me, in terms of the transportation of pupils to school, if you know, can you tell me what is the number of children that are transported, negro children that are transported to school, total number.

[fol. 135] A. I couldn't give you that figure. I don't have it at hand.

Q. Is that figure available?

A. We can get that for you.

Q. Would I be able to get that from you?

A. Yes.

Mr. Carter: That's all.

Judge Huxman: Any questions by defendants?

Mr. Goodell: We have no questions.

Judge Huxman: Anyone request the presence of Dr. McFarland any further, or may he be excused?

Mr. Carter: Well, I would like for Dr. McFarland to be able to get from him the school schedule and the number of pupils transported, and I think——

Dr. McFarland: You mean class schedule or hours? You want hours?

Mr. Carter: Hours that the school is in session, that is, including the afternoon recess.

Judge Huxman: Can you furnish that, doctor?

Dr. McFarland: Yes.

Judge Huxman: Will you furnish that to counsel on each side and also copies for the Court?

Dr. McFarland: Yes, sir.

(Witness excused.)

[fol. 136] Lena Mae Carper, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court please.

A. Lena Mae Carper.

Q. Are you one of the plaintiffs in this action?

A. Yes.
Q. Where do you live, Mrs. Carper?
A. 1217 Hillsdale.
Q. 1217.
A. Yes.

Mr. Goodell: Twelve what?
The Witness: 1217 Hillsdale.

By Mr. John Scott:

Q. Is that in the City of Topeka?
A. Yes.
Q. Are you married, Mrs. Carper?
A. Yes.
Q. And do you have children or a child of school age?
A. I have one.
Q. What is her name?
A. Katherine Louise Carper.
Q. How old is she?
A. She's ten years old.
[fol. 137] Q. Will you state to the Court what school she attends?
A. She attends the Buchanan School.
Q. The Buchanan School. What grade is she in?
A. Fifth grade.
Q. Fifth grade.

Mr. John Scott: For the purpose of the record, the residence the plaintiff, Mrs. Carper, has testified to appears to be in the district Gage and Randolph indicated on the official map of Topeka, the same being Exhibit—Defendants' Exhibit "A".

Mr. Goodell: No, that is our exhibit "A". Oh, pardon me. Did you say was in both of those school districts?

Mr. John Scott: Yes, and it's also indicated on the map in the color of red and blue.

Mr. Goodell: Do you mean it's in Gage and Randolph?

Mr. John Scott: Gage-Randolph.

Mr. Goodell: There are two different territories.

Mr. John Scott: She lives in the same district.

By Mr. John Scott:

Q. Now, Mrs. Carper, how does your child go to school?

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A. She has to walk about four blocks on Huntoon and then [fol. 138] has to cross the highway at Huntoon and Gage and catch a school bus.

Q. What time does she catch the school bus?

A. The school bus is supposed to be there at 8:40. However, I go to work, and I go with her each morning she goes to school, and sometimes it has been as high as five minutes to nine before the bus showed up.

Q. Can you state to the Court the approximate distance from the school—strike that—the approximate distance of the pick-up point to the Buchanan School.

A. Oh, in the neighborhood of about—oh, I say about twenty-four blocks, anyhow.

Q. And can you state to the Court what schools that you live near?

A. She—we live near the Gage Park or the Randolph School.

Q. Randolph School. And is there also a school now under construction located at 17th and Stone?

A. Yes.

Q. Do you know the name of that school now under construction?

A. No, I don't.

Q. Are you also located near that particular site?

A. Yes.

Q. Now, Mrs. Carper, do you prepare a lunch for your child?

A. Yes.

[fol. 139] Q. Every day that she attends school?

A. Yes.

Q. Does she come home for dinner?

A. No.

Q. What time does she return home?

A. She usually gets home around 4:30.

Q. Around 4:30. Have you ever had an occasion to observe the number of people riding the bus that your child rides?

A. When the bus comes for my child it's nearly loaded.

Q. When you say "nearly loaded" be more explicit about that, Mrs. Carper.

A. Sometimes it is really overloaded.

Mr. Goodell: Move to strike that answer as a conclusion of the witness.

Judge Huxman: Overruled.

By Mr. John Scott:

Q. And I believe you stated, Mrs. Carper, that there have been times that the bus has been late, is that correct?

A. Many times.

Q. Would that be during the cold winter months?

A. Yes.

Q. And what would your child and other children be doing at that time?

A. They would usually stand in the cold waiting for the bus until they couldn't stand it any longer, and then we would take them to a small grocery store on Gage and [fol. 140] take them in there and try to get them warm until the bus come. When the bus come, I would get out and hail the bus in front of the store to pick them up.

Q. Are there any shelters or any means of protection against weather conditions there on the corner where the bus stops?

A. None.

Q. Is there a stop signal there at Huntoon and Gage?

A. Absolutely none.

Q. Can you tell the Court what the traffic conditions are where your little girl catches the bus?

Mr. Goodell: Object to this as outside the scope of the issues and the pleadings. There is no evidence that the Board of Education has any control over safety devices, the installation or operation of them.

Mr. John Scott: If the Court please——

Judge Huxman: Just a minute. The objection will be overruled.

By Mr. John Scott:

Q. Did you understand the question?

(The last preceding question was here read by the reporter.)

A. At that time of the morning the cars are really congested going along that highway. It's really congested

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traffic along there at that time. In the morning most people are going to work at that time.

[fol. 141] Mr. John Scott: I believe that is all. You may cross examine.

Mr. Goodell: No questions.

Judge Huxman: You may step down; call your next witness.

(Witness excused.)

KATHERINE CARPER, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. Katherine, don't be nervous; these gentlemen up here are your friends. Now, what is your name?

A. Katherine Carper.

Q. Katherine, how old are you?

A. Ten.

Q. When is your birthday?

A. February 24th.

Q. February 24th.

A. Yes.

Q. Where do you live, Katherine?

A. 1217 Hillsdale.

Q. What—was that your mother that was just on the stand?

A. Yes, sir.

Q. Do you know the difference between right and wrong, [fol. 142] Katherine?

A. Yes, sir.

Q. And you know what it means to tell the truth, don't you?

A. Yes, sir.

Q. Now, Katherine, you attend Buchanan School, is that correct?

A. Yes, sir.

Q. And you also ride the bus.

A. Yes, sir.

Q. I want you to tell these three gentlemen up here—strike that. Just tell the Court how many people, the conditions of the bus that you ride when you catch it in the morning,

A. It is loaded, and there is no place hardly to sit.

Q. There is no place hardly to sit, is that right?

A. No, sir.

Q. People are standing up.

A. Yes, sir.

Q. And you have stood on the corner when it was cold, is that right?

A. Yes, sir.

Q. And did your hands get cold?

A. Yes, sir.

Q. Now what grade are you in, Katherine?

A. Fifth.

[fol. 143] Q. Fifth grade.

A. Yes, sir.

Q. Do you know what time you arrive at school in the morning?

A. Quarter to nine.

Q. And what time does school—what time does school start?

A. Nine o'clock.

Q. Nine o'clock. And what time do you get out at noon?

A. Quarter to twelve.

Q. Quarter to twelve.

A. Yes, sir.

Q. Do you know what time the first grade gets out?

A. Eleven thirty.

Q. And do you know Mrs. Crawford?

A. Yes, sir.

Q. What grade does she teach?

A. The first and half the second.

Q. Is that at Buchanan School?

A. Yes, sir.

Q. And does she do anything else other than teach school?

A. Takes the kindergarten home.

Q. The kindergarten children home.

A. Yes, sir.

Q. What time does she take the kindergarten children home?

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A. Eleven thirty.

Q. Eleven thirty. And what does she do with her class?

[fol. 144] A. Let's them go into Miss McBrier's room.

Q. Mrs. McBrier?

A. Yes, sir.

Q. What grade does she teach?

A. The third and half the second.

Q. The third and half the second. Is her class out at the time that Mrs. Crawford's children go in there?

A. Yes, sir.

Q. They are out. Katherine, I want you to tell these three gentlemen what the conditions of the bus in the evening are when you go home.

A. Sometimes when I get on the bus it is loaded, and there is no place to sit.

Q. And are the children sitting on top of each other?

A. Yes, sir.

Mr. Goodell: We object to this whole line of leading questions of counsel testifying rather than the child.

Judge Huxman: They are slightly leading, but try not to lead the witness. The objection is overruled.

By Mr. John Scott:

Q. In your neighborhood, Katherine, do you live in a neighborhood with white children?

A. Yes, sir.

Q. Do you play with them?

[fol. 145] A. Yes, sir.

Q. What schools do they go to?

A. Randolph.

Mr. Goodell: I object to that as incompetent, irrelevant and immaterial, outside the issue.

Judge Huxman: Objection to this line of questioning will be sustained.

Mr. John Scott: I believe that is all.

Judge Huxman: Any questions? You may be excused.

(Witness excused.)

Mr. Goodell: If the Court please, if they will tell me where these children live, what the distance is to the pick-up point, we will agree to all of this and shorten this up.

Judge Huxman: They are entitled to make their case. We will proceed this way, at least presently.

OLIVER L. BROWN, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. You may state your name to the Court, please.
A. Oliver Leon Brown.
Q. And where do you live, Mr. Brown?
[fol. 146] A. 511 West First Street.
Q. Are you a citizen of the United States?
A. I am.
Q. And you are a plaintiff in this lawsuit?
A. I am.

Judge Huxman: Talk a little louder, Mr. Brown.
Judge Mellott: He didn't answer yet.
The Witness: Yes.

By Mr. Bledsoe:

Q. What is your business or occupation?
A. Carman welder.

Mr. Bledsoe: Speak a little louder.
The Witness: A carman welder.
Judge Huxman: Mr. Brown, it's difficult to hear you. I wish you would make an effort to speak so we can hear you distinctly; we want to hear what you say.

By Mr. Bledsoe:

Q. Are you married?
A. Yes.
Q. And, if so, who constitutes the members of your family
A. I do.
Q. What I mean by that, who constitute the members of your family?
A. I have a wife and three children.

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Q. What are the ages of your children?

[fol. 147] A. My oldest daughter is eight years old; I have one four and another one five months.

Q. What is the name of your daughter, oldest daughter?

A. Linda Carol Brown.

Q. In what school district or territory do you live, Mr. Brown?

A. I live in the Sumner District.

Q. Sumner School District.

A. Yes.

Mr. Bledsoe: For the purpose of the record, if the Court please, let it be shown that the witness resides in Sumner School District. I think it's this district here marked (indicating on exhibit)—that is colored red.

Judge Mellott: Well, I am afraid your testimony standing alone isn't too intelligent; it isn't to me. Now, as I understand it, Topeko is one school district, you agreed at the pre-trial, but you said that there were certain territories.

Mr. Bledsoe: Well, I may susbstitute territory for—if I may—territory for district.

Judge Huxman: Wouldn't it be more helpful to the Court if you just had these witnesses locate their residence with reference to the colored school that they attend, rather than having it defined by the various territories. [fol. 148] That is the important factor, how far they are from school.

By Mr. Bledsoe:

Q. Now, Mr. Brown, where do you live with reference to Monroe School?

A. Well, — stated that I live at 511 West First Street which is fifteen blocks, approximately, from Monroe School.

Mr. Goodell: I didn't get that.

Judge Mellott: Fifteen blocks from Monroe School.

The Witness: Twenty-one blocks, pardon me; approximately twenty-one blocks.

By Mr. Bledsoe:

Q. You are talking about now the way your daughter has to travel to go to Monroe School, is that correct?

A. That is true.

Q. Does your daughter ride the school bus?

A. Yes.

Q. All right. Now, Mr. Brown, what time does your daughter leave home in the morning to walk to First and Quincy, the bus pick-up point, to go to school; what time does she leave home?

A. She leaves at twenty minutes 'till eight o'clock.

Q. Twenty minutes of eight.

A. Every school morning.

Q. What time, or thereabouts, does she board the bus [fol. 149] at First and Quincy?

A. Well, she is supposed to be there at eight o'clock and which she has been, in many instances, but many times she has had to wait through the cold, the rain and the snow until the bus got there, not knowing definitely what time it gets there all the time.

Q. All right. Now, Mr. Brown, she boards that bus about eight o'clock. What time does she arrive at the school?

A. She's supposed to arrive at the school around 8:30.

Q. Eight thirty. And, as I understand it, what time does the classes begin at school?

A. Nine o'clock.

Q. What does your daughter do between the time the bus arrives at the school at 8:30 and 9:00 o'clock?

A. Well, there is sometimes she has had to wait outside the school until someone came to let them in, through the winter season and likewise, many times.

Q. What else does she do, if anything?

A. Well, there is nothing she can do except stand out and clap her hands to keep them warm or jump up and down. They have no provisions at all to shelter them.

Q. And what you want the Court to understand is that your daughter is conveyed to the school, she gets there by 8:30 in the morning, and that she has nothing to do until school starts at 9:00 o'clock, is that right?

[fol. 150] A. That is correct.

Q. Now, Mr. Brown, you don't—withdraw that, please. What provisions are made by the school board for your daughter to have warm lunch, if any.

A. There are no provisions made at all.

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Judge Huxman: Mr. Bledsoe, hasn't it been agreed and testified to by Dr. McFarland that no provision is made for warm lunches?

Mr. Bledsoe: I beg your pardon; I believe you are correct, if the Court please.

Judge Huxman: That stands admitted, doesn't it?

Mr. Bledsoe: That's right; that is all right. Let me withdraw that, please.

By Mr. Bledsoe:

Q. Now, then, your child—you don't get to see your child during the daytime until she returns home in the evening, is that right?

A. That is correct, sir.

Q. Would you, Mr. Brown, would you like to have your daughter home, have the same opportunity of giving her parental guidance as the white fathers and mothers might do their child.

A. Yes, sir.

Mr. Goodell: We object to the form of that question as assuming a state of facts not in evidence and, in fact, con-
[fol. 151] trary to some of the admitted stipulation of facts.

Judge Huxman: The objection will be sustained.

By Mr. Bledsoe:

Q. But you do not see your daughter from the time she leaves in the morning until she returns in the evening, is that correct?

A. I do not.

Q. What time is that?

A. She gets home around fifteen minutes to five.

Q. Fifteen minutes to five. Do you know whether or not there is any provisions made to shelter or protect your daughter while she is standing on the street or the designated bus pick-up——

Judge Huxman: Mr. Bledsoe, that has been testified to, and I think it's conceded no shelter is provided in any of these points where colored children are picked up, is that not so, Mr. Goodell?

Mr. Goodell: That's right.

By Mr. Bledsoe:

Q. Now, Mr. Brown, what is the condition of the area there between your residence and First and Quincy where your daughter boards the bus?

A. Well, there are a considerable amount of railroad tracks there; they do a vast amount of switching from the Rock Island yards and from the time that she leaves [fol. 152] home until she gets to Quincy, First and Quincy, to board the bus, she has to pass all of these switch tracks and she—also including the main thoroughfare, Kansas Avenue and First; there is a vast amount of traffic there morning and evening when she goes and returns. There is no provisions at all made for safety precautions to protect those children passing these thoroughfares at all.

Q. Now, Mr. Brown, if your daughter were permitted to attend Sumner School would there be any such obstructions or any such conditions as she will meet on her way to First and Quincy?

A. Not hardly as I know of.

Q. How far is it from your residence to Sumner School?

A. Seven blocks.

Q. Seven blocks. Mr. Brown, are you assessed a tax for the support and maintenance of the public schools of the City of Topeka?

A. I am.

Mr. Goodell: We object to that, if the Court please; it's wholly outside the scope——

Judge Huxman: He may answer.

The Witness: I am, sir.

By Mr. Bledsoe:

Q. Mr. Brown, do you consider it an advantage to have a school in the neighborhood in which you live near your home? Do you consider that an advantage?

[fol. 153] Mr. Goodell: We object to that as incompetent, irrelevant and immaterial what he considers.

Judge Huxman: Objection sustained.

Mr. Bledsoe: If the Court please, I believe that is really a part of our case.

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Mr. Goodell: If the Court please, every parent would like to have a school next door, but that is impossible.

Judge Huxman: I think it flows naturally it's an advantage to live closer to a school than to have one far away. I don't think we need to spend much time to establish that fact. I think the Court will take judicial knowledge of the fact that if it had children of school age it would rather have them go to a close school than one far away.

By Mr. Bledsoe:

Q. Mr. Brown, is there a more direct route from your residence, 511 West First Street, to the bus pick-up point at First and Quincy; is there any more direct route than there?

A. Than just my family do you mean?

Q. No, for your daughter going down to the bus pick-up point, is there a more direct route for her to travel?

A. No, there isn't.

Q. There is not.

Judge Huxman: Any questions?

[fol. 154] Cross-examination.

By Mr. Goodell:

Q. Mr. Brown, you see that map there, Defendants' Exhibit "A"?

A. I do.

Q. You understand that the portions colored there form the school territory for the whole city of Topeka.

A. I do.

Q. And, directing your attention to the corner here or all the area in blue, you understand that that is territory outside of the city limits of Topeka, but in Topeka for school purposes alone.

A. I understand.

Q. What?

A. I understand that.

Q. You say your child goes four blocks to the bus pick-up point.

A. She goes six blocks to the pick-up point.

Q. Six blocks, pardon me. Don't you know as a matter of fact that in many, many instances there are children that go to the white schools in this town that go thirty and thirty-five blocks and walk to get there.

Mr. Carter: I object to that.

The Witness: Where at?

Mr. Carter: I see no materiality to this question.

[fol. 155] Judge Huxman: Objection will be sustained. That is not proper cross-examination of this witness.

Mr. Goodell: No further questions.

Judge Huxman: The Court will take a short recess of approximately ten minutes.

(The Court then, at 11:15 o'clock a.m., stood at recess until 11:25 o'clock a.m., at which time the following further proceedings were had:)

Judge Huxman: You may proceed:

Darlene Watson, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. State your name to the Court, please.

A. Darlene Watson.

Q. Where do you live?

A. I live at 508 West First.

Q. Do you have children of school age?

A. Yes, I do.

Q. And what school do your children attend?

A. They go to Sumner.

Q. Sumner School. Are you acquainted with Oliver Brown and his family, the Oliver Brown who just left the stand.

A. Yes; we are neighbors.

[fol. 156] Q. You are neighbors. Now, Mrs. Watson, are you able to tell the Court what time Linda Brown leaves in the morning to go to school?

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Mr. Goodell: We object to this as repetition; simply cumulative; already been testified to.

Judge Huxman: Yes, this evidence is cumulative but plaintiff is entitled to reasonable latitude.

Mr. Goodell: We will admit the time you say is right; we will admit that.

Judge Huxman: You may answer.

The Witness: I have watched her leave at 7:40.

By Mr. Bledsoe:

Q. Now, do you have a son who attends Sumner School?

A. Yes.

Q. What time does you son leave; you live directly across the street from Mr. Brown.

A. That's right.

Q. Now, what time does your son leave to go to Sumner School?

Mr. Goodell: We object to this as incompetent, irrelevant and immaterial, and not tending to prove any burden within the scope of the 14th Amendment which is what this lawsuit involves, for the reason that if this is a proper inquiry, then we have got to subpoena all of the parents of the white children and show in some cases they live [fol. 157] thirty-six blocks away, and they have to leave maybe at 7:15. It's pure accident where families may live close to schoolhouses. We can't have schoolhouses next door to everybody.

Judge Huxman: The objection will be overruled.

The Witness: My boy leaves at 8:40, twenty minutes of nine.

Q. Twenty minutes of nine.

A. Yes.

Q. How far is it from your home to the Sumner School?

A. It's seven blocks.

Q. Seven blocks. And you just testified that Linda leaves home at 7:40 in the morning.

A. That's right.

Mr. Goodell: We object to this as repetition.

Mr. Bledsoe: That is all.

Judge Huxman: Mr. Bledsoe, speaking for myself alone, for your future guidance, I will take judicial knowledge of

the fact that where there are only four colored schools in a town of this size, against eighteen white schools, that there are innumerable instances of this kind where colored children will go by a white school and go much farther to [fol. 158] a colored school than they would be required to go if they had the privilege of attending the white school. That is what you are trying to establish, isn't it?

Mr. Bledsoe: That is, if the Court please.

Judge Huxman: I think we can take judicial knowledge of the fact that that is inevitable where you have only four colored schools as against eighteen white schools.

Mr. Bledsoe: That is. You may take the witness.

Mr. Goodell: No questions.

Alma Jean Galloway, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court, please.

A. Alma Jean Galloway.

Q. Mrs. Galloway, please speak right out enough so the Court and the reporter may hear you, please. Where do you live, Mrs. Galloway?

A. 428 North Lake.

Q. 428 North Lake.

A. Yes.

Q. Do you have a child or children of school age?

[fol. 159] A. Yes; I have two.

Q. Have two. How old are they?

A. One is six and one is five.

Q. And do they attend any of the public schools in the City of Topeka?

A. Washington School.

Q. Washington School. Do you know the approximate distance Washington School is from your residence?

A. I think it's sixteen blocks.

Q. How do they go to school?

A. Well, they take the school bus.

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Q. Where does the school bus pick them up?
A. On the corner of Chandler and Greeley.
Q. How far is the bus pick-up point from your residence?
A. Well, it's two and a half blocks.
Q. Two and a half blocks. Are you located near any school that might be within close proximity of your home?
A. Yes, State Street School.
Q. State Street School. Have you ever had an opportunity to observe the conditions of the buses that take your children to school?
A. Well, no, I haven't.
Q. Are you required to fix a lunch in the morning?
A. Yes.
Q. And your children do not come home at noon, is that [fol. 160] correct?
A. No.
Q. What time do they arrive home in the evening?
A. Well, about five or ten minutes past four.
Q. I see. And what time do they leave in the morning?
A. About between 8:20 and 8:25.

Mr. John Scott: That will be all. You may cross-examine.
Judge Huxman: Any cross-examination?
Mr. Goodell: No.
Judge Huxman: You may step down.

(Witness excused.)

Sadie Emanuel, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:
Q. State your name to the Court, please.
A. Mrs. Sadie Emanuel.
Q. Are you one of the plaintiffs in this actions, Mrs. Emanuel?
A. I am.
Q. Where do you live?
A. I live at 1606 East Third.
Q. 1606 East Third Street.

[fol. 161] A. Yes.

Q. Are you a parent of children of school age?

A. I have one boy in school.

Q. How old is he?

A. He is nine years old.

Q. And what school does he attend?

A. He attends Washington School.

Q. Washington School.

A. Yes.

Q. Do you know the approximate distance Washington is from your home?

A. Well, I don't know just exactly, but I imagine it would be from our place to Washington around about fifteen or sixteen blocks, I just imagine; I don't know.

Q. How does your child travel to school?

A. I send him to school on the city bus.

Q. State to the Court why you send your child to school on the city bus.

A. Well, when he was in kindergarten, the kindergarten teacher she picked him up at our home, and then he would return on the school bus in the evenings, and I would meet the school bus which he had about five blocks to come from the bus line when he was in kindergarten, and the reason why that I stopped him—after he got out of kindergarten and started in the first grade when I would [fol. 162] meet the school bus the children would be hanging out of the bus and when they would get so far the other larger children would push the smaller children on the ground, and I bought him a cap and when he came home he said some of the children pulled his cap off and threw it out of the bus, so we were only just one block from the city bus, and he has been riding on the city bus ever since, and I just didn't like it because it seemed that there wasn't any order on the school bus, and I just didn't like the condition; it was so crowded and congested until I just didn't like the idea so I send him to school on the city bus.

Q. And you pay his fare each and every day.

A. I sure do.

Q. Approximately how long have you been doing that, Mrs. Emanuel?

A. Ever since he has been in the first grade.

Q. What grade is he in now?

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A. He is going into the fourth.

Q. Do you prepare a lunch for him in the morning?

A. Yes, I do.

Q. Therefore he stays at school and eats his lunch, is that right?

A. Yes.

Judge Huxman: Mr. Counsel, can't we stipulate and [fol. 163] agree that in all instances lunches are prepared, and the colored students stay from the time they come there in the morning until they go home at night.

Mr. Goodell: That would be true as to the children transported, but it is not an accurate statement as to——

Judge Huxman: That is what I mean, as to those who are transported. Can we stipulate that into the record that all colored school children who are transported stay at the school from the morning; they take their lunch with them and leave the school building only when school is completed in the afternoon.

Mr. John Scott: Yes, sir.

Mr. Goodell: The stipulation ought to be that they are not required to stay.

Judge Huxman: They are not required but, of necessity, they do that.

Mr. John Scott: Convenience.

Judge Huxman: They have no place else to go.

Mr. Goodell: Which is precisely like it is in the white schools where children live far away.

Judge Huxman: We will not add that on to it.

Mr. John Scott: That is your case.

[fol. 164] Judge Huxman: Nothing gained by asking each witness whether they prepare the lunch and whether their children stay there and don't come home until evening because that seems to be the pattern.

By Mr. John Scott:

Q. Is there a school located near your home?

A. Two blocks.

Q. Two blocks. What's the name of that school?

A. Lafayette School.

Q. Lafayette School.

Mr. John Scott: I believe that is all.

Judge Huxman: Any questions; cross-examination?
Mr. Goodell: No.

Shirley Mae Hodison, having been first duly sworn, assumed the stand and testified as follows:

Direct Examination.

By Mr. John Scott:

Q. State your name to the Court, please.
A. Shirley Mae Hodison.
Q. Are you one of the plaintiffs in this action?
A. Yes.
Q. Where do you live?
A. 734 Garfield.
[fol. 165] Q. Do you have a child or children of school age?
A. I have one of school age.
Q. What is his name?
A. Charles Hodison, Jr.
Q. How old is he?
A. He is nine.
Q. Do you know what grade he is in?
A. He is in the fifth.
Q. What school does he attend.
A. Buchanan.

Judge Mellott: What school?
The Witness: Buchanan.

By Mr. John Scott:

Q. Does he ride the school bus?
A. Yes, he does.
Q. What time does he—do you prepare him to catch the school bus in the morning?
A. Well, I have him to leave about ten after eight.

Mr. Goodell: If the Court please, we don't want to be obstreperous. We object to this whole line of questioning on the basis that it could not furnish the basis of recovery, distance travelled, and a long line of decisions by the federal

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courts have held that that is not such a situation that would invoke the 14th Amendment. I have a long line of decisions on that.

Mr. John Scott: We have——

[fol. 166] Mr. Goodell: That is, those are disparities that are bound up here in any school system, and it occurs within the white districts and that that is not a ground for invoking the equal protection of the laws.

Judge Huxman: The objection will be overruled and, if a study of the authorities should convince the Court that this testimony is incompetent, of course, it would be disregarded in reaching our conclusion. We can't stop to analyze all the cases at this stage.

By Mr. John Scott:

Q. What time did you say he left for school?

A. Ten after eight.

Q. Is that the time the bus arrives?

A. It's supposed to be there about a quarter after.

Q. And where do you catch the bus?

A. On 7th and Garfield.

Q. On 7th and Garfield. That is a block from your home.

A. Just about; I live the second house from the corner of 8th and Garfield.

Q. Do you know the approximate distance Buchanan School is from your home?

A. I am not sure; I believe it's about eight blocks, I imagine.

Q. Would you say twelve?

A. I am not sure.

Q. Do you know what time your child arrives at school?

[fol. 167] A. No, I don't.

Q. Is there a school located near your home?

A. Yes.

Q. What's the name of that school?

A. Clay.

Q. Clay School.

Mr. John Scott: It has already been stipulated about the lunches so we don't have to go into that.

Judge Huxman: Any questions?

Mr. Goodell: No questions.

JAMES V. RICHARDSON, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. State your name to the Court, please.
A. James V. Richardson.
Q. Where do you live, Mr. Richardson?
A. 1035 Jewell.
Q. 1035 Jewell. Do you have a—children of school age?
A. One boy.
Q. What is his name?
A. Ronald.
Q. Did you tell me how old he was?
A. Seven years old.
[fol. 168] Q. Seven years old. What school does he now attend?
A. Holy Name School.
Q. The Holy Name. That is a parochial school?
A. That's right, sir.
Q. Why do you send your child to a parochial school, Mr. ——
A. Simply because I do not believe in segregation.

Mr. Goodell: Move to strike out that testimony as incompetent, irrelevant and immaterial.
Judge Huxman: The objection will be overruled.

By Mr. Bledsoe:

Q. Now, did your child ever attend Buchanan School?
A. Yes, sir.
Q. How far is Buchanan School from you?
A. Oh, approximately ten or eleven blocks.
Q. How far is Lowman School from——
A. Two or three blocks.
Q. Two or three blocks.

Mr. Bledsoe: I believe that's all.
Judge Huxman: Any questions?
Mr. Goodell: No questions. You may step down.

(Witness excused.)

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[fol. 169] LUCINDA TODD, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. State your name to the Court, please.
A. Lucinda Todd.
Q. Where do you live, Mrs. Todd?
A. At 1007 Jewell.
Q. Do you have a daughter of school age?
A. Yes, I do.
Q. Now what school does your daughter attend?
A. Buchanan.
Q. Buchanan School. How far is Buchanan School from your residence?
A. About ten blocks.
Q. About ten blocks. Is there a school nearer your home than——
A. Yes, there is.
Q. What school is that?
A. Lowman Hill.
Q. How far is that school from your residence?
A. About three blocks.
Q. Does your child ride the bus?
A. Yes, she does.
Q. What time does she leave in the morning?
[fol. 170] A. About twenty minutes of nine.
Q. About twenty minutes of nine. And of course she doesn't return for the noontime.
A. No.
Q. She does not. What time does your daughter get home in the evening?
A. About four fifteen, four twenty.
Q. And she rides—comes home on the bus, does she?
A. Yes, she does.
Q. Have you noticed the condition of that bus as to how many rides it?
A. Yes, I have; it's very crowded.
Q. Mrs. Todd, do you know of any instances where your daughter suffered from waiting for the school bus?

A. Oh, many instances; she has been stranded on the corner waiting for the bus from a half-hour to forty-five minutes many times.

Mr. Bledsoe: I believe that is all.
Judge Huxman: Any questions?
Mr. Goodell: No questions.
Judge Huxman: You may step down, please.
(Witness excused.)

[fol. 171] MARGUERITE EMMERSON, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court, please.
A. Marguerite Emmerson.
Q. Are you one of the plaintiffs in this action?
A. Yes, I am.
Q. Where do you live?
A. 1029 Grand.
Q. Are you a parent of a child or children of school age?
A. Yes, I have two.
Q. What are their names?
A. Claude Arthur and George Robert.
Q. How old are they?
A. They are nine and eight—nine and seven.
Q. Do you know what grades they are in?
A. They are in the second and fourth grades.
Q. What school do they attend?
A. Buchanan.
Q. How do they get to school?
A. On the school bus.
Q. What time does the school bus pick up your children?
A. Around a quarter to nine and ten minutes to nine.
[fol. 172] Q. Where do they catch the bus?
A. On 11th and Woodward.
Q. Has there ever been any instances that your children have missed the bus?
A. Yes, there has been.

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Q. You can state to the Court what you did, if anything.
A. Well, they have missed the bus, and I have called the school, and they have sent the bus back after them.
Q. They sent the bus back after them.
A. Yes.
Q. Have there been any instances that they missed the bus and your child didn't go to school at all?
A. No, because when he has missed the bus before that I have sent him on the city bus.
Q. On the city bus, I see. Is there a school located near your residence?
A. Yes, there is.
Q. What's the name of that school?
A. Lowman Hill.
Q. How far is it from your residence?
A. About five blocks.
Q. About five blocks.

Mr. John Scott: That is all. You may cross examine.
Mr. Goodell: No questions.

[fol. 173] Judge Huxman: Step down, please.

(Witness excused.)

Zelma Henderson, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Bledsoe:

Q. State your name to the Court, please.
A. Zelma Henderson.
Q. Where do you live, Mrs. Henderson?
A. 1307 North Jefferson.
Q. Now, Mrs. Henderson, do you have children of school age?
A. Yes, I do; I have two.
Q. What school does your children attend?
A. McKinley.
Q. How old are your children?

A. Seven and five.

Q. Seven and five. Do you have a child in the kindergarten now?

A. Yes, she just completed the kindergarten.

Q. In what grade—the other?

A. In the first grade.

Q. Is there a school nearer your residence than McKinley School?

A. Yes, there is.

[fol. 174] Q. How far is that school from——

A. I would say approximately five blocks.

Q. What is the name of that school?

A. Quincy.

Q. What time does your children leave home in the morning?

A. All the way from 8:15 to 8:30.

Q. Do they ride the bus?

A. Yes, they do.

Q. And, of course, they don't come back for lunch.

A. No; the little girl did at noon, of course, but the little boy stayed all day.

Q. What time would they return home in the evening?

A. About 4:15.

Q. Now, tell the Court whether or not you prepare lunches for your son.

A. Yes, I prepare lunch but——

Mr. Goodell: Object to this as having already been stipulated to.

Mr. Bledsoe: If the Court please, I have something else I want to——

Judge Huxman: All right, you may ask.

By Mr. Bledsoe:

Q. Do you prepare lunch for your son?

A. Yes, I do.

Q. Tell the Court whether or not your son is able to eat his lunches.

[fol. 175] A. My son——

Mr. Goodell: We object to that; that might depend on a lot of things rather than that the school board——

Judge Huxman: I think the objection will be sustained.

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By Mr. Bledsoe:

Q. Have you noticed any physical difference in your son due to his eating the lunch?

A. Yes.

Mr. Goodell: Wait a minute. We object to this as this witness is not qualified to give an opinion of that character.

Judge Huxman: Objection sustained.

By Mr. Bledsoe:

Q. Have you observed your son; what was his condition?

A. One month after starting to first grade he was ill.

Mr. Goodell: Just a minute, we object to that unless—we are not trying the physical elements of these children unless it's connected up with discrimination and violation of the 14th Amendment.

Judge Huxman: I think the answer would be immaterial. Furthermore, the question is so vague; you couldn't tell what condition was referred to. What effect the eating of a lunch would have upon one individual wouldn't throw any light on the constitutional question involved. The objection [fol. 176] is sustained.

Mr. Bledsoe: That will be all. Thank you.

Mr. Goodell: No questions.

(Witness excused.)

Silas Hardrick Fleming, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. John Scott:

Q. State your name to the Court, please.

A. Silas Hardrick Fleming.

Q. Where do you live, Mr. Fleming?

A. 522 Liberty.

Q. Are you a parent of a child or children of school age?

A. Yes, sir.

Q. What are there—how many?

A. Two.

Q. What are their names?
A. Silas Hardrick Fleming, Jr., and Duane Dean Fleming.
Q. And state to the Court their ages?
A. Well, ten and seven.

Mr. Goodell: What was that again, please?
The Witness: Ten and seven.

By Mr. John Scott:

Q. What school do they attend?
A. Washington School.
[fol. 177] Q. Do you know the approximate distance Washington is from your school—I mean from your home.
A. Oh, between ten, twelve blocks, I would say; I don't know the exact distance.
Q. How do they get to school?
A. They ride the East Tenth Street bus.
Q. They don't ride the school bus.
A. No.
Q. You state to the Court why they don't ride the school bus.
A. Well, the school bus is about six or eight blocks away. It comes across Brannan Street; that is about six or seven blocks away from Sixth and Liberty.
Q. You mean that is the pick-up point?
A. That's right.
Q. I see. Go ahead. Well, how far do you have—the children have to walk to catch the regular city bus?
A. Half a block going to school and about a block starting home.
Q. Do you pay their fare?
A. Yes, sir.
Q. Each and every day?
A. That's right.
Q. Is there a school located near your home?
A. Yes, there is one two blocks away from me, and there [fol. 178] is one about four or five blocks. They pass two schools going to their school.
Q. They pass two schools.
A. Two white schools, yes.
Q. What's the name of those schools, if you know?
A. Lafayette is one and Parkdale the other.

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Q. Which of the two schools is closer to your home?

A. How's that?

Q. Which of the two schools that you just mention are closer to your home?

A. I guess it's Parkdale; it's two blocks away, Parkdale.

Q. You are mistaken——

A. It's Lafayette.

Q. That's right. Is there any other reason you don't permit your children to ride the school bus?

A. How's that?

Q. Is there any other reason that you don't permit your children to ride the regular school bus?

A. No; my only reason is that it's just about as far away from the bus as they would be from the school. They are only a few blocks away from the school to pick up the bus. I will ask the Court, Your Honor——

Judge Mellott: I can't hear the witness.

The Witness: I would ask this for a few minutes to explain why I got into the suit whole soul and body.

[fol. 179] Mr. Goodell: We object to the voluntary statement.

Judge Huxman: I can't hear what you say.

Mr. Goodell: He wants to explain why he got in with the other plaintiffs to bring this lawsuit.

Mr. John Scott: He has a right to do that.

Judge Huxman: Didn't you consent to be a plaintiff in this case?

The Witness: That's right.

Judge Huxman: You did not?

Judge Mellott: He said he did, but he wants to tell the reason why.

The Witness: I want to tell the cause.

Judge Huxman: You want to tell the Court why you joined this lawsuit?

The Witness: That's right.

Judge Huxman: All right, go ahead and tell it.

The Witness: Well, it wasn't for the sake of hot dogs; it wasn't to cast any insinuations that our teachers are not capable of teaching our children because they are supreme, extremely intelligent and are capable of teaching my kids or white or black kids. But my point was that not only I and

my children are craving light, the entire colored race is [fol. 180] craving light, and the only way to reach the light is to start our children together in their infancy and they come up together.

Judge Huxman: All right, now you have answered and given us your reason.

The Witness: That was my reason.

Mr. John Scott: Thank you.

By Mr. John Scott:

Q. Just one more question, Mr. Fleming. What time do your children leave in the morning to go to school?

A. About 8:20.

Q. What time do they get home in the evening?

A. Oh, about 4:10 or 4:15; sometimes the bus is a little early and sometimes late.

Judge Huxman: The Court is going to adjourn presently at 12:00 o'clock. Before we adjourn, we would like to request that counsel on both sides meet with the Court in the district courtroom chambers.

We will adjourn to 1:30. We would like to have counsel meet us at 1:15 in the district courtroom chambers.

You may announce a recess of the court until 1:30.

(The court then, at 12:00 o'clock noon, stood at recess until 1:30 o'clock p.m., at which time court was reconvened [fol. 181] and the following further proceedings were had:)

Judge Huxman: You may proceed.

Mr. Goodell: If the Court please, we do have one of the records that was asked for on the schedule, the hourly schedule, of the elementary schools. I have that record.

Judge Huxman: Is that what they promised to furnish?

Mr. Goodell: Yes.

Judge Huxman: I don't think we have that in the record here. One of those should be marked.

Mr. Goodell: Dr. McFarland said he would furnish it. It was what the witness, McFarland, Dr. McFarland said he would furnish.

Judge Huxman: And that has been prepared.

Mr. Goodell: This is it.

Judge Huxman: Is this offered as an exhibit in the case?

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Mr. Goodell: Yes.

Judge Mellott: What is the next exhibit number, Mr. Clerk?

The Clerk: "N".

Judge Mellott: "N". Let it be admitted as Defendants' Exhibit "N".

[fol. 182] Defendants' Exhibit "N", having been offered and received in evidence, is contained in the case file.

Hugh W. Speer, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Will you please tell the Court your name.

A. Hugh W. Speer.

Q. And what is your occupation?

A. I am chairman of the Department of Education at the University of Kansas City.

Q. Have you ever been in public school work, Mr. Speer?

A. Yes, I was in public school work in Kansas for about twelve years.

Q. You mentioned the Department of Education, University of Kansas City, what is the function of the Department of Education?

A. Our chief function at the present time is the training of elementary school teachers.

Q. Do you train teachers eligible to teach in Kansas?

A. Yes, and a number of them do.

Q. How many members are on the teaching staff of your Education Department under your supervision?

[fol. 183] A. At the present about twenty.

Q. Do you have any other responsibilities at your university?

A. Well, I am a member of the President's Advisory Committee; I am chairman of the Curriculum Committee of the university.

Q. Do you regularly come into contact with elementary schools?

A. Yes, we conduct an elementary school of our own. We call it the demonstration school in the summer. We do practice teaching in the public schools in our locality, which means we are in and out of the schools constantly.

Q. Would you tell us something of your educational background, Dr. Speer; where did you attend public school?

A. Attended public schools at Olathe, Kansas.

Q. And what universities did you attend and what degrees do you hold?

A. I hold a Bachelor's Degree from American University in Washington, D. C., a Master's Degree from George Washington University, and a PhD. Degree from the University of Chicago.

Q. What was your major field in your doctorate?

A. Evaluation.

Q. Would you please explain to the Court what evaluation means.

A. Evaluation is a rather general term. We sometimes evaluate educational programs or buildings or the behavior changes that are produced in children as a result of educa-[fol. 184] tional programs.

Q. Do you belong to any professional organizations, Dr. Speer?

A. I am a key member of the National Education Association, a member of the Missouri State Teachers Association, a member of the National Vocational Guidance Association; that is about it.

Q. Do you hold any honors or scholarships?

A. I have recently been granted a Fullbright scholarship by the United States Department of State to lecture on education in Iran.

Q. What will be the purpose of your visit in Iran?

A. I will work through the University of Tehran to help improve the school system of Iran.

Q. Dr. Speer, have you ever made an examination of the elementary schools of Topeka?

A. Yes.

Q. When?

A. During the last month.

Q. Why did you make this examination, Dr. Speer?

A. At the request of counsel for plaintiffs.

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Q. What aspects of the schools did you examine during your examination?

A. We examined the more important aspects that we thought had a bearing on the major issues in this case. We [fol. 185] have examined the buildings, the curriculum, the equipment, the library, the preparation and experience of the teaching staff and the salaries, the class loads, the size of classes and a few other minor points.

Q. Now, I am going to ask you some questions about your findings. What did you find concerning the comparison of teachers in the colored schools with those of the white schools?

A. I found only minor differences between the two groups, and these differences tend to balance each other. For example, in preparation, all the colored teachers have Bachelor's degree and all but 15% of the white teachers have Bachelor's degrees. On the other hand, in terms of Master's degrees, 12% of the colored teachers have Master's degree and 15% of the white teachers hold Master's degrees. The colored teachers average twenty years of experience, and the white teachers nineteen years.

Q. Dr. Speer, what did you find concerning class size and teaching load; would you explain to the Court what teaching load is?

A. Teaching load is the number of pupils which the teacher has each day and, again, here I found not much difference. There is some difference at the kindergar*d*en level where the colored kindergartens are somewhat smaller. I think the white average is 42; the colored aver- [fol. 186] age about 25. But, in grades 1 to 6, the average is very close together; 34 in the white schools and 32 in the colored schools. Again, I would say, I found no significant difference in teacher load or teacher preparation.

Q. In examining the two sets of schools, negro and white, did you find any provisions for special rooms in any of these?

A. I found provision for two special rooms for white children; I found no provision for special rooms for any colored children.

Q. Now, did you study all of the school buildings in Topeka, Dr. Speer?

A. Yes, we examined data in the Board of Education files on all school buildings, and we personally visited, Dr. Buchanan and I and some of my other assistants, we visited about two-thirds of the schools in the city.

Judge Hill: If counsel will let me interrupt, what do you mean by special rooms?

Mr. Greenberg: Well, if I may explain, in the white schools there are rooms for specially retarded or handicapped children, whereas in the negro schools there are none.

Judge Hill: Very well.

By Mr. Greenberg:

Q. Did you examine these schools with regard to their age and their insured value?

A. Yes. We——

[fol. 187] Judge Huxman: With regard to what?

Mr. Greenberg: Regard to their age and insured value.

The Witness: On the revised list furnished by the Board of Education we secured the ages of the buildings and also from the insured values of buildings, as provided by the Board of Education, in the exhibits, we made a study of the current values in terms of the insured values.

By Mr. Greenberg:

Q. Why did you use insurance value rather than construction cost, Dr. Speer?

A. Construction cost back over the sixty-year period dates these buildings would vary a great deal which is obvious. Therefore, we could not make comparisons on construction cost; but we assumed that the Board of Education and their insurance companies have arrived accurately at the current value of buildings, and that those values are reflected in the insurance figures furnished by the board.

Q. Is the total insurance value—does the total insurance value of the building reflect accurately the value of the building as broken down into instructional units?

Mr. Goodell: We object to this testimony from this witness. There is no foundation laid for his expert knowledge about evaluating of physical property. The testimony

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[fol. 188] shows he is an educator, that is true. That is in the field of engineering and architects.

Judge Huxman: The question presupposes a knowledge he might not have because sometimes you only insure a building for three-fourths of its value and others may be insured for 100%.

Mr. Goodell: Plus the additional reason for the objection is that it stands admitted the physical value of the physical plants on two exhibits.

Judge Huxman: We will let the witness answer.

Mr. Greenberg: May I ask him whether or not, as an educational expert he has been trained in evaluating the physical plants of buildings?

Judge Huxman: On the basis of insurance?

Mr. Greenberg: On the basis of insurance.

Judge Huxman: Mr. Counsel, here's the difficulty with that question: Suppose it is the policy of the board to insure Buildings for 25% of their—75%——

Mr. Greenberg: I intend to bring out an explanation of that particular factor.

Judge Huxman: You don't know the basic of the insurance.

Mr. Greenberg: They insure on the basis of 80%, Your Honor, and I intend to bring that out.

[fol. 189] Judge Hill: That would be hearsay from this witness, wouldn't it?

Mr. Greenberg: It has been admitted in evidence by stipulation.

Judge Hill: All right.

Judge Huxman: They are insured at 80% of their value, is that in the stipulation?

Mr. Greenberg: Your printed sheet of insurance values of each building; the one you have right there.

Mr. Goodell: No, that doesn't mean that. We have got an insurance clause that 80% on total loss is paid; that is the type of insurance, but that doesn't mean that their insurability of the buildings is limited to 80%.

Judge Huxman: I think the objection to the question will be sustained.

By Mr. Greenberg:

Q. Dr. Speer, in making your evaluation, did you take into account the fact that some buildings might have had some unused classrooms?

A. Yes.

Q. What significance did you ascribe to that fact?

A. Well, an unused classroom is very limited value to the school. We assume that as most schools operate one class with one teacher, can profitably use one classroom.

[fol. 190] Q. Now, did you conduct a visual inspection of any of the buildings in Topeka as well as inspecting the records which you have indicated?

A. Yes, we did.

Q. How many schools did you inspect visually?

A. We inspected I think it was fourteen directly.

Q. And what criteria did you use to determine which schools you would evaluate merely on the basis of the records and which schools you would evaluate by a personal visit?

A. We first examined the records on all of them, and then, in order to substantiate our findings, we thought we should visit at least a representative sample and we visited in all two-thirds of them, making sure we got the older buildings and the newer buildings and some of the medium-aged buildings so that we would have a representation of the complete range.

Q. What criteria did you use in your visit?

A. We used the usual criteria that are recognized in this area, such as sight, the nature of the structure, the plan of the building, the classrooms, the service rooms, the kindergartens, library books, the supplies, the safety features, the maintenance features. I might add these are the kind of features that are included by such authorities as Holly and Arnold in their scorecard for elementary school [fol. 191] buildings. Dr. Holly is from the Ohio State University and Dr. Arnold is from the University of Pennsylvania.

Mr. Goodell: We object to this as hearsay, about what some book says about evaluation.

Judge Huxman: He is testifying as to the basis of his

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knowledge of works on this. I think it's competent. This is an expert witness. He may testify.

Judge Mellott: There seems to be no unanswered question.

By Mr. Greenberg:

Q. In order to save the time of the Court, Dr. Speer, did you make any general observations that seemed to apply to all of the buildings you visited?

A. Yes, I think I can. First of all, in regard to gymnasiums and auditoriums, the facilities, all in all, seemed to be about equal between the colored schools and the white schools. Three-fourths of the colored schools have a combined gymnasium-auditorium, and we would say approximately that proportion of the white schools have similar facilities. However, I should add that none of the colored schools have anything like the luxurious facilities that we would find in the Oakland building or the State Street building or the Gage Building, for example.

Q. How do the various——

A. I might, if I may——

Q. Go ahead.

[fol. 192] A. —add one or two other general observations to save time. The buildings are all well kept, well preserved, and I think well maintained. Dr. Buchanan and I felt that that was equal throughout the system.

Q. How do the buildings compare as to their ages, Dr. Speer?

A. The ages of the white buildings average twenty-seven years, according to the figures furnished by the board, and the ages of the colored buildings thirty-three years. In other words, the white buildings average six years newer. However, I think we should add another feature here. Inasmuch as the newer buildings tend to be larger, we found this to be the case, that according to last year's enrollment figures, 45% of the white children attend schools that were newer than the newest colored buildings, whereas 14% of the white children attended schools that were older than the oldest colored building. To state another kind of a comparison, 66%, or two-thirds, of all white children attend schools that are newer than the average age of the colored buildings.

Q. Dr. Speer, how do the colored schools compare to the

white schools in regard to the insured value per available classroom?

A. The average for the white schools is $10,517, and the average for the colored schools is $6,317. Or, stated another way, the insured value per available classroom is 66% [fol. 193] higher in the white schools.

Q. Dr. Speer, did you examine the curriculum in the schools in the City of Topeka?

A. Yes.

Q. Tell the Court what you mean by "curriculum", also.

A. By "curriculum" we mean something more than the course of study. As commonly defined and accepted now, "curriculum" means the total school experience of the child. Now, when it comes to the mere prescription of the course of study, we found no significant difference. But, when it comes to the total school experience of the child, there are some differences. In other words, we consider that education is more than just remembering something. It is concerned with a child's total development, his personality, his personal and social adjustment. Therefore it becomes the obligation of the school to provide the kind of an environment in which the child can learn knowledge and skills such as the three "R's" and also social skills and social attitudes and appreciations and interests, and these considerations are all now part of the curriculum.

Q. I see, Dr. Speer. Do you have anything further to say?

A. Yes. And we might add the more heterogeneous the group in which the children participate, the better than can function in our multi-cultural and multi-group society. For example, if the colored children are denied the experience [fol. 194] in school of associating with white children, who represent 90% of our national society in which these colored children must live, then the colored child's curriculum is being greatly curtailed. The Topeka curriculum or any school curriculum cannot be equal under segregation.

Q. Dr. Speer, I would like to go through these—through the school system rather rapidly now school by school and have you point out key characteristics you found as to each school.

What did you find concerning the Buchanan School in regard to these?

A. The Buchanan School is thirty years old; the insurance

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value per available classroom is $5,623. It has five rooms, all of which are in use, including a double room divided with sliding doors that is used for an auditorium and also for a playroom. The furniture is quite old, reflecting the age of the building. The site and playground is only fairly adequate. The books in the building are generally old and in poor condition. Many titles date back to the 1920's and even some before 1920.

Q. What did you find concerning Gage School, Dr. Speer?

A. The Gage School, a white school, is twenty-three years old and has an insured value per classroom of a little more —of $9,136. It has fifteen classrooms all in use. The building is more crowded than most, although the classes run [fol. 195] about average for the system. It has a good auditorium with—it's combination—it has a kitchenette that adjoins the auditorium and has an attractive kindergarten room with murals, toilet facilities and a fireplace; and also it has some old titles among the books, but a fair proportion of the books in this building are of a newer and better — than we found elsewhere. It has a very excellent and spacious playground.

Q. Concerning Lafayette School, Dr. Speer.

A. Lafayette is forty-eight years old, has an insurance value per classroom of $3,373.

Mr. Goodell: While he is making his testimony, would it be better if he designates which are the white schools.

Mr. Greenberg: Dr. Speer, when you describe a school, tell us also whether it's a negro school or white school.

The Witness: Thus far——

By Mr. Greenberg:

Q. Buchanan is what?

A. Colored.

Q. What about Gage?

A. White.

Q. What about Lafayette?

A. Is white. The Lafayette building is forty-eight years old, insured for $3,373. Although not the oldest, this is [fol. 196] certainly one of the poorest buildings in Topeka. The comprehensive plan suggested in 1942 by the planning commission recommended that it be abandoned but it still

houses 300 pupils. Small, the auditorium is small, and the playground is small. The kindergarten is fair; books are only fair. There are two fire escapes, but the safety factor is somewhat questionable partly due to the number of children who are housed in the building.

Q. Tell us your findings concerning the McKinley School, Dr. Speer.

A. McKinley is a colored school; it's forty-four years old. It's insured value per available classroom is $2,477. The building was well constructed. It has wooden floors and stairs, which make it something of a fire hazard. It has one fire escape. Approximately three-fourths of the books were too old to be suitable for school use. The comprehensive plan for the City of Topeka, prepared by the City Commissioner——

Mr. Goodell: If the Court please, we object to this witness telling about some book comprehensive plan. It's outside the scope of the issues in this case; secondly, it's not the best evidence; it's hearsay as far as this witness is concerned.

Mr. Greenberg: If the Court please, may I ask Dr. Speer whether such city plans and city surveys are things which [fol. 197] an educator customarily studies in making an evaluation.

Judge Huxman: What comprehensive plan are you referring to, Doctor?

The Witness: I am referring, Your Honor——

Judge Huxman: Bartholomew plan?

The Witness: I am referring, Your Honor, to the one that was mentioned in court this morning that was prepared jointly by the Board of Education, the City Commissioners, and, I think——

Mr. Goodell: Now, if the Court please, that is this witness' idea that it was prepared jointly.

Judge Huxman: That plan was ruled out. We haven't received or permitted any evidence concerning that plan. I think the witness should refrain from reference to this comprehensive plan.

The Witness: This—the site of the McKinley building is not at all attractive and hardly adequate for school purposes. In other words, we might say it has very poor aesthetic value.

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By Mr. Greenberg:

Q. Would you tell us what you found concerning Monroe School?

A. Monroe. Colored building, is twenty-four years old; it's valued at $9,760. This is, in our judgment, the best of the colored buildings. It's well constructed, has tile floors. [fol. 198] Again, however, many of the books are too old for good school use. The site is rather small, and the building and site are not very attractive.

Q. And tell us about what you found concerning Oakland School, Dr. Speer.

A. The Oakland School is white; it's only one year old. It's insured value per available classroom is $23,906. It's a beautiful structure. It's about the last word in school buildings; has modern furniture, asphalt tile floors, acoustical ceilings, good lighting, good heating, darkroom for audio-visual aids, office vault, public address system for use of radio programs, music programs, has a beautiful, large combination auditorium-gymnasium very suitable for community gatherings and parent meetings, large dining and social room with a kitchen adjoining; well adapted for community meetings; has a beautiful kindergarten room with new equipment; the books still not ideal but they are very good. All in all, it's an excellent building that should provide for one of the best educational opportunities.

Q. And tell the Court what you found concerning the Parkdale School.

A. The Parkdale, white, is age twenty-seven, value $8,016. The building appears to have been rather poorly constructed. It has a stucco exterior for the most part. It is [fol. 199] in rather an attractive location with ample playground area. The kindergarten room is quite dull; the books are just fairly good.

Q. And would you do the same concerning the Polk School.

A. The Polk School, for white children, is sixty-four years old; it's the oldest building in Topeka. It's insured value per room is $2,547. It is the oldest building in Topeka, but it is not, in my judgment, the worst building. It is surprisingly substantial, surprisingly attractive on the inside. Has a nice auditorium, two playrooms in the basement, built

of native stone; has two fire escapes; the books in the building are very good.

Q. And what did you find concerning the Potwin School?

A. The Potwin School is white, age two years, value per room, $18,100. It's a beautiful building with very modern features. It has a spacious playground which is surfaced with asphalt. It has a beautiful auditorium, also double playrooms. The books are mostly good, at least dating from the 1930's on, mostly. It has a kitchen, a visual aids room. This building seems to be filled to capacity already although only two years old. It is, all in all, one that should provide an excellent educational opportunity.

Q. And what about the Randolph School, Dr. Speer.

A. The Randolph School, a large school, age twenty-four, [fol. 200] value $6,947. It's a large building which is reasonably good. The desks are old, but the books are fairly good, the majority of them dating in the 1940's. It has a very attractive kindergarten with a fireplace and good decorations. It has an excellent, spacious playground. It has a beautiful row of trees which highlight the landscaping. Although it's a little old, this building is still capable of providing a very good educational opportunity. It has a small combination auditorium-gymnasium which is not adequate for the entire enrollment.

Q. Would you please tell the Court what you found concerning State Street School.

A. State Street is a white school, age eleven years, insured value per classroom, $13,880. It's an excellent building, beautifully located, well landscaped; most of the new features, such as a public address system, beautiful auditorium, adequate gymnasium, excellent playground, has a kitchen, library room; the books are fairly good but not in keeping with the building. All in all, the facilities are available to provide a very good educational opportunity, one of the best.

Q. Would you tell the Court what you found concerning Sumner School.

A. The Sumner School is white, age fifteen years, value $15,936 per room. It's another excellent building; beautiful [fol. 201] auditorium, a large good gymnasium, has its public address system; the books are good; very attractive

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kindergarten. Again, the facilities are available for an excellent educational opportunity.

Q. Would you do the same concerning the Van Buren School.

A. Van Buren is a white school, age forty-one years, value $6,030 per classroom. Although it's an old building, it has steel stairways which eliminates some fire hazard. It has an auditorium and a playroom; has good pictures and good books. The one fire escape, however, is approached through a window on the second floor which might be locked or hard for children to reach in an emergency. However, the building can still provide a fair educational opportunity.

Q. Would you tell the Court what you found concerning the Washington School.

A. Washington is a colored school, thirty-six years old, valued at $6,284. It's a fairly good building in a rather unattractive setting. One room seemed to be set aside for books. The books were fair; better than in most of the colored buildings. The faculty here—there was evidence to lead us to believe that the faculty here were doing the best to make the most of their facilities.

Q. Are there other buildings that you did not visit, Dr. Speer, but concerning which you have data.

[fol. 202] A. Yes, there are, I think, eight other buildings that I have this data on.

Q. Could you rapidly go down that list and tell the Court what data you found.

A. Yes, I will very quickly read age first and value second, if I may.

Central Park, white, thirty-nine years old, $5,160.

Clay, White, twenty-five years old, $12,750.

Grant, thirteen years old, $15,336. Grant is a white school.

Lincoln, a white school, thirty-five years old, $4,610.

Lowman Hill, a white school, forty-eight years old, $5,220.

Quincy, white building, forty-seven years old, $4,040.

Quinton Heights, thirty-eight years old, $3,024.

I might mention here that there is a new building now under construction to be called the Southwest building which, I presume, will be available sometime during the

coming year and, by our formula, the insured value per classroom should be about $26,660.

Q. Now, Dr. Speer, you have gone through all the schools [fol. 203] in the City of Topeka, and I would like to ask you some hypothetical questions which I would like you to answer on the basis of your study of the schools in the City of Topeka and on the basis of your knowledge and experience and study as an educator.

I want you to assume the following set of facts, Dr. Speer: That a negro child who lives in Topeka, where there are racially segregated schools, attends the Buchanan School, although if there were not racial segregation in the City of Topeka, because of where he lives, he would otherwise attend the Randolph School, would you say that on the basis of the evidence you have given above and the other factors which I mentioned, that he obtains the same educational opportunity at Buchanan that he would obtain if he attended Randolph?

Mr. Goodell: To which we object as the hypothetical question assumes a fact not proven, and the fact assumes another fact that is contrary to some evidence. The fact it assumes that if the child lived at Randolph and there wasn't racial segregation he would attend Randolph. It assumes that fact. It isn't necessarily so. The child, even if you didn't have segregation, might not prefer to go to Randolph. He might prefer to go to some school where he wasn't outnumbered by fifty to one. Object to the question in the present form because it assumes a hypothe- [fol. 204] tical fact unsupported by any evidence.

Judge Huxman: You may answer, Doctor.

The Witness: The question, as I understand it——

Mr. Greenberg: (To reporter) Would you read it back, please.

(The last preceding question was read by the reporter.)

By Mr. Greenberg:

Q. What is your answer to that question, Dr. Speer?

A. No, I would say he would not get the same educational opportunity for some of the following reasons: First of

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all, the Buchanan building is an older building; it's thirty years old; Randolph is twenty-four years old. The insured value per classroom for Buchanan is $5,623; for Randolph it's $6,947. To look at some of the details of the buildings, Buchanan has no combined gymnasium-auditorium; Randolph has one that is not completely adequate but it will hold several grades at one time. The furniture——

Mr. Goodell: Pardon me, I want to interpose another objection, that this has no probative force to show denial of equal protection of the law on this sort of a comparison because he is now demonstrating that because—that an inequality exists because some physical plants are newer [fol. 205] and bigger and better than other physical plants. He is comparing, it's true, with a colored plant, but he is also in the other part of his testimony—he has shown that the same disparity exists between many white schools as to the newer school where we have very old schools, very low cost per capita per room, classroom, and also the testimony very obviously shows no school system in the world could have buildings equal because newer buildings necessarily incorporate modern facilities not known when they were built twenty or thirty years ago.

Mr. Greenberg: May I answer that, Your Honor?

Mr. Goodell: I address that to the Court, not you.

Mr. Greenberg: I didn't ask you whether I could answer it.

Judge Huxman: The witness may answer.

The Witness: Proceeding, on the other hand, we might say that the Randolph building has these features, a much more attractive kindergarten room, more spacious playground, much more attractive surroundings which adds to its aesthetic educational value, and I would add, if I may consult my notes a moment here——

Mr. Greenberg: Go ahead.

The Witness: That the books in the Randolph School are better than the books in the Buchanan building, in [fol. 206] my judgment. There are better heating and lighting in the Randolph building, and I think I would add, Your Honor, that most important of all the curriculum in the Randolph building provides a much better educational opportunity than the one in the Buchanan building, be-

cause, in the Randolph building, the colored child would have opportunity to learn to live with, to work with, to cooperate with, white children who are representative of approximately 90% of the population of the society in which he is to live.

By Mr. Greenberg:

Q. Now, Dr. Speer, rather than asking you the same question again, I would like you to answer the same question, comparing the Gage and the Buchanan Schools.

Judge Huxman: Would your answers be substantially the same, based upon substantially the same reasons?

The Witness: Some of the reasons would be the same, Your Honor. However, I believe this particular comparison the difference is greater.

Judge Huxman: Well, would be a difference of degree, otherwise your answer would be the same.

The Witness: Some of the specific details might be different.

Judge Huxman: Does that satisfy you, Mr.——

[fol. 207] Mr. Greenberg: That is all right; that satisfies us, yes.

By Mr. Greenberg:

Q. I would like to ask you the same question concerning a comparison of Sumner and Monroe Schools, Dr. Speer.

A. Sumner and Monroe. Again I would say for some of the same kinds of reasons that the Sumner building would provide a better educational opportunity.

Judge Huxman: May I ask the doctor a question?

Mr. Greenberg: Yes.

Judge Huxman: To be sure I understand his answer, is one of the reasons which is common to all three of these, your reason that they are by segregation denied in all three of these schools the opportunity to mingle and live with the white children, which they would otherwise have and that, to you, is an important factor, is that part of your answer?

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The Witness: Yes, Your Honor, that would enter into all of them.

Judge Huxman: I was quite sure that was it, but I wanted to be clear in my own mind that that was a part of your answer in all of these schools.

By Mr. Greenberg:

Q. Dr. Speer, I would like you to make a similar comparison between State and Washington Schools.

[fol. 208] A. The same curriculum reasons, of course, apply and, in addition, we find, as I stated in earlier testimony, that the State Street School is one of the better schools, and it has many features such as the P. A. system and a beautiful auditorium, an excellent playground, a library room, a kitchen that can be used to provide a considerably better educational opportunity than could be provided in the Washington School.

Mr. Greenberg: Your witness.

Judge Huxman: You may cross examine.

Cross-examination.

By Mr. Goodell:

Q. Dr. Speer, if I understand your testimony correctly, boiled down to—as to the physical facts on the comparison of buildings and facilities feature of it, eliminating the racial feature, is it your opinion that any school, white school, that is considerably older and inferior and a wide disparity as to modern facilities, that that child going to such a white school is likewise being denied an equal opportunity of education?

A. It is unequal in another sense, I would say, if I understand your question correctly. Would you mind repeating the crux of it; I am not sure that I understand you.

Q. What I am trying to say is, eliminating the racial feature and restricting your opinion entirely to comparison of plants, facilities and accessories, will you still [fol. 209] say that a child, a white child, who goes to one of these other schools, such as Lafayette, Quinton Heights, Polk and some of these old schools, and Lowman, are

denied equal educational opportunities as against children —as compared to children who live in a territory such as Oakland and Randolph and Potwin and get to go to those new schools.

A. A child might be—might have an inferior educational opportunity in some respects, but he would not have the stigma of segregation, nor be denied the opportunity to mix with the majority group of the population. Also——

Q. I said eliminating that feature of it. Other than that, do you consider that it's an inferior opportunity as far as the white child is concerned so that he is denied an equal opportunity of education, eliminating the racial thing.

A. It might be if all other facilities are equal, but that is an accident of geography.

Q. Well, you made comparisons between some of the best white schools we have here in town to the colored schools, haven't you?

A. Yes, sir.

Q. Now, while we are on that subject, I will ask you to turn to Exhibit "K", which is the Board of Education's record pertaining to the original cost of these buildings [fol. 210] and also, in the same connection——

A. I don't have a copy of that here, sir.

Q. I will step over here and let you see it. What I have marked on my copy here in red are the negro schools; what I have marked in blue pencil are the white schools; you understand?

A. Yes, sir.

Q. Now, I will direct your attention, if the schools that were built about the same time, the white schools, as the colored schools, if this exhibit doesn't show the same—practically—outlay of cost and, in some instances, more money spent for structural, or the school, and land acquisition than there were for white schools that were built at that same period of time.

A. I think that may be possible.

Q. Doesn't the exhibit show that, the records of the Board of Education.

A. Which two buildings do you mean?

Q. Well, compare Quinton Heights, which was built in 1913, at a cost of $12,640.

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A. With what?

Q. We will get that in a minute, and McKinley, which was built six years earlier at a cost of $51,000 for the structure.

A. I would say that between 1907 and 1913 building costs might have fluctuated a great deal, and I don't think—[fol. 211] I would not base a comparison on building—on construction cost with that many years intervening. That is why we used insurance costs which are supposed to be current and accurate as prepared by the Board of Education.

Q. Let's compare Lowman Hill, which is a white school built, according to the exhibit, in 1906, with McKinley.

A. May I correct you? It was built in 1901 and an addition in 1906.

Q. All right. Compare that to McKinley School.

A. McKinley School was built in 1907, six years later; again there may have been considerable difference in construction costs over a six-year period. They sometimes change very rapidly to the best cycle and other things.

Q. Let's look at the exhibit on the insurance values; don't you see disparity between the old white schools and the new white schools?

A. That is possible.

Q. On the present insurance table——

Judge Mellott: What is the exhibit on the insurance?

Mr. Goodell: "L".

By Mr. Goodell:

Q. I call your attention specifically to some schools shown on this exhibit and their present insurance values as shown by this exhibit. Quinton Heights has a total [fol. 212] structure insured value of $14,000, doesn't it?

A. Yes, sir.

Q. Van Buren has an insured value of $46,800, doesn't it?

A. Yes, sir.

Q. That is a white school. Washington has an insured value of $64,800, doesn't it?

A. Yes, sir.

Q. Monroe has an insured value of $112,000, doesn't it?

A. Yes, sir.

Q. So there you have got three white schools, all of which are lower present value than the colored schools, isn't that right?

A. If I may express my view, my basis, you cannot compare building by building on—even on insured cost because some buildings are larger than others. Therefore, the only basis I was able to arrive at was an insured value per available classroom. You have to have some kind of a common yardstick to use on all buildings. For instance, some of those buildings are twice as big as others and, therefore, their value would naturally be proportionately greater.

Q. Do you know of any school system in the United States—not just Topeka—in the United States, that has buildings that are equal, that there isn't great differences based upon when they were built and the needs of the com- [fol. 213] munity at the time they were built?

A. That has not—doesn't have great differences as to their value and commodious quarters and characters that are recognized now in modern education and that are applied in modern buildings, that doesn't have great disparities, those types of buildings, in any school system in the United States with buildings built twenty, thirty or forty years ago.

A. I believe there is very likely to be some disparity, may not be great, and may not be great as compared to this group and this group, but between individual buildings, I am sure you would find some disparity if there is more than one building.

Q. You realize that school buildings are built as a community grows up and population trends—where the town grows and which way it grows determines whether buildings are located and newer buildings are added.

A. That is one factor.

Q. Do you know of any way *way* on earth to keep those facilities adequate and at the same time equal in any school system?

A. There are ways that it can be approached.

Q. Well, just tell me how you would approach it.

A. By forming a good cooperative city planning with

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the Board of Education and the City Commissioners on [fol. 214] a long-term scale and then following it.

Q. Would you recommend that if we had a building like, say in Topeka, that cost $112,000 and is now a sound and structural safe colored building, that you tear that down because we happen to have a new building built a year ago that cost a half million dollars; would you recommend that?

A. Not merely for that reason, no.

Q. What other reasons would you have for tearing it down?

A. If I found that throughout the community the colored children's buildings were decidedly inferior to the buildings of the white schools, then I would consider that to be an unequal educational opportunity between the groups.

Q. Well, now, let's talk about that subject. Let's talk about Quinton Heights and Polk Street and Lafayette School and Lowman School, all of which have a physical plant value at the time they were built and at the present time, an insurance value less than any of the four colored schools. Do you think that makes the white children get inferior education than to the colored children going to those schools?

A. The colored children are getting an inferior education, I think, for this reason: That, as I cited in my original testimony, 45% of the white children can go to schools that are newer than the newest colored building; only 14% [fol. 215] of the white children have to go to schools that are older than the oldest colored building, so it's a comparison of 14% against 45%.

Q. Let's get back on the track. I asked you whether or not, using an illustration of four white schools, if they are inferior as to value, both at the time they were built and now, to the colored schools, do you consider that alone makes the white child that is attending those schools, Quinton Heights, Polk, Lowman and Lafayette, receive in and of itself, receive an inferior education.

A. Not necessarily.

Q. Well, then, why do you say that when you talk about that element as causing the colored child——

A. Because——

Q. Wait just a minute until I ask my question, will you please? Why do you say that when you are talking about a colored child who goes to one of the four colored schools and you compare the plant and facilities to some of the modern buildings—school buildings—in the last two or three years.

A. Because, in the first instance, we are assuming——

Judge Mellott: The witness must wait until the question is completely asked. The reporter can't get it down when you both talk at the same time.

(The last preceding question was read by the re-
[fol. 216] porter.)

Judge Mellott: Strike out the answer as partially given.

By Mr. Goodell:

Q. Why do you say in such a situation in making the comparison in the case of a negro child going to one of the four negro schools, comparing it to some of the schools built in the Topeka area, in the Topeka school system in the last two or three or four years, such as Randolph, Potwin and Oakland, that that fact alone gives the negro child an inferior educational opportunity, that would not apply in the case of the children going to the white schools that I have previously mentioned in my other question.

A. In the first instance, if I understand you correctly, I was assuming that other things were equal because of the —as we admitted, the faculty preparation is approximately equal, the class size equal, and so forth. But, in the latter instance, other things are not equal primarily because of the difference in the curriculum which is a very important factor.

Q. All right, now, what is present in the case of the Quinton Heights white school, in the curriculum you talk about, that is not present for comparison purposes in any of the four colored schools?

A. Because in Quinton Heights the child has the opportunity to learn his personal adjustments, his social adjust-
[fol. 217] ments and his citizenship skills in the presence of a cross-section of the population.

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Q. I asked you to eliminate the racial feature entirely and restrict it to physical things alone; that is what I asked you.

The Witness: If the Court will permit, I don't think that we can answer an educational opportunity purely on physical features. There are too many other elements that are also involved.

Q. Mr. Speer, Professor Speer, I probably misunderstood you. I thought—I understood your testimony to be that because of these physical things that in and of itself, ignoring the racial thing, that that constituted an unequal educational opportunity to the negro child because of these modern buildings that he wasn't allowed to go to; is that correct, or not?

A. It is certainly one of the very important things and, if the other factors are equal, and this one is unequal, then there may be an inequality in the total educational opportunity.

Q. Maybe I am so stupid I can't understand you. Did you not say, is it your opinion, that because of physical factors, and I mean by physical factors differences in plant facilities, of some of the white schools and the four negro [fol. 218] schools, that alone, in and of itself, causes you to give an opinion, and it is your opinion that that child, the negro child, because of that alone, doesn't have equal educational opportunity.

A. That is a contributing factor, but I do not consider that of—that alone.

Q. Then you didn't say that alone caused him to have an unequal opportunity.

A. No, but that coupled with other factors did cause him to have an unequal opportunity.

Q. What are the other factors rather than racial factors.

A. Curriculum factor; there is faculty; there is size of classrooms; there is books——

Q. Let's compare some white schools—let's take Quinton Heights, Lowman, Polk and Lafayette again. What is present as to the faculty, comparing that to the faculty of the four negro schools, that is inferior or that is—there is a disparity.

Mr. Carter: I would like—I think that we have listened to this line of questioning—it seems to us that it is now objectionable. What I apparently gather from the line of examination that is being made is that the—Mr. Goodell is attempting to establish that because there are deprivations of white children that he call off the deprivations of the negro child in segregation. We don't think that is [fol. 219] the issue in the case.

Judge Huxman: This is cross-examination of your expert witness where the latitude is a little greater. You may proceed.

By Mr. Goodell:

Q. Restricting now for this question, I will ask you to compare and point out dissimilarities or disparities between the faculty—one thing alone now—the faculty, that is, the teaching in the four white schools, that is, Quinton, Polk—Quinton Heights, Polk Street, Lowman Hill and Lafayette, to the four negro schools that are in issue in this lawsuit.

A. I can't answer that at the moment, sir. I would have to add up the preparation of the faculties of those four particular schools. I do not have that at hand. I added them up for the entire system and took the entire averages, but I do not have them for those four particular schools.

Q. As far as you know, they are perfectly equal then, is that right?

A. I don't think they could be perfectly equal; that would be impossible.

Judge Huxman: Well, now, that is rather quibbling, of course. Perfect equality you can't find in two teachers any place.

Mr. Goodell: I think so.

The Witness: Yes.

[fol. 220] By Mr. Goodell:

Q. What—is the faculty, then, comparing it to the other factor which you mentioned, curriculum, on the four white schools covered by the illustration and the four negro schools——

A. How does the curriculum compare?

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Q. Yes.

A. Between the two schools. As far as course of study is concerned, as far as I know, it is probably about equal but as far as the total curriculum is concerned, and that is the only basis on which I can discuss it, it is not equal.

Q. What do you mean by total curriculum?

A. I mean the total school experience of the school child, what the instructions, what the books are, what the surroundings of the buildings are, what his associations with the other children are.

Q. Well, eliminating that feature, the associations with the other children, which is the racial feature, what are the other part of the curriculum which is any dissimilarity or inferior factors present in the case of the negro schools and the white schools that I have used for illustration.

A. In professional circles we have a term called the great "gestalt" which means the sum is greater—the whole is greater than the sum of the parts and, when we start taking into account only the parts one by one, we destroy [fol. 221] our "gestalt", and we cannot make a wise comparison.

Judge Mellott: What was that word?

The Witness: (Spelling) G-e-s-t-a-l-t.

By Mr. Goodell:

Q. Now you come from Missouri, don't you?

A. I at present live in Missouri, yes, sir.

Q. You have segregated schools there, don't you?

A. We have some segregated schools. On the university campus we have a mixed school.

Q. I am talking about the public school system in the State of Missouri.

A. Yes, sir.

Q. And it is mandatory, isn't that right?

A. I presume in some cases it is.

Q. Have you studied any of the various state statutes over the country which we have had for a half century concerning this segregation of students?

Mr. Carter: Your Honor, I can't see how this——

Mr. Goodell. This is preliminary for another question.

Judge Huxman: I think that is an improper question. Well, as long as it is preliminary, you may answer whether you have or have not studied these various statutes.

Mr. Goodell: I will withdraw the question.

[fol. 222] By Mr. Goodell:

Q. You know in a great many cities and communities of the United States there are statutes similar to the statutes here in Kansas which we have had for a half century or three-fourt-s of a century, isn't that right?

A. I presume so.

Q. You know, as a practical man, laws get passed by legislators coming from the various parts of their communities over the state, don't you?

A. Yes, sir.

Judge Huxman: Mr. Goodell, what is the purpose of that question? What value does that have to our problem how laws are passed?

Mr. Goodell: I am getting to that. I can't ask it all at once. I am trying to get from this witness the feature as to whether he thinks elimination of racial segregation, if it's unwanted by the community and is out of step with the thinking of the community which the mere existence of the laws have some indication——

Judge Huxman: I think Dr. Speer has made it quite clear from his evidence—he has to me at least, if I understand it—that segregation, racial segregation, is the prime and controlling factor of the equality of the whole curriculum, and that these physical factors are secondary, and that his testimony, as it registered with me, is that aside from [fol. 223] racial segregation he perhaps would not testify that there was any such inequality in the physical properties as would deny anybody an equal educational opportunity. Do I understand your testimony correctly?

The Witness: If I may say, Your Honor, I think I would sum up this way: That there is, in my opinion, some inequality in physical facilities between the groups in Topeka, but, in addition to that, there is also the difference of segregation itself which affects the school curriculum.

Judge Huxman: Let's see if I can get myself straightened

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out. Do you not also agree with what Mr. Goodell is trying to bring out here—you haven't gotten together—that if you put it on that fact, that there is inequality in physical facilities as between the white schools and the colored schools, sometimes the greater facilities are with the colored schools against the older white schools.

The Witness: Yes, Your Honor, but they are not as many in that direction as there are in the other direction in this case.

Judge Huxman: It seems to me we are spending a lot of time on that when that is rather, it seems to me, it would be obvious if you have an older white building [fol. 224] than a colored building that perhaps the physical facilities in the older white building would be poorer than the colored building.

The Witness: Yes, I will agree.

Mr. Goodell: I will try to shorten this up.

By Mr. Goodell:

Q. If I understand you correctly, the basis of your opinion on saying that the mere separation—strike that. It's your opinion, then, that you can't have separate schools in any public school system and have equality, is that right?

A. Yes.

Q. And that is predicated on the—on your philosophy or your theory that merely because the two races are kept apart in the educational process, isn't that right, mere separation causes inequality.

A. That is one of the things which causes inequality, yes, sir.

Q. Yes. Now, assuming, Doctor, that we didn't have separate schools and they were altogether, and you still had a social situation in this community which didn't recoignize co-mingling of the races, didn't admit them on free equality, that child would run against those—run up against those things in his practical every-day world, wouldn't he?

[fol. 225] A. I presume so.

Q. Sir?

A. I would think so.

Q. Wouldn't that tend to cause more of a tempest and emotional strain or psychological impact if he got used to going to school with white children than when he went downtown and couldn't eat in a white restaurant, couldn't go to a white hotel and couldn't do this and that, wouldn't that make the impact greater and accentuate that very thing.

Mr. Greenberg: This witness is qualified as an expert in the field of education, and I don't believe has testified or is qualified to testify concerning segregation all over the State of Kansas or elsewhere.

Mr. Goodell: Well, I restrict it to Topeka.

Judge Huxman: I think the Court will sustain the objection. That is purely argumentative. I doubt whether the doctor has qualified himself.

By Mr. Goodell:

Q. Assuming, Doctor, we will restrict this to the educational process, assuming that—that we didn't have segregation, for the purpose of this question, and assuming further we had a negro child going to Potwin or Oakland or Randolph and assuming that the population trend appears in the schoolroom as it does in our city, so that he would be outnumbered from twenty to fifty to one, assuming all that, for the purpose of this question as being true, [fol. 226] wouldn't that cause some inferiority feeling on the part of the colored child when he went to such a school where he was outnumbered twenty to fifty to one and caused some sort of mental disturbance and upset.

A. On which basis would you rather for me to—on theory or on personal observation or experience?

Q. I am talking about theory here.

A. And personal observation and experience.

Q. Yes.

A. Let me first mention the latter one; we have adjoining our campus a demonstration school of 210 students in the elementary grades and mixed in with them are about ten negro children, so they are outnumbered in that proportion, and my observation is, and the reports I receive from my assistants are, that those children are very happy, very

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well adjusted, and they are there voluntarily. They don't have to attend.

Mr. Elisha Scott: I object to that.

Judge Huxman: Mr. Scott, are you entered here as an attorney of record?

Mr. Elisha Scott: I am supposed to be.

Judge Huxman: Go ahead.

Mr. Elisha Scott: I object to that because he is invading the rights, and he is answering a question not based upon [fol. 227] the evidence adduced or could be adduced.

Mr. Goodell: You just got here; you wouldn't know.

Mr. Elisha Scott: Yes I do know.

Judge Huxman: Objection will be overruled. You may answer.

The Witness: Shall I repeat the answer?

By Mr. Goodell:

Q. Have you finished?

A. I think, also, on the basis of our knowledge of child behavior that we can say on a short-range basis there may be occasionally, the first time we jump into water we may be a little bit frightened, but, on a long-range basis, we generally are able to work out our adjustments and make a good situation out of it.

Q. Segregation occurs, doesn't it, Doctor, in any school system among the races. I mean by that, children that come from wealthy families co-mingle with children from poor families; they go off into different cliques; that occurs, doesn't it?

A. It occurs sometimes.

Q. Occurs frequently, doesn't it?

A. Well, it all depends on your definition.

Q. And the child that is left out of the swim, so to speak, he feels inferior or second-class, doesn't he?

A. Yes, and I think we should prevent that in all cases [fol. 228] possible.

Q. You wouldn't make a new social order to prevent social strata of society, would you?

Judge Huxman: Just a minute. The Court will sustain an objection to that question.

By Mr. Goodell:

Q. Have you made a survey of any of the students that have gone to our segregated schools, the negro students, and picked them up to see what effect to their education that you call attention to as being inferior, how it's worked out in every-day life.

A. I have talked to a few of them, but I have not made a survey of them.

Q. Have you heard of anybody getting hired or a professional man having a plant or a businessman having a customer based upon what elementary school he went to in the first grade or the second grade or the sixth grade for that matter?

A. Oh, probably not, but probably there are cases where a person is hired or not hired on the basis of the kind of education he received in the first six grades.

Q. You don't know a thing about our community and how the negro child, when he goes through our school system, how he is received in the business world at all, do you?

A. Oh, I have known Topeka for some years. I may have a little knowledge.

[fol. 229] Q. Do you know anything about that?

A. A little, not too much.

Q. What?

A. I don't know too much about it.

Q. Do you know that in the case of the junior high grades and in the senior high grades that they are not segregated?

A. Yes, sir.

Q. Do you think, getting back to the school system and the illustration of where the negro child would go to a school where he would be outnumbered twenty to fifty to one, and he wasn't recognized because of pure majority rule and wasn't elected head of his class or class officers or recognized in the various school activities, that that would have any impact on such a child.

A. Not as much impact as having been denied even to get into the running.

Q. You think if you got in the school and left out entirely he would feel happy about it, would he?

A. What's that again?

Q. You think if the negro child was simply by edict of

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law forced into the white school, whether the white school was ready to receive him or not, and however much he was in the minority and however much he would be left out of things, he would still be happy merely because he had found his way into the white school, is that right?
[fol. 230] A. I think on a long-range plan he would be happier than on the other way.

Mr. Goodell: That's all.

Mr. Carter: Your Honor, may we have a five-minute recess?

Judge Huxman: Yes. The court will take a ten-minute recess.

(The court then, at 2:40 o'clock p. m., stood at recess until 2:50 o'clock p. m., at which time court was reconvened and the following further proceedings were had:)

Mr. Goodell: I would like to recall Dr. Speer for two short questions.

Judge Huxman: Dr. Speer, take the witness stand for a question or two further.

Hugh W. Speer, having been previously sworn, reassumed the stand and testified further as follows:

Cross-examination (continued).

By Mr. Goodell:

Q. Dr. Speer, in giving your opinion here a moment ago as to the comparison based upon library books—library or books in certain of the negro—in the negro schools to certain of the white schools covered by your testimony, did you consider, in forming that opinion, the fact that the Par-
[fol. 231] ent Teachers Association in the various school territories contribute personally and raise the money to buy those books, and they are not furnished by the Board of Education.

A. Yes, I have been informed that that is sometimes the case.

Q. Well, how did you segregate which books have been bought by Parent Teachers Association and the books that have been furnished by the Board of Education?

A. I didn't make that separation. I felt that by neglect the Board of Education permitted an inequality to exist.

Q. Now, did you also—strike that. State whether or not any of the books in any of the libraries or rooms in the schools that you made the investigation concerning books, that at the end of the term the books, some of them, were gone, that is, packed up in boxes.

A. Yes, we understood that, and we also understood that some of the books are regularly kept in the central office of the Board of Education, and we took that into account, knowing that the same—those books are taken out of all the schools and kept in the Board of Education, so that what remained are really the comparable—form the basis for comparison.

Q. So if some of the books were missing, either being packed up or gone, and you didn't know what they were, you are just basing your testimony, your considered opin-
[fol. 232] ion, on what you found, is that right?

A. Sir, the books that were gone are the books that circulate among all the buildings in the course of the year, so we assume that those are equal. It's the books that are left in the building that really belong to that building, and it is on that basis that we made our differential.

Q. Were some of them packed up?

A. Some of them packed up, and we looked into the boxes.

Q. Did you take them all out volume by volume and examine them?

A. We did not examine every book in the Topeka school system, but we sampled it in an unbiased way. We sampled a large number of rooms and a large number of buildings and a large number of boxes, but we did not examine every book.

Q. You mean you took a book out here and there from a box and, from that, made up your mind that they were all alike and, consequently, that is the way you got at your opinion.

A. No, sir. We took sampling in a scientific way.

Q. What do you mean scientific way?

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A. We took a sample that was representative and large enough to where we could feel confident in it.

Judge Huxman: Is that all?

By Mr. Goodell:

Q. Which books were bought in the various schools that you gave your opinion about—were bought by the Parent [fol. 233] Teachers Association?

A. I don't know just which books. Some, no doubt, were but not a great many. It is not enough to affect the percentage very much.

Q. If you don't know what books they were, some of the books you didn't even examine, you don't know what quantity they are, how do you get at an opinion as to book facilities at the various schools?

A. On this basis, sir, that it is the books in the school that are responsible for the education of the child, and we examined the books in the school and, on that basis, we made our opinion.

Q. So what you are saying, if I understand you right, the books you found and examined showed less books or inferior quality as to date and so forth in the colored schools than the books you found in the white schools, is that right?

A. Yes, sir.

Mr. Goodell: All right.

Judge Huxman: Step down.

James H. Buchanan, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Greenberg:

[fol. 234] Q. Dr. Buchanan, will you tell the Court your full name, please.

A. James H. Buchanan.

Q. Please tell the Court something of your educational background.

A. At the present time I am Director of the Graduate Division, Kansas State Teachers College, and acting head of the Department of Education. The year preceding this year I was associate professor of education at the Kansas State Teachers College. Six years preceding that time, from 1943 to 1949, I was superintendent of schools at Boulder, Colorado. From 1933 to 1943 superintendent of schools in Lamar, Colorado, and, from 1930 to '33, superintendent of schools at La Jara, Colorado, and, from 1928 to 1930, superintendent of schools in Boyero, Colorado.

Q. Dr. Buchanan, what degrees do you hold and where were they earned?

A. I hold an A.B. Degree from Denver University, 1928; Master of Arts Degree, University of Colorado, 1932; I have had three years—three summers of graduate study at Harvard University, 1936, 1938, 1939, and a Doctor of Education Degree from the University of Colorado, 1949.

Q. Have you visited any of the schools in the City of Topeka?

A. Yes.

Q. Did you visit the Buchanan School?

[fol. 235] A. Yes, I did.

Q. Gage, Lafayette?

A. Yes.

Q. McKinley?

A. Yes.

Q. Monroe?

A. Yes.

Q. Parkdale?

A. Yes.

Q. Polk?

A. Yes.

Q. Potwin?

A. Yes.

Q. Randolph?

A. Yes.

Q. State Street?

A. Yes.

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Q. Sumner?
A. Yes.
Q. Van Buren?
A. Yes.
Q. Washington?
A. Yes.

Q. Did you observe the general appearance of the interior, exterior and the surrounding areas about the school? [fol. 236] A. I did.

Q. Would you describe what you noticed with regard to these factors in the Randolph School.

A. Well, I would say that the Randolph School was situated in a very average residential section; perhaps above average. I think the school is a well-constructed building; it shows good signs of being in a very good state of repair, I should say, and the maintenance in it has been excellent. The facilities in it, such as auditorium, the classrooms and so on, are adequate to a good educational program. I would say the grounds are ample for proper play and recreation for the pupils.

Q. Would you tell us what you found concerning these factors at the Buchanan School, Dr. Buchanan.

A. I would say that the Buchanan School is an older school. It has been well constructed. The walls are in a good state of preservation; redecoration seems to have been done within a reasonable time and the maintenance is equally good. I think in the maintenance you have to take into consideration the age of the building, but I would say it was very good at the Buchanan School. The playground, it would seem to me, was ample for recreational facilities. I think there was no auditorium in the Buchanan School, but it was my impression that adequate precautions have been made for prevention of fire or escape from the building [fol. 237] in case of fire.

Q. I don't recall, Dr. Buchanan, did you say anything concerning the surrounding areas of the Buchanan School?

A. Yes, I would say the surrounding area, as I observed it, being a stranger to the city, practically so, was not quite as substantial; certainly not as substantial a residential area as I would say around the Randolph School.

In other words, I would say it would reflect the general community in which it was associated, perhaps both in age and state of preservation of the building.

Q. Would you tell us what you found concerning the Gage School, Dr. Buchanan.

A. Well, the Gage School is a very fine school. I would say, speaking from memory, I would say it's within a few years of the age of the Randolph School. I have the impression it's somewhat larger. It had some very good pictures on the wall; the walls were in a good state of preservation; there was some repair work going on. There were some rooms in which they needed some repair work and were planning on doing it immediately because there were materials placed outside the doors and, in some places, the floors were up. I would say that the playground and the landscaping is quite attractive and quite beautiful; a very nice piece of work.

Q. Would you tell us, now, what you found concerning [fol. 238] the Sumner School.

A. The Sumner School is a newer school than Gage. I think it's perhaps about ten or eleven years old. It has quite ample—very spacious suitable classroom facilities and a nice auditorium. I think the landscaping would be nothing that anyone could take particular objection to. The general appearance of the building, I should say, was in keeping with a good school situation.

Q. Will you now tell us what you found concerning the Monroe School, Dr. Buchanan.

A. I would say the Monroe School would compare fairly well in construction, in appearance, with the Randolph School, I would rather carry them in mind. I think the Monroe School, I woud say, is about twenty-four, twenty-five years of age. It has fireproof stairways. It shows sign of good care and good maintenance and quite serviceable, I should say, for a number of years. The playground and the landscaping in front of the building is about in keeping with the community in which it is located, I should say. In other words, I would say it is a credit to the community.

Q. And would you tell the Court about the State Street School?

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A. Yes. I saw the State Street School. It is a very good school, I should say; it's more or less in a class with the Sumner School, perhaps a little more modernistic, a [fol. 239] little more in keeping with modern design and the demands of modern education. The playground or the grounds that were vacant, which I assume were available for the children, I thought were quite adequate and quite spacious for a large enrollment. It had auditorium facilities and other features of that kind that make for a good educational situation.

Q. Would you tell us something about the area surrounding the State Street School.

A. I would say that it was quite a creditable residential section.

Mr. Goodell: I didn't hear that.

The Witness: I say it was quite a creditable residential section; very good residential section.

By Mr. Greenberg:

Q. Would you tell us what you found concerning the Washington School, Dr. Buchanan?

A. Well, the Washington School is an older school; I think it is not so old as the Buchanan School; at least that is my impression of it. It has been well cared for. It has an auditorium which, I would assume, for an enrollment of 150, 160 children, would be adequate for them. The maintenance there is quite a creditable thing. I would say that was characteristic of the Topeka schools. There were fourteen I visited; I would say the maintenance and repairs were quite good.

[fol. 240] Q. In your visit to the fourteen schools, Dr. Buchanan, did you make any general observations concerning the areas in which they exist?

A. I think I have already implied that in the answers that I have given. My observation would be that the schools visited, the fourteen of the twenty-two schools, reflect the communities in which they are located, that is, if they are like, well, Polk, perhaps Buchanan, Gage; the varying degrees of the quality of the school is somewhat dependent upon the age of the residential region or section

of the city in which they are located. That is, you would find the better schools in the places that are comparatively newer and better developed; that would be my general observation. The poorer schools were perhaps in a region, we might say, have longer been a residential region or area of the city, which is tending, perhaps, to slide down just a bit in quality.

Q. Can you make any general statement concerning the negro schools which you saw and the areas in which they live, Dr. Buchanan.

A. My general statement would be merely to say that they reflect the situation which I have outlined. I think they show a very good care. I think, for instance, the Monroe School, is a school that definitely looks the way you would expect; I think anyone who has had experience [fol. 241] in examining or visiting schools would say that it looks about the way you would expect it to look when you see it from the outside and when you go in. It has been well cared for. All of the schools in Topeka I was impressed by the fact that there was a minimum amount of marking on the walls or disfiguring of the walls or furniture in any way, either in the white schools or the colored schools.

Q. Did you make any general observation concerning the areas in which these colored schools existed, Doctor?

A. I would say, in general, they probably are in the areas which were not the best residential section of the city. I don't know that they would be the poorest, but they were not in the best residential section, and I think there was some variation there. I thought I observed some variation in the quality of the residential section.

Q. Dr. Buchanan, in evaluating the quality of education which a student obtains when attending school, does an educator consider the physical characteristics of the school; I mean their appearance and the appearance which they present to the child, along with the appearance of the area in which the school exists. Is there a direct correlation between that and educational opportunity?

A. Yes, I think that is true. I think the educator—educators do recognize the relationship between the quality [fol. 242] of the building, landscaping of the grounds, the

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area in which it is placed as an important factor in education.

Q. Now, bearing that criterion in mind, Dr. Buchanan, I would like you to make several comparisons. I want you to assume in the City of Topeka a negro child would attend Randolph School, if there were not racial segregation in the city, but is compelled to attend Buchanan because of racial segregation. Would you say that if all other factors in the City of Topeka and in the schools were equal, except these factors concerning appearance, residential area, and so forth which you have just described in answer to a previous question, if all factors were equal except those factors, would the child attending Buchanan obtain the same educational opportunities that he would obtain if he attended Randolph?

A. I believe no; my answer would be that he would not receive the same educational opportunity.

Q. Well, bearing in mind the correlation which you stated between educational opportunity and physical appearance and area, would you explain the reason for your answer?

A. I believe that education is best facilitated when it is in a beautiful environment, where there is a building which pupils can take pride in and where they have beautiful landscaping and the interior of the building is a place where there are the maximum number of modern facilities [fol. 243] to facilitate a good curriculum.

Q. And to the estent that these are different, you would say that the opportunity to learn is different.

A. Beg pardon; would you——

Q. Would you say that to the extent that these are different, the opportunity to learn is different?

A. Yes, I think it has a relationship to the opportunity, yes.

Q. Is this supported by the authorities in the field of education, Dr. Buchanan?

A. I am certain it is, yes, sir.

Q. Did you say yes?

A. I am certain that it is, yes.

Q. Could you state any authorities who support this view?

A. Well, I think that my number of authorities, for instance, Dr. Reeder of Ohio State University in his recent

publication on administration, "Public Education of the United States" which came from the press in 1951, just a few months ago, a revision of his book, makes that very clear. He makes that statement that the quality of a building, its setting, is an important factor in the education of a child. Strayer and Englehart, of Columbia University, who are recognized as the leading authorities in schoolhouse construction, hold that view and numerous others.

Judge Mellott: You drop your voice, and I usually get [fol. 244] most excepting the last two or three words. You drop your voice, and I can't hear you.

The Witness: I am sorry; I thought I had a very strong voice.

Judge Mellott: You do, but you don't keep it up.

By Mr. Greenberg:

Q. Dr. Buchanan, I am going to ask you to make three more comparisons without going into as much detail, if you believe the detail you stated concerning the first comparison applies to the following schools: I would like you to compare Gage against Buchanan with regard to these criteria.

A. I would say that Gage very obviously is a better school than Buchanan.

Q. On the basis of the criterion you stated?

A. Yes.

Q. I would like you to compare Sumner against Monroe.

A. Obviously Sumner is a better school than Monroe; a more up-to-date school, a newer school, as I have indicated.

Q. I would like you to compare State Street School against Washington Street School with regard to these criteria.

A. State Street is a better school than Washington School in terms of age, in the terms of these things we have talked about.

Mr. Greenberg: Your witness.

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[fol. 245] Cross-examination.

By Mr. Goodell:

Q. Dr. Buchanan, if I understand you correctly, you are stating that the plant or the building is a very important factor in the educational opportunity.

A. Yes.

Q. The building a child goes to.

A. Yes, indeed.

Q. And, therefore, where you have one building with shrubbery around it and landscaping, which is pretty, and another building built earlier many years ago which isn't as pretty, even however strong and commodious and sufficient, if it isn't as pretty and big and new and as modern, that educational opportunity is minimized in the child that goes to that building, is that right?

A. That would be—other factors being equal, I would say the better one——

Q. I am restricting it to that factor if I understood your testimony.

A. That's right; I would say that that would be detracting from it.

Q. The only way children in any community could have an equal educational opportunity would be to have buildings all beautiful, built about the same time, all modern, all beautifully landscaped and everything just about alike, [fol. 246] isn't that right?

A. As far as that factor is concerned, that is correct.

Q. As a practical matter, don't you realize that we live in a practical world?

A. I have lived in it for nearly fifty years.

Q. How do you think any Board of Education could have all of their buildings built at the same time, same landscaping——

Judge Huxman: You need not answer that question; that is argumentative, has no probative value.

By Mr. Goodell:

Q. Well, according to your theory, if I understand it right, if I went to a little country schoolhouse, even though I had good teaching and good texts and all other facilities,

but not a building as good as Randolph, I was in a bad way, or anybody would be in a bad way, to get an education, is that right?

A. No, that isn't my theory. My theory would be you would get a better education if you had better equipment, but you would not—I wouldn't say you would have a poor education because you went to a poorer building. You might have a very superior teacher or you might have very superior ability yourself.

Q. Buildings don't make the educated child, does it?

A. I wouldn't say entirely, no; they are a contributing factor, but not the entire thing.

[fol. 247] Q. You compared the negro schools to Gage and Randolph and Sumner, I believe those three.

A. I think so.

Q. Now, would you please compare those same schools, I mean those white schools; they are all white schools, aren't they?

A. Yes.

Q. —with the schools of Lafayette and Quinton Heights and Polk and Lowman and Quincy.

A. Well, I didn't visit all you have named, but——

Q. Which did you visit?

A. Lafayette. I visited——

Q. Didn't you know we had those others?

A. Yes, but——

Q. You didn't get around to them.

A. We didn't get around to them. I would say that Lafayette compared with Gage or Randolph or Sumner would be far inferior.

Q. Far inferior.

A. Far inferior to it.

Q. We are discriminating then against a child that lives in that territory if he goes to Lafayette as against a child that lives—goes to Gage.

Judge Huxman: That is immaterial and need not be answered.

[fol. 248] Mr. Goodell: No further questions.

Judge Huxman: Anything else of this witness? Doctor, you may stand aside.

(Witness excused.)

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R. S. B. ENGLISH, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Greenberg:

Q. Will you please tell the Court your full name, Mr. English.

A. Horace B. English.

Q. What is your occupation, Mr. English?

A. I am professor of psychology at the Ohio State University.

Q. Would you tell the Court something about your background and the degrees you hold.

A. I took my Bachelor's Degree at Oxford University, and there I also took a certificate in cultural anthropology. Later I took the Ph.D. Degree at Yale. As for my experience, I have been teaching and doing research work since 1916. I have been a full professor since 1921. During the war I was—during the first war I was psychological examiner and then chief of the re-education service in one of the hospitals. In the second world war I was a consultant on personnel problems part time for the Adjutant General's Office of the Army and then immediately after the surrender [fol. 249] I was a morale analyst in Japan. I then—I have had a number of part-time positions; I was consultant for the Forest Service on human relations. I was consultant to the West Virginia Department of Education on the curriculum in their state teachers colleges. I was chairman of the counsel on human relations appointed by the American Association for the Advancement of Science, for work with the Conservation Departments of the government, and I spent some six months in the study and research in the field of child development under the auspices of the American Council on Education.

Q. Have you ever held office in, or been a member of, any learned societies?

A. Yes, in the American Psychological Association I am a Fellow; I have been a member of the Council of Directors, and I have been chairman of the Committee on Professional Ethics of that association. At the moment I am president

of the Division of Educational Psychology of that association. In 1940 I was president of the American Association for the Advancement of Science—for the American Association for Applied Psychology, and I have been president of the Ohio State Psychologists and the Midwestern Psychological Association. And I am a Fellow of the British Psychological Society and member of the Executive Committee of the Psychology Section of the American As- [fol. 250] sociation for the Advancement of Science.

Q. Have you ever published any books or articles in the field of education and psychology, Dr. English?

A. Published with Victor Ramey, of the University of Colorado, a book on studying the individual school child. Just this year brought out a textbook on child psychology, and I have published something around 150 articles in professional journals.

Q. Have you ever made any studies bearing on the capacities of different groups to profit by education?

A. Yes. As a matter of fact my first research, which was begun in 1912, was addressed to this very thing; the results were published in 1918. Then I was also on the team which brought out the celebrated alpha test of intelligence in the United States Army, as I helped with the experimental work which lead to that; and I have been continuously occupied in the field of individual differences and of group differences, and I teach that subject at the Ohio State University. Then I also supervise somewhere between 75 and 100 students a year who make case studies of individual children and I may add some of these are always negro children. I have done some research studies in the field of attitudes, including two of them concerning the attitudes of negroes and, finally, in this list I have done a rather prolonged [fol. 251] series of experiments in the field of learning with special reference to how children learn in school, rather than mere laboratory learning.

Q. Dr. English, have you told me all the courses that you now teach at Ohio State University?

A. No; I teach chiefly individual differences, child psychology and the more practical aspects of learning, rather than theoretical, and I also teach the theory of personality. Those are the main courses.

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Q. Dr. English, at this point I want to ask you a hypothetical question. I want you to assume that in the City of Topeka there is a body of white school children and a body of negro school children, and that there is also racially enforced segregation in the schools. Would you say that on the basis of your learning, experience and study that on the basis of color alone there is a difference in their ability to learn?

A. No, there certainly is not.

Q. Would you tell me, the support for your statement.

A. Well, in the first place, we don't have racial groups learning; we have individuals learning and in both groups, white and negro, we have some persons who are very good learners; we have some persons who are very poor learners, and we have some medium learners. You can break that down to as fine a point as you like; the range is exactly [fol. 252] the same. Well, I say that, as a matter of fact, with regard to school children in respect to the I. Q. which is the best single measure of a child's ability to learn. The best I. Q. on record is that of a negro girl who has no white blood as far as that can be told at all, but right after this child there are four white children, so, you see, it's—at the top it's quite equal and at the bottom it's quite equal and in the middle it's quite equal. It's a matter of individuals and not a matter of groups. So knowing only the color you can't predict at all how well a child can learn. If a child is white you can't tell from that fact alone how well that child will learn in comparison with a group of negro children and, of course, vice versa from the fact that a child is a negro you can't tell how well he will learn with respect to a group of white children. From color alone there is no telling. We know that the negro child, moreover, learns in the same way, that he uses the same process in learning and learns the same things, but I do want to make one exception; it's a notable exception: If we din it into a person that it is unnatural for him to learn certain things, if we din it into a person that he is incapable of learning, then he is less likely to be able to learn.

Q. That difference is not based upon any inherent quality.

A. Not at all. It's a parallel exactly the way it is with [fol. 253] women learning mathematics. There is sort of

a superstition that women are naturally incapable of learning mathematics, and so they don't, most of them, learn it. They can, if they will, and some of them do, but there is a tendency for us to live up to, perhaps I should say to live down to the social expectation . . . to learn what we think people say we can learn, and . . . l segregation definitely depresses the negroes expectancy and is therefore prejudicial to his learning. If you get a child in the attitude that he is somehow inferior, and he thinks to himself, "Well, I can't learn this very well.", then he is unlikely to learn it very well.

Q. Dr. English, is there any other scientific evidence to support this conclusion which you have stated other than what you have said.

A. Yes, there is a good deal. For example, in the last war we took the people who were illiterates. These, of course—a good many more of them were colored than white, but we put them into schools to teach them fourth-grade literacy and, as a matter of fact, 87% of the negroes and 84% of the whites successfully completed the work of these schools. Now I don't make anything of the difference of 3% in favor of the negroes as compared with the white. That is, of course, within the range of accidental error, but I say these results do show that under favorable conditions [fol. 254] and under conditions of motivation where these men wanted to learn, the negro men proved that they could learn as well as the whites. Most of the scientific evidence concerns intelligence testing, which, as I said a moment ago, is the best single measure of the ability to learn, and the scientific question that we would ask is, "Are there differences in intelligence which we find? Are these differences due to race or are they due to unequal opportunities?" and the whole trend of the evidence, beginning with the work in 1912, but especially beginning after the first world war when we analyzed the scores of the recruits in the first world war, the whole trend of the evidence is this, and there are no real exceptions to this trend, that wherever we try to equalize the opportunities, we minimize or extinguish the differences in learning ability as between the two racial groups. Perhaps the best study of this is Dr. Klineberg's study showing the results of the migration to New York

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City of children from the deep south. He found—of course we all know that the schools in the south, and particularly the negro schools in the south, are by and large inferior. There are some cities in the south where the schools are very good, but the general tendency, and especially in the rural regions, is for the educational opportunities in the south to be very bad and particularly bad for negroes. [fol. 255] These things are well known in educational circles. So the negroes then coming out of these very poor school situations had very low ability to learn. They seemed stupid and their intelligence test scores were low. But each year that they were in the more favorable learning opportunities in the north, their intelligence quotient was rising, and the longer they were in that favorable region the more their intelligence rose, so that the conclusion is unavoidable that their previous condition was due to the unfavorable opportunities.

Q. Dr. English, is there any scientific evidence to the contrary?

A. Very little indeed and such little evidence as there is doesn't stand up. Now, for example, there was a study by a man named Tanzer, worked with Canadian negroes in a place in Ontario. They went to the same school with the whites, and the whites were, as a group, somewhat better than the negroes. But in this study when we reanalyze the data we found that the negroes were of lower economic status, and we know that lower economic status affects these things, and we found that the negro children went to school less often. In the white group the attendance was 93 and in the colored group it was 84% of the time. With a loss of schooling like that and coming from an inferior group, the tendency is to think that the difference found was [fol. 256] attributable to these unfavorable factors, rather than the race itself. Certainly these factors that I mention were a contributing cause, and I don't say they are the whole thing; they themselves reflect the whole tissue of social circumstances which somewhat discouraged negro learning, and this is a rather typical sample of the few, the relatively few, studies which even seem to point in the opposite direction. The overwhelming tendency is all in the direction of my first statement. May I summarize that?

It seems to me that what we have here is that the segregation tends to create—first of all, segregation seemingly is based upon a fallacy of a difference and then by the mere fact of segregation it turns around and creates the very difference which it assumes to have been present to begin with, and we get into a vicious circle.

Q. Dr. English, I would like to ask you another hypothetical question now, and I would like you to answer on the basis of your experience and learning as an educational psychologist. I want you to assume that a negro child lives within a few blocks of a school; that he lives a much greater distance from another school, which is a negro school which he is compelled to attend on the basis of race; that he spends perhaps a half hour, perhaps more, perhaps an hour or two a day travelling to and from school, whereas if he were not compelled to attend this negro school he [fol. 257] would spend a few minutes, perhaps fifteen or twenty minutes, a day going to and from school. Would you say that if all other factors were equal that he would receive the same benefits from attending the negro school as he would from attending the white school?

A. Definitely not.

Q. Give us the reasons.

A. May I say—perhaps your question is, you say from attending the negro school. May I broaden it, from his education, if the Court will permit that extension because it's the whole education of the child which is being damaged here. The education of the child is not wholly in the classroom. The education of the child goes on on the playground, in playing with his equals and his fellows, around home. This is one of the most important things for the wholesome development of the child and, when you take an hour a day from a child, you are taking away something very precious to his total education. I have had this in my own home because one of my children had to go to quite a distant school because of a physical handicap, and we could see the results upon his development of this deprivation. It was one of those things we couldn't help. I gather that what you are talking about is something that we could help if it were not for the presence of the law.

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[fol. 258] Q. Is there any scientific data supporting this opinion which you have just given, Dr. English?

A. It would be very hard to find it, for me to recall it. It's one of those things which has such universal consent that I can't recall it ever being challenged. I am sure we see in our clinics all the time, as we examine children who are disadvantaged and who are maladjusted, we see all the time the evidence of the children who do not get out and play with others. As a matter of fact, I don't think there is any—I am sure there is no psychologist, no child psychologist in the country who would challenge the statement that there is—that the child's play is of the utmost importance and should not be unnecessarily diminished.

Mr. Greenberg: That is all.

Cross-examination.

By Mr. Goodell:

Q. Dr. English, this opinion you have rendered is somewhat founded upon theory, is it not?

A. No, sir, it is based upon literally thousands of experimental studies.

Q. How many cases have you taken, for example, of children that have gone to segregated schools and followed them through—you yourself—and examined their situation in adult life.

A. Well, now to what answer of mine is that addressed. I [fol. 259] thought you were asking me about the question of individual differences.

Q. No.

A. What are you asking them about.

Q. Have you personally conducted a survey or supervised a survey where you took cases of children that had gone through, negro children, that had gone through segregated schools and examined them in their adult life to determine whether or not the fact that they had gone to segregated schools had any bearing or relation to their success or achievement record.

A. I don't believe that I testified on that point, did I?

Q. I didn't say you did. I am asking you if you have ever done such a thing.

A. I have not done such a thing. I am not sure that it's relevant at all to my testimony.

Q. Well, is it possible that you could be in error in some of your conclusions here? Could you be mistaken about some of them?

A. Every man can be mistaken; certainly I can.

Q. You could be mistaken, couldn't you?

A. Oh, yes.

Q. Have you given this expert testimony around the country in cases such as this?

A. No, sir, never before; I teach it.

[fol. 260] Q. Now, Doctor, the ideal state, if I understand your testimony, that you testified in your opinion to, would be where you had no segregation as far as educational process.

A. I don't think I said anything about the ideal state.

Q. Well, it would be better, in other words, is that right?

A. I certainly believe that things would be better if we had no segregation, but that is not an expert opinion; that is my personal opinion. I didn't testify to that.

Q. Well, I mean restricting it to the educational process is what I meant.

A. Yes, without any doubt.

Q. Would you—would it change your opinion any if the facts present in this community were that the child, the negro child, that we are dealing with, if he went to a white school he would be outnumbered ten to one or fifty to one.

A. Not at all. I have seen that happen. I have grown up in schools where that happened myself. I have seen it happen repeatedly. We have it in our own city.

Q. Don't you think there is a general tendency, forgetting the racial thing, for the majority to rule and operate the thing that they belong to.

A. In what sense "majority"?

Q. Well——

A. Racial majority?

[fol. 261] Q. Assuming you had 500 white children going to Randolph School and ten negro children. What would be the natural tendency, taking into account the human element and human equations of whether the negro children

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would run that school or participate actively in the student activities or whether it would be run by the white students?

A. Well, of course, the majority would generally have a preponderant voice if they divided along racial lines which they tend to do, but which they do not invariably do. I have seen many cases where the colored child receives in a mixed school from the majority group considerable amount of status and honor. You may recall just recently a man was elected captain of the football team in a predominantly white school. I think it was Williams or Amherst, I am not quite sure which, and this is reproduced all the way through our school systems where we do have mixed schools.

Q. And there are some outstanding negroes in different fields of professions and—who have received their—part of their education—in the deep south in segregated schools.

A. That is true.

Q. And yet have achieved great places of importance, isn't that right?

A. Education isn't the whole answer to ability; it is merely one factor. There are men who are big enough, [fol. 262] white or black, to rise above unfavorable circumstances.

Q. Surely. You are familiar, of course, as an educator, with the experience that was had back in the reconstruction days, sometimes referred to as the carpet-bagger days in the south.

A. Very definitely.

Q. You realize that a certain element, radical element I would call it, of the Republican party, perhaps to gain some political advantage, decided to go down in the various states and abolish certain segregation; you realize that was done.

A. Well, there wasn't exactly segregation at that time, but they did go down there and set up some laws of one sort or another, yes.

Q. Which attempted, in one swoop, to eliminate all of their custom and usages of those communities in the south, didn't it?

A. I am not here as an expert on history, but I read history that way, yes.

Q. Surely. Don't you realize that the experience of that period was that they had a tremendous amount of trouble, tremendous amount of emotional outburst and that it caused a great deal of strife between the races and didn't work at all.

[fol. 263] A. Well, if the Court wants a layman's opinion on history, I will answer that question to the best of my knowledge as a layman on history; I am not here as a historian.

Judge Huxman: It seems to me the question is going far afield.

Mr. Goodell: That is all.

Judge Huxman: Any further questions of the doctor? If not, you may step down, doctor.

(Witness excused.)

Wilbur B. Brookover, having been first duly sworn, assumed the stand and testified as follows:

Direct Examination.

By Mr. Greenberg:

Q. Mr. Brookover, will you please state your full name.

A. Wilbur B. Brookover.

Q. What is your occupation?

A. I am a social psychologist by profession. The position I now hold is professor of social science, sociology, at Michigan State College.

Q. What degrees do you hold, Mr. Brookover?

A. I hold an A.B. Degree from Manchester College, a Master of Arts Degree and a Doctor of Philosophy Degree in sociology and psychology from the University of Wisconsin.

Q. Are you a member of any learned societies, Doctor?

[fol. 264] A. I am a member of the American Sociological Society, Society for Applied Anthropology, Society for the Psychological study of Social Issues, the High Valley

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Sociological Society, Michigan Academy of Science, the American Association for the Advancement of Science.

Q. What is your field of special interest, Dr. Brookover?

A. I am particularly concerned in my teaching and research in the field of social psychology with particular reference to the human relations in the school society, or the school as a social institution and in relations between minority groups and majority groups in society.

Q. Are you the author of any books or publications?

A. I am the author of several articles on various topics concerned with social relations between teachers and pupils and other aspects of social factors in education. I am also the author of articles concerned with relation of these social factors to teaching—to pupil achievement. I have published articles on the impact of social stratafication on education, one that is in press at the present time to appear in the Journal of Educational Theory. I am also the author of articles concerning social factors in relation to citizenship education, an article to appear in the 1951 yearbook of the National Council of Social Studies, now in press. I have in preparation a book to be published by the American Book company that will be entitled "The Sociology of [fol. 265] Education." I am a joint author of a book now in preparation; it's a monograph which will report research which—committee of which I was chairman conducted on minority groups in Maple County, which is a midwestern community.

Q. Other than what you have stated, have you devoted any special study to the problem of the effect of racial segregation on the individual?

A. Well, the monograph which I last mentioned grows out of a rather extended project still in process on the analysis of minority group relations in midwestern society. I have inaugurated at the present time, designed a study to analyze the dynamics of prejudices among youth.

Mr. Goodell: I didn't get that.

The Witness: The dynamics of prejudices among youth in a midwestern school community.

Q. Now, Dr. Brookover, I am going to ask you a hypothetical question which I would like to have you answer

on the basis of your learning. Assume that in the City of Topeka there is maintained a racially segregated school system. Would you say that the negro child who attends the racially segregated school receives the same benefits as he would receive from attending a racial integrated school, if all other factors were equal?

A. No, I would not.

[fol. 266] Q. On what do you base your opinion?

A. Well, I would say, first of all, that I would want to emphasize the nature of the educational process in this respect: Education is a process of teaching youth to behave in those ways that society thinks is essential. In our society it has long been held that this is a necessary function, to prepare democratic citizens. Now, the child acquires these essential behavior patterns in association with other people. In other words, they are not fixed; they are not inherent in the behavior of the child, but they are acquired in a social situation. Now, in order to acquire the types of behavior that any society may expect and to learn how to behave in various situations, the child must be provided an opportunity to interact with and understand what kinds of behavior are desired, expected, in all kinds of situations. This is achieved only if the child has presented to him clearly defined models.

Q. What do you mean by models, Professor?

A. Examples, illustrations of behavior; persons behaving in the ways that are—that the child is expected to behave and also consistent behavior of this sort. In other words, of an example, one kind of a model, and another time he is expected to behave if at one time he is presented one kind of an example, one kind of model, and another time he is [fol. 267] presented another kind of a model, and there is a constant confusion. Now that, I think, leads us immediately to the situation with regard to segregated schools. In American society we consistently present to the child a model of democratic equality of opportunity. We teach him the principles of equality; we teach him what kind of ideals we have in American society and set this model of behavior before him and expect him to internalize, to take on, this model, to believe it, to understand it. At the same time, in a segregated school situation he is pre-

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sented a contradictory or inharmonious model. He is presented a school situation in which it is obvious that he is a subordinate, inferior kind of a citizen. He is not presented a model of equality and equal opportunity and basis of operating in terms of his own individual rights and privileges. Now, this conflict of models always creates confusion, insecurity, and difficulty for the child who can not internalize a clearly defined and clearly accepted definition of his role, so he is faced with situations which he doesn't—he has two or three, at least two in this situation, definitions of how he is expected to behave. This frustration that results may result in a delinquent behavior or otherwise criminal or socially abnormal behavior. Now the negro child is constantly presented with this dual definition of his role as a citizen and the segregated schools perpet- [fol. 268] uates this conflict in expectancies, condemns the negro child to an ineffective role as a citizen and member of society.

Q. Dr. Brookover, this opinion and the reasons you have just given, are they supported by scientific authority?

A. Yes, there is extensive work been done by psychologists, social psychologists, on the whole theory of role-taking and the question of eternization of patterns of expectancy, such people as George Herbert Meade, Charles Horton Cooley and numerous other people have done extensive work, extensive research in the processes of personality development and learning a situation through social interaction.

Mr. Greenberg: That is all.

Cross-examination.

By Mr. Goodell:

Q. Doctor, I will just ask you one question: Have you ever heard of these people, all negroes: Mary McLeod Bethune of Sumter, South Carolina, who is president of the college there, Bethune-Cookman College, Daytona Beach, Florida.

A. I have heard of someone by the name of Bethune. I am not sure that I know.

Q. Richard Wright, Greenwood, Mississippi and Jackson, Mississippi, author of Native Son, negro.

A. I have.

[fol. 269] Q. Charles Johnson of Bristol, Virginia.

A. Charles Johnson, that I know.

Q. Sociologist and president of Fisk University.

A. I think that is in Tennessee.

Q. Perhaps so. Walter White, of Atlanta, Georgia, Executive Secretary of National Association for the Advancement of Colored People.

A. I have heard of him; don't know him.

Q. George Washington Carver, Neosho, Missouri, residence.

A. I have heard of him.

Q. Langston Hughes, poet and author; I believe from Kansas.

A. I have heard of him; don't know him.

Q. W. E. B. DuBois who was an author, I believe connected with Fisk University at Nashville.

A. I know a DuBois who is an anthropologist. I don't know if this is the one.

Q. Mordecai Johnson, Paris, Tennessee, president of Howard University, Washington, D. C., negro university.

A. I know the name; I don't know him at all.

Q. William Grant Still, a composer of Little Rock, Arkansas.

A. Don't know him.

Q. Negro. A. Philip Randolph, Florida, president of the Sleeping—strike that. Charles Wesley of Baltimore, Maryland, president of the university in Ohio; I don't have the town.

[fol. 270] A. I don't know him.

Q. Frederick Patterson, president of Tuskegee Institute, Washington, D. C.

A. I don't know him.

Q. Some of these men you know. Assuming they were all educated—got their preliminary education in segregated schools, a large part of them in the south, would you—did you consider that in arriving at your opinion here?

A. Certainly did. The fact that occasionally a person is able to overcome, through various readjustments and other

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experiences, the conflict of roles, the conflict of models, does not disturb the generalization which I make, in the least. Certainly there are individual cases which either through psychotherapy or other experiences, the individual is able to overcome such difficulties. But this is not the general case at all.

Q. Well, there are many illustrations of emotional stress and strain among the white children who go to school and don't get—get sort of left out, don't make the football team or the basketball team or don't get invited to the parties, isn't that right?

A. Sure, there are differences in ability to adjust and there are emotional disturbances. The differences which you cite are not enforced differences. They are not inevitable in terms of the situation in which they come—in which [fol. 271] they operate. The child is not by fiat or legalization required to have presented to him this conflict.

Q. That is your opinion about what the law ought to be, in other words, is that it?

A. I would say on the basis of my testimony that the segregation of schools presents a conflicting set of models inevitably.

Q. This opinion you have given here is largely your own personal view based upon your study.

A. No, I wouldn't say it's my own personal view at all. I would say it's the result of a tremendous amount of research and evidence.

Q. I said study.

A. That is accumulated by social psychologists over a period of years and as I have studied and analyzed this research, I would come to this conclusion.

Q. You think you could be wrong?

A. Of course any scientist always presents the possibility or recognizes the possibility that new evidence and new research may modify to some extent the conclusions of a particular time.

Mr. Goodell: That is all.

(Witness excused.)

[fol. 272] LOUISA HOLT, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Mrs. Holt, what is you occupation?

A. I am a social psychologist.

Q. Would you indicate to the Court what your educational background is.

A. I received the Bachelor's Degree, Master's Degree and Ph.D. all from Radcliffe College, which is the feminine adjunct of Harvard University. This was in the field of sociology in the Department of Social Relations there, which includes cultural anthropology, clinical psychology, social psychology, as well as sociology.

Q. Mrs. Holt, would you also describe your various job experiences.

A. Well, I started under an arrangement which gave me a kind of internship in public administration where I worked in the Federal Bureau of Prisons.

Q. Where was this?

A. For six months in Alderson, West Virginia; for about nine months in Washington. Following that, I had a year of graduate study concurrent with work in a settlement house in Boston, South End House, and then was appointed an instructor in sociology at Skidmore College and also [fol. 273] director of a college community center in Saratoga Springs. I was then returned to Radcliffe College where I was appointed a teaching fellow and tutor in sociology. Concurrently with that, I held a Sigmund Freud Memorial Fellowship at the Boston Psychoanalytic Institute in 1944 and 1945. Following these other jobs, I participated in some research work for the Family Society of Boston in connection with their vocational counseling service. I was then an educational counselor for the National Institute of Public Affairs in Washington. From 1947 to 1949 I held a part-time appointment in the Menninger Foundation School of Psychiatry and for part of that time in their school of clinical psychology affiliated with the University of Kansas.

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Q. That is located in this city.

A. What's that?

A. Is that in Topeka?

A. Yes. In the interim, there was a post-doctorate research fellowship of the National Institute of Mental Health. This past year I have been on the faculty of the University of Kansas in the Psychology Department, teaching courses in social psychology and personality and some of their inter-relations. At the same time I also prepared a long paper for a United States Public Health Service project in connection with the Mid-Century Whitehouse Conference [fol. 274] on Children and Youth dealing with the problems, the methodology of evaluating mental health programs.

Q. What is your major field of interests, Mrs. Holt?

A. It's probably clear that I am interested in the relations between social process and social conditions and personality functioning behavior.

Q. Are you a member of any professional societies?

A. The American Sociological Society, the Society for Applied Anthropology, Society for the Psychological Study of Social Issues, the American Society for Group Psychotherapy and Psychodrama, and I am an associate member of the Topeka Psychoanalytic Society.

Q. Mrs. Holt, are you at all familiar with the school system in Topeka?

A. Yes; I have one child who entered that system this last year and another who enters next September.

Q. You are then aware of the fact that the schools are operated on a segregated basis.

A. I am.

Q. Based upon your experience and your knowledge, taking the segregated factor alone in the school system in Topeka, in your opinion does enforced legal separation have any adverse effect upon the personality development of the negro child?

[fol. 275] A. The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which inevitably is interpreted both by white people and by negroes as denoting the inferiority of the negro group. Were it not for the sense that one group

is inferior to the other, there would be no basis, and I am not granting that this is a rational basis, for such segregation.

Q. Well, does this interference have any effect, in your opinion, on the learning process?

A. A sense of inferiority must always affect one's motivation for learning since it affects the feeling one has of one's self as a person, as a personality or a self or an ego identity, as Eric Erickson has recently expressed it. That sense of ego identity is built up on the basis of attitudes that are expressed toward a person by others who are important. First the parents and then teachers, other people in the community, whether they are older or one's own peers. It is other peoples reactions to one's self which most basically affects the conception of one's self that one has. If these attitudes that are reflected back and then internalized or projected, are unfavorable ones, then one develops a sense of one's self as an inferior being. That may not be deleterious necessarily from the standpoint of [fol. 276] educational motivation. I believe in some cases it can lead to stronger motivation to achieve well in academic pursuits, to strive to disprove to the world that one is inferior since the world feels that one is inferior. In other cases, of course, the reaction may be the opposite and apathetic acceptance, fatalistic submission to the feeling others have expressed that one is inferior and therefore any efforts to prove otherwise would be doomed to failure.

Q. Now these difficulties that you have described, whether they give a feeling of inferiority which you were motivated to attempt to disprove to the world by doing more or whether they give you a feeling of inferiority and therefore cause you to do less, would you say that the difficulties which segregation causes in the public school system interfere with a well—development of a well-rounded personality?

A. I think the maximum or maximal development of any personality can only be based on the potentialities which that individual himself possesses. Of course they are affected for good or ill by the attitudes, opinions, feelings, which are expressed by others and which may be fossilized into laws. On the other hand, these can be overcome in

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exceptional cases. The instances I cited of those whose motivation to succeed in academic competition is heightened [fol. 277] may very well not be fulfilling their own most basic, most appropriate potentialities but seeking, rather, to tilt against windmills, to disprove something which there was no valid reason, in my opinion, to think was so anyhow, namely, the feeling of their inferiority. So even when educational success is achieved that still may not denote the most self-realization of the person. I feel, if I may add another word, I feel that when segregation exists, it's not something—although it may seem to be such—that is directed against people for what they are. It is directed against them on the basis of who their parents are, since that is the definition which, according to sociologists and social psychologists analysis of the matter, that is used in determining who shall go to a segregated school, a negro school or a white school; it is not simply skin color. In the case of Walter White, for example, and sociologist Allison Davis, his brother, John Davis, who are negroes, their skin color is lighter than mine; of course, I have been out in the sun—the definition does depend upon who a person's parents were. That appears also if a dark-skinned person had parents who were high potentates in India he is not defined as a negro; therefore he is not required to use segregated facilities. It is not the skin color; it is who the parents were, and my understanding and various sociolo- [fol. 278] gists and psychologists analysis of the American tradition, religious tradition as well as set of values and ethos, determining much of our most valued and significant behavior, hinges upon a belief in treating people upon their own merits and we are inclined to oppose a view which states that we should respect people or reject them on the basis of who their parents were.

Q. Now, Mrs. Holt, you are aware of the fact that segregation is practiced in Topeka only for the first six grades. Thereafter, the child goes to high school and junior high school apparently without regard to race or color. You have described difficulties and interferences with the personality development which occurs by virtue of segregation at the first six grades. Is the integration of the child at the

junior high school level, does that correct these difficulties which you have just spoken of, in your opinion?

A. I think it's a theory that would be accepted by virtually all students of personality development that the earlier a significant event occurs in the life of an individual the more lasting, the more far-reaching and deeper the effects of that incident, that trauma, will be; the more—the earlier an event occurs, the more difficult it is later on to eradicate those effects.

[fol. 279] Q. Your opinion would be that it would be more difficult to eradicate those effects at the junior high school level, is that it; merely because you integrate them at the junior high school level——

A. Well, once a trauma has occurred, and I do believe that attending a segregated school, perhaps after the preschool years of free play with others of different skin color, is a trauma to the negro child; that occurs early. There is also evidence emerging from a study now going on at Harvard University that the later achievement of individuals in their adult occupational careers can be predicted at the first grade. If that is true, it means that the important effects of schooling in relation to later achievement are set down at that early age, and I therefore don't think that simply removing segregation at a somewhat later grade could possibly undue those effects.

Cross-examination:

By Mr. Goodell:

Q. You mean, Mrs. Holt, there is a serious study being made now to project in the future whether a child in the first grade is going to be a flop or a success?

A. I do.

Q. You have confidence in that, do you?

A. That study is being directed by Professor Tawkett [fol. 280] Parsons, the head of the Department of Social Relations.

Q. You have a good deal of confidence in that?

A. I certainly do.

Q. You made a comment in your testimony I would like

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to call your attention to again; this segregation in some cases would spur, act as a whiplash, on the child to spur him on and make him achieve, and that would be a bad thing.

A. Yes.

Q. You mean it's a bad thing, for example, for a poor boy, because he is poor, the whiplash of poverty makes him work harder to rise higher; that is a bad thing?

A. I mean that that can be at the expense of healthy personality development, self-actualization, self-realization of the most basic fundamental and appropriate kind for that person, and we have plenty of evidence of people who burn themselves out with various emotional or perhaps psychosomatic diseases in whose cases that can be attributed to this overweening striving for competitive success to overcome feelings of inferiority.

Q. Mrs. Holt, more or less educational process has in it competitive features, that is, the children are given tests and examinations and gradecards and the ones that don't make good grades, they get poor grades; at least the teacher gives them their merit grade. You don't believe [fol. 281] in that, do you?

A. I believe in the children being appraised on the basis of their own objective achievement.

Q. You don't believe, then, in any sort of competition in the public school system, do you?

A. I believe competition has its values.

Q. Do you believe in that in the way it's carried on and have competitive examinations and gradecarding and things of that kind?

A. I don't know how else one can operate a society in which individuals are judged primarily on their own merits rather than through connections of who their parents were or who they know which are the alternatives to that system.

Q. Progressive education, that is one of the elements that they believe which has been set up in California and other areas, to abolish all grading, abolish all examinations, let every child go to school and never have to worry about what his grades are; never know what they are, isn't that right?

A. I think a child needs some definiteness in the expectations which the authorities over him, the teachers, have in order to stimulate him to his own maximal productiveness. I think also competition with his peers, if not carried to excessive limits, if not *if not* undue emphasis is placed on it, can also have very beneficial effects.

[fol. 282] Q. These are your personal views you have been giving here largely.

A. They are based on a fair amount of acquaintance with scientific work in this field.

Mr. Goodell: That is all.

If the Court please, at the outset the Court mentioned—I don't care to be objecting about it, but the Court, I thought, suggested a limit on this line of testimony.

Judge Mellott: That is about nine now that we have had on this phase. How many more are there?

Mr. Greenberg: Pardon me, sir, I didn't hear you.

Judge Mellott: You have had several now of the so-called expert testimony; how many will there be?

Mr. Greenberg: We have three or four more, Your Honor, and they are all different.

Judge Huxman: Well, now, we are not disposed to be critical, but it's my opinion from having listened to this testimony, the last four witnesses—that it's all cumulative. I can see no difference, substantial difference, between any of the testimony of the last three or four witnesses. It's fifteen minutes until adjournment time. We are going to have to adjourn this evening at 4:30 on account of a com-[fol. 283] mitment I have. We can, perhaps, finish one more witness in that time. Then I suggest that you gentlemen tonight really appraise your witnesses and appraise this evidence, see whether my statement is warranted that this evidence we are now receiving is all substantially the same and, unless there is more difference in the testimony that you have, we might well have the qualifications of the remaining witnesses read into the record and have a stipulation that their testimony as to the effect of segregation itself upon the mental attitude upon the outlook and life of the student is substantially as testified to by these witnesses. I am just simply suggesting that, saying not that

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we will enforce that rule in the morning, but it was understood that about five witnesses would be allowed, and then we would examine the subject, and we are reaching that point, so suppose you call your next witness; that will take us to adjournment time.

JOHN J. KANE, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Greenberg:

Q. What is your full name?

A. John J. Kane.

[fol. 284] Q. What is your occupation?

A. I am an instructor in Sociology at the University of Notre Dame.

Q. What is your educational background?

A. I have a Bachelor of Arts Degree from St. Joseph's College, a Master of Arts Degree in sociology from Temple University, a Doctor of Philosophy Degree in Sociology from the University of Pennsylvania.

Q. What positions have you held?

A. I was an instructor in sociology at St. Joseph's College about two and a half or three years. I have been instructor in Sociology at the University of Notre Dame for three years.

Q. Have you devoted yourself for any of your professional attention to the field of the impact of racial segregation on the individual?

A. I have done two studies in the general field of prejudices, racial—my major interest in the graduate school was in the field of race relations and ethnic relations.

Q. Mr. Kane, on the basis of your educational experience and your studies, I want you to answer the following hypothetical question: Assume that in the City of Topeka there is maintained a racially segregated school system and that a negro child is compelled to attend a racially segregated school because of his race alone; that if this [fol. 285] system did not exist, he would attend a racially

integrated school, would you say that if all other factors are equal, that he obtains the same educational opportunities at the former school as at the latter?

A. No, I would not.

Q. Now, would you give us the basis for your opinion, Mr. Kane.

A. I would begin with two points: The first one is that the school, with the exception of the home, is the institution that makes the greatest impact on American youth. You see, the school gets the child early in life, keeps him for a number of years, so that day after day, year after year it is transferring attitudes for him. Now, we have some scientific evidence about the effectiveness of the accumulation of materials in this area. For instance, Professor Thurston's work on changing attitudes through motion pictures shows that when one picture was shown to a group of youngsters it had relatively little influence in changing attitudes; two had a little more, but if he worked in series of three, he discovered cumulative evidence was very powerful in changing attitudes. What I am mentioning this for is the fact that the influence of the segregated school, when a negro child day after day, year after year, does have this cumulative effect. Secondly, I would like to point out that one of the things children get out of education besides cer-
[fol. 286] tain manual skills, spelling, arithmetic and science, is above all, the formation of attitudes. This is what lasts; this is what continues after the school years, and therefore the attitude they get in the particular schools is of great significance. Now, in a school system in which racial segregation is practiced, you have a day after day accumulation of attitudes that the negro child is inferior because segregation is differentiation and distinction. It means, as Professor Newcomb has pointed out, that one group denies to another group, status, privilege and power and so it is borne in upon a negro boy and girl that they are being differentiated not merely because of skin color or physical characteristics, but because there is something inately inferior or subordinate about them and so most of them begin to learn that certain avenues of vertical mobility are closed to them.

Q. What do you mean by vertical mobility?

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A. I mean the opportunity of advancing in the world, moving ahead, having a better job than your father had, more social position, and I would point out to you that this concept is fundamental to the American system of values. This is one of the things that we Americans believe in very intensively, and it is something which is denied to negro children. Furthermore, the philosophy of racial segrega- [fol. 287] gation is supported by rationalizations on the racial myth of inferiority for which we have no adequate scientific evidence. Secondly, segregation cuts down on the communication among people. It erects a barrier. Now, certain barriers will exist whether you have a segregation enforced by law or not, but here's a case where barriers are created and upheld by law. The total effect is to make most of your negro children feel inferior, and I would like to refer to a study that was made by Preston with regard to projected scores on tests. A number of white boys were asked to put down the score they expected to get on a certain test and, when they put down the score, they were told that negro youths had made a higher score. The white boys were allowed to change, and they immediately changed their scores above the negro score. Negro youths were told they were about to take a test and were asked to put down the expected score and, when they put it down, they were told this was higher than the white boys made, and they were asked if they wanted to change it, and they lowered their scores below that of the white group. This is indicative of the expectation of behavior which is engendered in a segregated school among most of your colored students.

Q. Dr. Kane, you mentioned a study that you made.

A. Well——

[fol. 288] Q. —in this field. Could you tell us whether or not that study supports the conclusion which you just stated and describe the study.

A. I studied groups of negro boys, gangs, in West Philadelphia. I think it could be used.

Q. Will you describe what you did in this study.

A. We discovered in this particular area there was a system of social stratafication among negroes. The area

was roughly split into two sections, one in which the negroes called the "Tops" and the other which they called the "Bottoms." In the "Tops" you had a high degree of homeownership, negro males there, the fathers had better occupations, larger income and a fairly stable family. The "Bottoms" area you never had any area in which as many as 6% of the negroes owned their homes. You had a relatively unstable family; for the most part they were employed in menial jobs. Now you would think that the "Bottoms" area, as a group, represented the lowest level of negro society, but these negroes themselves made a distinction, and they would point out that there was still a lower group than this, and that was the negro from the south and, if you asked them, they said because of segregated education. Now, I want to point out, whether or not that was true, is quite beside the point because, as W. I. Thomas indicated long ago, if men define situations as [fol. 289] real, they are real in their consequences and this is the attitude the negro group itself held, and, of course, this is the way we form attitudes about ourselves; not only what we think, but what we know or believe other people think about us. So, here again, you have an indication of the inferiority that was engendered because of the segregated school system amongst the immigrants from the south.

Mr. Greenberg: That is all.

Cross-examination.

By Mr. Goodell:

Q. Professor, don't you believe a home which has the child, say the first five years without any—where the school doesn't have him at all, in any case whether he is negro or white, don't you think the child has a great deal to do with attitudes, it's race and towards another race and acceptance, and so forth.

A. You are perfectly correct. As a matter of fact, the home is much more important than the school, if it's an adequate home. Now, I should like to point out, if I may——

Q. That answers my question.

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Judge Huxman: You may go ahead and give your explanation. This is an expert witness.

The Witness: I should like to point out that when the home facilities are inadequate, as they are in so many [fol. 290] cases of your poor negro family, then the school becomes increasingly important and, in those cases probably, more important than the home since it is exercising little influence.

Mr. Goodell: I have no further questions.

Judge Huxman: It is now five minutes of adjournment time, and we perhaps could not finish another witness, and I just have an appointment I must keep. So we will suspend at this time.

The court will be in recess until tomorrow morning promptly at 9:30.

(The court then, at 4:25 o'clock p. m., adjourned until 9:30 o'clock a. m., the following day, Tuesday, June 26, 1951.)

[fol. 291] Tuesday, June 26, 1951

(Pursuant to adjournment as aforesaid, the court met, present and presiding as before, and the following proceedings were had:)

Judge Huxman: You may proceed, gentlemen.

Let me inquire of the attorney for plaintiff, how many more of these expert witnesses do you have?

Mr. Carter: Your Honor, we at the present time—we only have one more expert witness to put on.

Judge Huxman: Just one more expert witness.

Do you have any testimony after that or will that conclude your case?

Mr. Carter: We have subpoenaed a number of witnesses, Your Honor, and we are contemplating calling only one other witness to establish one point.

Judge Huxman: All right, you may put on this other witness, expert witness.

BETTIE BELK, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Carter:

Q. Miss Belk, what is your occupation?

A. At the present time I am on the staff of the Workshop in Human Relations at the University of Kansas City, Missouri.

[fol. 292] Q. What is your educational background?

A. I have my Bachelor's Degree from State Teachers College in Worcester, Massachusetts, my Master's Degree from Clark University in Worcester, Massachusetts, and, at the present time, I am working on my Ph.D. in Human Development at the University of Chicago.

Q. Miss Belk, what other than your present employment at the University of Kansas City—what other job experience have you had?

A. I have taught junior and senior high school in Indiana for two years; for ten years I was employed by the Y. W. C. A., first as director of the teen age program in Trenton, New Jersey, and for five years as a member of the national staff as a consultant on the teen age program. In that capacity I did work in the midwest; Kansas was one of the twelve states in the area that I served, and I have worked with the local organization here on their problems of teen age program. At the university I have been employed as a research assistant in the study of developmental tasks of adolescents and, during the past year, I have been on the staff of the Center for Inter-Group Education.

Q. Have you published any books or articles on the problems of adolescents?

A. Yes, for the Y. W. C. A. I published several articles on teen age problems and a pamphlet designed for train-

[fol. 293] ing adult leaders to work with teen agers.

Q. Do you belong to any professional societies?

A. Yes. I am a member of the National Association of Group Workers.

Q. What is your field of major interests?

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A. Well, my recent experience has been in training adults to work with groups, and I am particularly interested in this aspect of human development. My work at the present time is in the training of adult leadership for this kind of job.

Q. That is the training of an adult—of adults to work with adolescents and so forth?

A. Yes.

Q. Now, assume, Miss Belk, that the City of Topeka has organized its public school system so that a child enters the first grade at approximately the age of six; goes through the elementary schools, six grades; he would be entering a junior high school at approximately the age of twelve. Assume that for the first six grades the schools in Topeka are maintained on a segregated basis. Thereafter, the junior high schools and high schools, the schools are integrated. Based upon your experience and your knowledge, would you give an opinion as to whether or not it would be harmful—it would have any adverse effect on the child at that stage of his development to move from a segregated educational [fol. 294] pattern into an integrated pattern?

A. I would say that by bringing children together for the first time at this age, the Board of Education is working a real hardship on both the negro and white children, and I would like to explain why, if I may.

Q. Please do so.

A. I think that it is a well established fact that the years just preceding age 12, the years 10 to 12, roughly, for girls and 11 to 13 for boys, are the years during which the important physical and physiological changes take place. The child at age 12 is trying to integrate two to five inches of standing height that he had acquired very rapidly. He is also trying to integrate very important physiological changes. In our society, girls reach puberty at about twelve and a half and boys at about thirteen and a half, and they are adjusting to really a new kind of body for them because of the changes which have taken place. There are social changes that take place also at this age; changes take place within the school system itself. Up until this point the child has been accustomed to a school situation in which he has related to one adult. Now he moves into what we

call a departmentalized pattern. He has several teachers; he moves from one classroom to another. In other words, he has a pattern of relationship with many important adults in the school system. Also, at this age the child moves [fol. 295] from a peer society which has been largely made up of members of the same sex, into a heterosexual society. The seventh grade is a crucial one for girls, particularly, because they become interested in boys before boys become interested in them, and this is a very difficult time for them to live through. All in all, these are the years when children are making some of their most important life adjustments, and I would say that having been brought up in a separate system where they can only learn that negroes and white are different, they must at this age then make an adjustment to living with someone that they have learned is different, and I think that this puts an additional adjustment on them at an age when it is very difficult for them to make it.

Cross-examination.

By Mr. Goodell:

Q. Is it Miss or Mrs. Belk?

A. It's Miss Belk.

Q. Are you familiar with the City of Topeka and the customs and usages with respect to inter-racial matters?

A. I have visited the City of Topeka as a consultant for the Y. W. C. A., yes.

Q. Do you realize that for half a century, to some degree, there has been segregation practiced in the business world and in the social strata of this community?

A. I believe that I have heard that there is segregation in [fol. 296] *in* the community, yes.

Q. Without regard to the merits, if that is a fact, assuming—strike that—that there is segregation practiced in the ordinary workday life of the community in the business world and in the social strata as of our two races here, negro and the white, and assuming further for the purpose of this question that there were no segregation in the first six grades of our public school system, and the negro children were absorbed in the present existing white schools,

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where they were outnumbered twenty-five to fifty to one and, in some cases, more than that, would you reform your opinion any, taking that into account?

A. No, I would not.

Q. Do you know what the natural tendencies are in a practical world? Would it be customary, where children come from homes—living in a community where segregation is practiced other than in the schools, for those same white children to carry on that same custom and usage in their relations with the race—with the opposite race—the negro.

A. I don't understand your question.

Q. Well, assuming that segregation, as I have just stated, as practiced in this community in Topeka, in the city, outside of the school, and that is a fact, children coming from homes in this community, isn't it very natural that they [fol. 297] would simply carry on that custom and usage in their relations with other negro students of the opposite race?

A. Well, I think our recent studies have shown that children, adolescents particularly, take most of their social pattern from their peers rather than their parents; in fact, it's one of the real problems in our American society today that this is true.

Q. Who are the children, what do you mean by that, that the negro children they would look upon as their peers and therefore they would follow them; what do you mean?

A. I mean that all adolescent children take most of their social patterns from people their own age; they tend to see each other as authorities. It's an age at which they break away completely from parental authority, in fact to the extent that it becomes a difficult problem in home-life, so it is not always the patterns of the parents that they are repeating; in fact, during this time they are forming their own values.

Q. I don't know as I understand it. You consider another child, that a child will look upon another white child as his peer, is that what you are getting at?

A. Yes.

Q. What is there about another child of the same age that would make him a peer as to another child?

A. This is one of the phenomena of development. The child must, in his growing up process, ultimately break [fol. 298] away from the home. Now adolescents in our society are treated at one moment as though they were children and the parents are very authoritarian with them and at another moment they are expected to behave like adults and, consequently, most of them are in some state of confusion as to what their status really is. But they are moving always toward adulthood, toward establishing their own values and, for this reason, they take more of their pattern—you can see it even in their dress. I don't know if you have any adolescent children of your own, but if you do you know they dress alike, they act alike, they talk alike. They get their values largely from each other at this age.

Q. Assuming for the purpose of this question, though, that segregation was abolished and the negro child was absorbed in the white school system and, for illustration, he was outnumbered in the particular school system on the average of thirty to one or twenty to one or any figure of that proportion; taking into account the natural factors of every-day life and the practicabilities of the situation, wouldn't that result in and of itself of him being a very small minority group and being left out of activities and the run of things, the negro child.

A. I do not think that that is necessarily true. In fact, in my own experience I have seen it not to be true.

[fol. 299] Q. Well, isn't that true within the white structure, that some children run things and others tag along; some are leaders and others aren't?

A. This is an individual matter. It is quite true.

Q. And to that extent where you have children that do run things, elected class officers and in all activities, make the teams and so forth, and in their own group, and in the other children that doesn't—aren't given recognition in that sense, that child—this philosophy of yours, this theory of yours, is made to feel second-class and left out of things, isn't that right, of his own group.

A. Of his own group, yes, and most of us who work in

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inter-group relations nowadays see this as a total thing. There is no longer any stress on negro-white relations; it's on inter-group relations.

Q. I mean without regard to the racial factor, you have that situation in any organized society, don't you; some people get along better than others, run things, are leaders; others tagging along and are not leaders.

A. This is true and our problem is to work so that everybody has a niche into which he fits.

Q. How would you eliminate that aspect of life in a school system where some children are not the leaders and don't run the show and are sort of left out, so they don't have an inferiority feeling that they are second-
[fol. 300] class? How would you get rid of that?

A. As a matter of fact we have been doing some work on that at the center for inter-group education. Our work deals with schools. Well, for example, in one school children said you are separated here according to whether or not you belong to the cashmere sweater set, so this became the problem that we worked on. The way that we usually do it is sitting down with young people themselves and talking about why people do exclude other people and why this is important to them and what are the values in learning to live with people who are different from you and being able to accept them.

Q. Well, without regard to your—adoption of your theories and your opinion here in the school system, you are still going to have that problem considering the practicalities of the situation.

A. The problem of rejection and acceptance is one that will be with all of us all through life.

Q. Surely. Isn't it awfully difficult for you to have the experience of a negro child so that you could expertly say what he feels, a first grader and a third grader, and so forth, how he feels about anything.

A. Is it difficult for me?

Q. Certainly, to put your mind—I mean to—for you to assume the feelings of a negro child that is in these elemen-
[fol. 301] tary grades? How do you do that?

A. It is difficult for me really to understand the experiences of anyone else, but this is part of my job.

Q. Well, I grant all that, but how do you do it; how can you tell what I feel and react and my reactions, and so forth, to a set of facts or my social relations.

A. How do I actually do it?

Q. How do you tell it, yes.

A. Well, I try to put myself in the other person's place.

Q. Well, I know that, but I mean is it like a mathematical problem that we have got in algebra so that you can add it up and prove it.

A. We do have techniques for doing this sort of thing and the technique is known as role-playing, and I would be glad to describe it to you.

Q. If some of your assumptions are wrong, then your whole conclusions you reach are wrong too, aren't they; isn't that right? That's all.

A. Well——

(Witness excused.)

Mr. Carter: We were going to call our next witness, Mrs. Dorothy Crawford, but I don't believe she is here, and so we will rest.

Judge Huxman: You will rest.

Mr. Carter: Yes, sir.

[fol. 302] Judge Huxman: Plaintiff rests.

Mr. Goodell: If the Court please, I would like to be given about ten minutes. There were some members of the school system I couldn't reach last night and, because you started at 9:30, I couldn't get hold of them in time. I won't take over ten minutes.

Judge Huxman: That was too early for the school members to be out?

Mr. Goodell: No, I couldn't get in touch with them.

Judge Huxman: You want a ten-minute recess?

Mr. Goodell: If it isn't imposing, yes.

Judge Huxman: Court will be in recess.

(The court then, at 9:45 o'clock a. m., stood at recess until 9:55 o'clock a. m., at which time the following proceedings were had:)

Mr. Goodell: Does the Court want all my witnesses sworn at one time?

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Judge Huxman: We will follow the same procedure.

Mr. John Scott: If the Court please, we have a witness that just arrived, and we would like to put her on; just a short witness.

Judge Huxman: All right.

Mr. John Scott: And we would also like to invoke Rule [fol. 303] 43(b), that is, on hostile witnesses. This witness will testify pertaining to transportation, and she also has a financial interest in it and, therefore, we would like to invoke that rule.

Mr. Goodell: Who is the witness?

Mr. John Scott: Mrs. Dorothy Crawford.

Judge Huxman: The hostile witness rule is rather a flexible rule, and it depends upon whether the witness shows any hostility, so suppose you proceed in the regular way of examination, and we will then be guided by what follows.

Mr. John Scott: All right.

Dorothy Crawford, having been first duly sworn, assumed the stand and testified as follows:

Direct Examination.

By Mr. John Scott:

Q. State your name to the Court, please.

A. Mrs. Dorothy Crawford.

Q. Where do you live?

A. 835 Clay.

Q. Here in the City of Topeka?

A. Topeka.

Q. Defendants' Exhibit "B"(1) that has been admitted into evidence indicates that you are engaged in the pro- [fol. 304] fession of teaching, is that correct?

A. That's right.

Q. And you also teach at Buchanan School.

A. That's right.

Q. And you also teach the first and part of the second grade, is that right?

A. That's right.

Q. And also Defendants' Exhibit "D" states that you receive $272.19 for transportation, is that correct?

A. I don't remember the exact amount.

Q. I want you to explain to the Court, if anybody, that you transport, what persons and of what grades that you transport.

Mr. Goodell: We object to that as incompetent, irrelevant and immaterial; don't see the purpose of it.

Judge Hill: What is the purpose of it?

Mr. John Scott: The purpose of this testimony is to show that she transports kindergarten children and she dismisses her grade for the purpose of transporting children, and those children are sent to another classroom during the time that she is conveying these children.

Judge Huxman: You may answer.

(The last preceding question was here read by the re-[fol. 305] porter.)

By Mr. John Scott:

Q. —if any.

A. I do transport kindergarten children after dismissing the first grade at 11:30 and the second grade at 11:45.

Q. Now, when you dismiss your class at 11:30, where does—where do the second-grade children go?

A. I stay in the building and teach the second-grade children until 11:45. I do not dismiss the second grade until 11:45.

Q. Now, Mrs. Crawford, you say you transport the children at 11:30, is that correct?

A. No, I did not say that. I said that I transport the children after dismissing the first grade at 11:30 and the second grade at 11:45. I do not leave the building until after I dismiss the second grade at 11:45.

Q. Isn't it a matter of fact that you take the kindergarten children home at 11:30, and you send the second-grade class into another classroom?

A. No, I do not.

Q. During the time that you have undertaken these duties

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of transporting the kindergarten children, haven't you done that?

A. I have not.

Judge Mellott: Didn't your witness testify it was 11:45 that this transportation began?

[fol. 306] Mr. John Scott: No, 11:30.

Judge Mellott: I don't agree.

Mr. John Scott: I think the testimony yesterday indicated it was 11:30.

Judge Mellott: No, the testimony yesterday was as she has given, after the dismissal of the second class at 11:45 that she transported the children.

Mr. John Scott: I don't think the record shows that, Your Honor.

Judge Mellott: I think it does, but you may proceed.

By Mr. John Scott:

Q. Well, during the year of 1950 and '51 can you state to the Court the approximate number of children that you transported, that is, each day.

A. The number varied according to the attendance, daily attendance, and also according to the transfer of children from one district to another and according to some children going out of town and some coming in town and also some parents on some days elected to come for their children; so it's hard to tell the exact number each day.

Q. Well, use your best judgment, Mrs. Crawford.

Judge Huxman: What's the purpose of this? What are you trying——

Mr. John Scott: It's to ascertain the number of children she transports daily, and I am going to ask her the type [fol. 307] of vehicle she is driving, Your Honor.

Mr. Goodell: If the Court please, this isn't an accounting procedure. Do they claim she's overpaid or what is it?

Mr. John Scott: We are not claiming anything such.

Judge Huxman: You are trying to establish the buses are overcrowded, is that it?

Mr. John Scott: Trying to establish the number of children she's transporting daily and the type of vehicle.

Judge Huxman: What is the purpose of that when you establish it?

Mr. John Scott: The fact that these children are transported under crowded conditions.

Judge Huxman: Well——

By Mr. John Scott:

Q. What type of vehicle do you drive, Mrs. Crawford?
A. I drive a Ford two-door.
Q. What model?
A. A two-door.
Q. Well, I mean——

Mr. Goodell: Year model he means.

By Mr. John Scott:

Q. Year model.
A. 1938.

[fol. 308] Q. Just give your best judgment the number of children that you take in that car each day; is it six, eight, nine, ten or twelve?

A. Well, I take no more than five at a time. When there are more than five children I make two trips.

Q. You make two trips.
A. Yes.

Q. I see. Do you have any special coverage for liability of these children that you carry?

Mr. Goodell: Now, we submit, if the Court please, we object to that as incompetent, irrelevant and immaterial, has no probative force in this case.

Judge Huxman: The objection will be sustained. It is collateral and can't go to any due process, has no bearing on this matter.

Mr. John Scott: I believe that is all.

Cross-examination.

By Mr. Goodell:

Q. Are you neglecting your teaching job by hauling some kids wholly during the noon hour?
A. I am not.

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Mr. Goodell: That is all.

Judge Huxman: Are you through now? Plaintiff rests?

Mr. Carter: Yes.

[fol. 309] Judge Huxman: You may proceed with the defense.

Clarence G. Grimes, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Goodell:

Q. State your name for the record and for the Court.

A. Clarence G. Grimes.

Q. You are commonly known around town here as "Cap" Grimes.

A. That's right.

Q. Were you an officer in World War I?

A. I was.

Q. Have you had for many years the contract with the Topeka Board of Education for the transporting of pupils to the negro schools?

A. Thirty-five years.

Q. Are you familiar then with all the details of the actual carrying out of that mission or the transportation of——

A. I am.

Q. There has been some testimony here offered in the plaintiffs' case to the effect that they had to wait long periods of time at scheduled bus stops. State what the facts are about these buses running on schedule, and so forth.

A. I plan my schedule on clock time to reach the corners at a certain time and, if they are waiting much longer [fol. 310] than what they say here, they are there before the bus is supposed to get there.

Judge Hill: I can't hear the witness.

Judge Mellott: It's difficult to hear you, Mr. Grimes; if you will talk a little louder.

By Mr. Goodell:

Q. Repeat that.

A. I say I run my bus on the scheduled time by the clock and, if there is children at the corners that have to wait any length of time, they are there long before the bus should be able to get there. They know what time the bus is supposed to get to the corner.

Q. There is some testimony here in the case given yesterday relating to scheduled stop where a child or parent, perhaps both, testified they had to go seven blocks down here to get to the bus at First and Quincy. Are you familiar with that?

A. Yes, I am.

Q. Is that correct?

A. No.

Q. What are the facts about it?

A. This child lives four blocks and three houses west of First and Kansas Avenue and the bus sets seventy-five feet east of First and Kansas Avenue.

Q. Were you present in court when the testimony was given about the time of the morning that they left in [fol. 311] order to get to the bus stop?

A. I was.

Q. So that would be thirty minutes to go four blocks.

A. That's right.

Q. Do you have, as a practical matter, do you have instances of colored children, negro children, going farther from their home than a scheduled bus stop in order to get to ride longer?

A. I used to have, but I don't have that anymore.

Q. What—do you know the proximity—some of the children have you pick them up—how far away?

A. I think the longest distance is five blocks.

Q. And the closest?

A. The closest distance, some of them are right by their houses.

Q. How far from school?

A. Oh, some of the Washington children are eight or nine blocks from school when I pick them up.

Q. What are some of the closest you pick up and take?

A. From the school?

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Q. From many of the schools, yes.

A. That is about the distance—Sixth and Chandler is the closest.

Q. Yes. Now there was some testimony given yesterday [fol. 312] to the effect by one parent—I don't have his name—lives out here in the east part of town, around Chandler in that neighborhood—he had his child ride on the city bus because he had observed children leaning out the windows and their arms out the windows, and so forth. How are these buses built?

A. According to the state regulations on buses, school buses, you have to have half windows in your buses and my windows let down from the top, not any farther than that distance, and they can't get their heads out.

Q. It's impossible.

Judge Mellott: Indicating what, six inches?

The Witness: About six inches.

By Mr. Goodell:

Q. Now, do you try to maintain some decorum in those buses so that it's orderly and the children——

A. —the principal to put a patrol on each one of these buses.

Q. You mean the principal of the schools have a school patrol on each bus.

A. That's right.

Q. And they ride the buses, do they?

A. They do.

Mr. Goodell: I believe that is all.

Judge Huxman: You may cross-examine.

[fol. 313] Cross-examination.

By Mr. Carter:

Q. Mr. Grimes, how many buses do you operate?

A. Just one.

Q. And to how many schools do you take children?

A. Two.

Q. I show you this exhibit, would you indicate to me what

the bus schedule you follow on that exhibit—the exhibit is marked "G"——

Judge Mellott: "G"?

Mr. Carter: "G".

The Witness: I follow the Washington and Monroe schedules.

By Mr. Carter:

Q. Now you have looked at this schedule and this is correct?

A. That is the time the bus arrives at certain places.

Q. I note on this schedule which you have indicated is correct that at 8:29 you unload the rest of the group at the Monroe School; that is, your first load is taken to the Monroe School, and you get there 8:29, is that correct?

A. That varies on account of traffic sometimes; sometimes it's after that and sometimes a little before that.

Q. The schedules—the schedule indicates—I think your testimony indicated that you arrived at a certain time per day and that there was no waiting because of the sched- [fol. 314] ule. Now you tell me that here when it says you are supposed to get to the Monroe School at 8:29 you cannot say that is correct because it varies due to the traffic. Now is this or is this not a correct time schedule for your buses?

A. I didn't say I got to the Monroe School at 8:29.

Q. Your schedule says it does.

A. I know, but that is not my schedule.

Judge Huxman: It seems to me—I don't want to restrict the opportunity to present this evidence—but this goes to a very minor matter. In the first place, there is a schedule and, in the second place, I think I would take judicial knowledge that maybe buses sometimes are a little bit late and sometimes children get there a little ahead of time. I doubt if there ever was a bus that ran exactly on the second. I don't want to restrict you in your cross-examination, but I wouldn't pursue that too far.

Mr. Carter: Well, the only reason that I raised it is that the testimony which has been established, attempted to be established by the defendants, is that the schedule is followed and that the bus arrives on time.

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Judge Huxman: Suppose you established that the schedule varied or the bus wasn't always there on time, do you think that would have a weighty bearing on the question [fol. 315] of whether the due process clause of the Fourteenth Amendment was thereby violated. It might be an insignificant——

Mr. Carter: I don't believe it would be crucial.

Judge Huxman: Let's not pursue it too far. This case isn't going to turn on whether this schedule is strictly adhered to or whether there is a variance in it.

Mr. Carter: All right, sir, I will follow your suggestion.

Judge Huxman: In the first place, I think the buses are late. I have never seen a bus yet that wasn't late.

By Mr. Carter:

Q. What is the maximum capacity on your buses?

A. My bus has a seating capacity of thirty-six.

Q. And you indicated that there are monitors on the bus.

A. Yes.

Q. Who are they?

A. I don't know them by name. I don't know hardly any of the children by last names; some of the first names, I believe, the older boys and girls of the different schools.

Q. Is this only on your return from school?

A. No, going to and coming.

Q. Going to and coming.

[fol. 316] A. Yes, sir.

Q. Every day there is a different person.

A. No, it isn't a different person; it's the same child.

Q. You don't know who it is.

A. I know who they are by looking at them. I can't tell you their names because I am not familiar with all their names.

Redirect examination.

By Mr. Goodell:

Q. Mr. Grimes, you mentioned that only Monroe and Washington were the only ones you personally transported.

Do you know how the other schools are handled, who transports them?

A. The Topeka Transportation Company.

Q. The city bus system.

A. The city bus system.

Q. They use their own ordinary equipment.

A. That's right.

Q. They contract that with the Board of Education.

A. That's right.

Mr. Goodell: That's all.

Judge Huxman: Step down.

(Witness excused.)

[fol. 317] THELMA MIFFLIN, having been first duly sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Goodell:

Q. State your name to the Court and for the record.

A. Thelma Mifflin.

Q. What official position do you hold in the city schools?

A. I am the clerk of the Board of Education.

Judge Huxman: I didn't get the answer.

The Witness: I am the clerk of the Board of Education.

By Mr. Goodell:

Q. How long have you been in such administrative capacity?

A. I have been in Topeka in that capacity for nine years; twenty-seven years total in other school systems.

Q. Are the records then that have been furnished the Court here that are exhibits in this case, were they made under your supervision and direction?

A. Yes, sir.

Q. They are true and accurate records?

A. They are.

Q. And reflect correctly the matters which are covered by them?

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A. That's right.

[fol. 318] Q. Did you bring with you this morning at my direction an exhibit or list of the number of colored, negro, students transported?

A. Yes, sir, four copies.

Q. I will hand you what has been marked Defendants' Exhibit "O" and is that a list of the—broken down by schools—of the negro students that are transported in the City of Topeka to the negro schools?

A. That's right.

Q. And it's true and correct?

A. It is.

Mr. Goodell: We offer the same in evidence.

Judge Huxman: What is the exhibit number?

Judge Mellott: "O".

Judge Huxman: Exhibit "O" will be received.

Defendants' Exhibit "O", having been offered and received in evidence, is contained in the case file.

By Mr. Goodell:

Q. Mrs. Mifflin, do you attend all board meetings in your capacity as clerk for the Board of Education?

A. Yes, sir, I do.

Q. You are present then when discussions of policy and administrative policy and the running of the schools comes up for discussion by the board and Dr. McFarland.

[fol. 319] A. Yes, sir.

Q. You are familiar, then, and have been all these years, with that policy.

A. Yes, sir.

Q. Are you familiar then with the actual policy with respect to the operation of the entire school system which includes the eighteen elementary schools and the four negro schools?

A. Yes, sir, I am.

Q. State whether or not you know the policy that has been adopted and carried out by the Board of Education with respect to the negro schools concerning the right of a child, if he so elects or his parents, to attend any one of the four negro schools of his own selection; do you know the policy about that?

A. Yes, it is the policy of the board to allow the child to attend the school which he wishes to attend in the colored division.

Q. Do you recall of any instances when that election was made which wasn't acceded to?

A. No.

Q. Are you likewise familiar with the course of study that is prescribed by state law and whether or not it's been adopted and used in the city schools, elementary schools, both negro and white schools.

A. The same course of study is used in all schools.

[fol. 320] Q. That would mean then, of course, the same textbooks.

A. That's right.

Q. There was some testimony given here yesterday by Dr. Speer concerning his examination of books and comparisons that he made from books found in negro schools, comparing the books found in certain of the white schools, that he made such a similar examination. Do you know whether or not, as far as the Board of Education is concerned, there is any distinction or differences in the furnishing of books to the different schools on the basis of their color, whether negro or white schools.

A. There is no distinction made. The number of books isn't—the number of books sent is determined by the number of children in the school.

Q. Well, I mean do you have any policy to send old-style books down to the negro schools and new books to the white schools?

A. No, there is no policy like that. I am sorry that Dr. Speer didn't see the schools when they were in operation. He saw them after they were closed. If a principal had "put his school to bed" as we say correctly, the good books would have been packed in boxes and packed away. The books that are left out on the shelf are books that could be eliminated, really.

Q. Obsolete books.

A. That's right.

[fol. 321] Q. But the modern up-to-date books that are actually used in the operation of the schools, your policy

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has been as soon as school is out to box them up and put them away.

A. Put them away very carefully so they won't be dusty when school starts.

Q. Now, Miss Mifflin, state, if you know, whether or not additional books, not furnished by the Board of Education, are sometimes furnished by the Parent Teachers Association made up of parents of children living in the various territories in the city?

A. Yes. P. T. A.'s very frequently have money to spend, and they do buy books for various schools.

Q. Buy it with their own money, not public funds.

A. That's right.

Q. And put it in that particular school where the P. T. A. decides to make that purchase, is that correct?

A. That's right.

Q. And that is no different, whether it's negro or white, is that right?

A. That's right.

Q. The board doesn't spend its money or have any control over that.

A. No.

Q. Other than that dissimilarity wherein the Parent Teachers Association in some territory might buy more—might have more money to spend, is there any dissimilarity [fol. 322] by reference books or books furnished by the board in any of the schools in the elementary system?

A. There is no difference.

Q. Now, I want to direct your attention, Miss Mifflin, to what has been introduced in evidence as Exhibit "A" and which I want—first, I will ask you if all of the territories are named and designated on this Exhibit "A", both white and negro?

A. Yes, sir.

Q. Of the entire school system?

A. That's right.

Q. Are school territories also shown on Exhibit "A" which are outside the city limits of Topeka?

A. Yes; the school district is on that map.

Q. In other words, you have some areas shown on Ex-

hibit "A" which are in the City of Topeka for school purposes alone, is that right?

A. That's right.

Q. Does that appear colored in blue?

A. That's right.

Q. I will ask you whether or not in each, if you know, according to the records of the Board of Education, if you have children attending from all of these areas shown in the territory, school territory, or put it another way, from [fol. 323] the blue, what is marked blue.

A. Yes, we do have.

Q. Is any transportation furnished to any of the white children from any part of town?

A. None at all.

Q. Do some of them live as much as thirty blocks away?

A. Yes, sir.

Q. Well, in those cases, if they ride a bus, do they ride a city bus?

A. Yes, they would have to furnish their own transportation.

Q. Now, do you furnish a convoy with any of these children, people to go with them to get them across the streets, and so forth.

A. No, sir.

Q. White children.

A. No.

Q. Do you have any control—state, if you know, whether you have any control—I mean by you, the Board of Education, over selection of traffic lights or blinker lights at any territory in the City of Topeka?

A. No; that is the business of the city.

Q. And how—and do you know how they make that decision?

A. I think they——

Judge Huxman: Mr. Goodell, that would have to be hearsay on her part.

[fol. 324] Mr. Goodell: Yes, it would be.

By Mr. Goodell:

Q. Miss Mifflin, Exhibit "E" and "J" that have been introduced in evidence have to do or set out in a portion

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of the exhibits the facilities of each school in the whole City of Topeka and, particularly, it shows on that exhibit —those exhibits—whether they have a gymnasium or auditorium and, in some cases, where they are combined, is that accurate, true and correct?

A. Yes, sir.

Q. Those exhibits.

A. That's right.

Q. Do you have some white schools where you have that combination where you turn one room into one, using it——

Judge Huxman: Mr. Goodell, haven't those exhibits been agreed to?

Mr. Goddell: I believe so. I have a note that it wasn't entirely agreed to as to that particular feature.

Judge Huxman: There were only two questions -bout it at all. The exhibits were admitted.

Mr. Goodell: Except it was held up because they claim inaccuracies in the case of one school. I have a note to that effect.

Judge Huxman: You might ask her about that one inaccuracy.

By Mr. Goodell:

Q. I believe Dr. Speer was the witness who testified [fol. 325] pertaining to four schools which I will direct your attention to, as being Buchanan, Lafayette, Polk and Potwin—in other words the data contained in this data as being true with respect to auditoriums and gymnasiums, will you examine now particularly those schools I have indicated. I will take it one by one and ask you a question: Potwin, for example, you have the record shows that it has an auditorium but no gymnasium, is that correct?

A. That's right, it has a playroom but all schools have playrooms.

Q. Is that true of the negro schools?

A. They all have rooms that they do not use; any room that is not used can be called a playroom.

Q. I notice Polk Street now, the next one that Dr. Speer mentioned in his testimony, it's marked auditorium room

used for auditorium purposes but no gymnasium, is that correct?

A. That's right; there is no gymnasium there.

Q. I notice the same before Lafayette, that your records show it has an auditorium room, facilities for an auditorium, but no gymnasium, is that right?

A. That's right.

Q. And I direct your attention to the same matter on Buchanan; your record shows it has an auditorium but [fol. 326] no gymnasium, is that correct?

A. That is correct.

Judge Mellott: Is the difference of opinion, take, for instance, Buchanan School, purely one of terminology? Now she refers to it as having an auditorium. As I understood it, counsel's statement was that there were two rooms capable of being thrown together for an assembly room, but they object to calling it an auditorium, is that the point of difference?

Mr. Goodell: That perhaps is the point of difference.

By Mr. Goodell:

Q. That is correct in some of these older schools, white schools, for example, like Lafayette and Polk and some of the others.

A. We have made auditoriums by remodeling in a number of schools. Now the auditorium, what we call auditorium at Buchanan, has a stage; it has seating. The only difference, if they do not wish to have the whole room included in the auditorium, they may pull a sliding door closed and not use the entire auditorium.

Q. Now, are you familiar and is it part of your job and are you familiar with the ordinary maintenance and operation of the school system with respect to furnishing of supplies upon requisition, accessories and needed supplies to properly make the school function?

[fol. 327] A. Yes, sir; I am the business manager of the schools; purchase all the supplies.

Q. You are familiar, then, with the practice and policy that actually has been adopted and used by the board in that respect in the furnishing of supplies.

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A. Yes, sir.

Q. State, if you know, as a matter of policy, whether there has ever been any distinction shown between furnishing supplies when requested to negro schools as compared to white schools in the elementary system?

A. There is no distinction made between colored and white schools.

Q. They are operated, in other words, the whole thing is operated as a school system, is it?

A. That's right; it's a school system, and we operate entirely on the need of the school.

Q. And do you know what factors—strike that. Are you familiar with the factors, by reason of board policy and administrative practice, that Dr. McFarland and the board uses actually in fixing teachers' salaries in the entire school system, inclusive of these elementary schools.

A. Yes, sir.

Q. What are those factors?

A. Salaries—you mean the salaries?

Q. How are they arrived at?

[fol. 328] A. Salaries are determined by education, by experience and how well the job is being done.

Q. Teaching experience, educational attainments?

A. That's right.

Q. And actual manner in which the teacher has performed his duties, is that right?

A. That's right.

Q. If I understand you correctly, then, you might have a teacher with the same number of years experience and the same educational attainments, but one that didn't have as good performance record; in the case of one that had a good performance record might get more money than another one having all the other qualities except that one.

A. He might; he also might have extra duties.

Q. Extra duties.

A. That's right.

Q. State whether or not the Board, as a matter of policy by Dr. McFarland and the board, in fixing these salaries there has ever been any other factors applied to the negro school teachers not applied to the white teachers in fixing those salaries?

Mr. Carter: Your Honor, all the things brought out, I think, so far have been stipulated to, particularly the salaries.

Mr. Goodell: They wouldn't stipulate on that, and I [fol. 329] have it in my stipulation and I have it marked they wouldn't stipulate.

Judge Huxman: She may answer. I didn't think there was any issue made on it. There is no evidence whatever to show anything to the contrary, but she may answer.

By Mr. Goodell:

Q. Are the same factors used, in other words, in fixing salaries in teachers contracts—I mean the same factors observed and actually followed in fixing salaries for both negro and white teachers?

A. Yes, sir, exactly the same.

Mr. Goodell: I believe that is all.

Cross-examination.

By Mr. Carter:

Q. Miss Mifflin, you said you were the clerk of the Board of Education?

A. That's right.

Q. I think you testified that—as to an exhibit with regard to the school program that this program was carried out throughout the school system, is that correct?

A. That's right.

Q. Among your duties as clerk of the board, are you the person who goes and visits the schools and examines them and inspects them; are those—is that included in your duties?

A. Yes, it is; I call on all schools.

[fol. 330] Q. I see. Now, with regard to the books that are held, if there is any difference between the books that are held by the white schools and those that are held by the negroes, if I understand your testimony correctly, you would attribute that to donations by the P. T. A. organization, is that right?

A. That's right.

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Q. Is it or is it not a fact that if these books do—if they are donated by the P. T. A. they belong to the school or the Board of Education or what happens?

Mr. Goodell: We object to that as calling for a conclusion, legal conclusion, of this witness, where title is in the books.

Judge Huxman: She said she's in charge of the school system for that purpose. She may answer.

The Witness: They are usually gifts to the school. If they are a gift, then they become the property of the school.

By Mr. Carter:

Q. They become the property of the school to which they are given.

A. However, we wouldn't feel that we could go—if a gift would go to a certain school, we wouldn't feel that we should go in and remove it to another school.

Q. I understand that. They become the property of the school to which it's given, and they remain there, is that correct?

[fol. 331] A. That's right.

Judge Huxman: You may step aside, please.

(Witness excused.)

Kenneth McFarland, having been previously sworn, assumed the stand and testified as follows:

Direct examination.

By Mr. Goodell:

Q. State your name again for the record.

A. Kenneth McFarland.

Q. And you are the superintendent of schools of the City of Topeka.

A. Yes.

Q. How long have you held that post?

A. Nine years; since 1942.

Q. How long have you been in educational work?

Judge Huxman: Wasn't all of that gone into yesterday. I thought the doctor was asked his qualifications.

The Witness: No.

Mr. Goodell: I don't recall it.

Judge Huxman: Proceed.

Mr. Goodell: I will dismiss it, though, if the Court doesn't want to hear it. I will make this very brief.

[fol. 332] By Mr. Goodell:

Q. What is your educational background?

A. Bachelor's Degree from Pittsburgh Teachers College here in Kansas and a Master's Degree from Columbia University and doctorate degree from Stanford University.

Q. How long have you been in education work, Doctor?

A. Twenty-four years.

Q. When you came to Topeka, state whether or not the elementary schools were being operated, separated as to negro and whites in the first six grades.

A. Yes, sir.

Q. You understand, do you, that the statute of Kansas is a permissive one, that the Board of Education may—it's up to their discretion—according to statute.

A. Yes.

Q. —to so operate the elementary schools.

A. Yes, I understand that.

Q. Has it ever been your policy that you recommended to the board to change that operation actually?

A. We have—no; we have never recommended that we change the fundamental structure of the elementary schools.

Q. Why not.

Judge Huxman: Mr. Goodell, what would that establish in this lawsuit?

Mr. Goodell: Well, I think he, as an administrator—I am leading to something. I can't ask more than one question [fol. 333] at a time.

Judge Huxman: I know, but what's the purpose? If the statute gives the city permission to operate the schools, and he testified they are operating separate schools, what difference would it make whether they had or had not considered changing?

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Mr. Goodell: It might make some difference. We had a lot of expert testimony here on a hypothetical community or hypothetical situation, and I want to show the human factor in the custom and usage in this community, whether he knows it and whether or not it had something to do with the operation of the schools, why they operated——

Judge Huxman: Whether the city authorities had considered discarding what they had a right under the statute to do or hadn't considered, wouldn't prove any issue in this case.

By Mr. Goodell:

Q. Have you ever, as an administrator of schools, considered it part of your business to formulate custom and—social customs and usage in the community?

A. Mr. Goodell, I think that point is extremely significant; in fact, it's probably the major factor in why the Board of Education is defending this lawsuit, and that is that we have never considered it, and there is nothing in the record historically, that it's the place of the public school system to dictate the social customs of the people [fol. 334] who support the public school system.

Q. Do you say that the separation of the schools that we have is in harmony with the public opinion, weight of public opinion, in this community?

A. We have no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure.

Q. Now, we will get on to the actual operation. Have there been any distinction in the question of fixing salaries, furnishing accessories or supplies to the negro schools as opposed to the white schools?

A. No. I think we found what we thought were some discrepancies when we first came here in salaries. Those were corrected; we adopted a minimum salary of $2400 for inexperienced teachers with degrees; that was the basis where we started and, from that point on, there has been no discrepancy of any kind.

Q. Do you take into account, as head of the schools, as recommending to the Board of Education the matter of the

color of the teacher at all in fixing that teacher's contract salary?

A. No.

Q. You have heard Mrs. Mifflin testify to the factors that are considered, is that correct?

A. The three factors plus the total responsibilities in- [fol. 335] volved in the job.

Q. Some teachers have more responsibilities than others.

A. That's right.

Q. Of course a principal, that would be naturally true. Now, in respect to furnishing, honoring requisitions and furnishing all supplies, are the same factors considered by you and the Board of Education in respect to that, without regard to whether the school is white or negro school?

A. Oh, yes, no difference.

Q. There has been some testimony here about curriculum. Is the same curriculum followed in both the negro and white schools, elementary schools.

A. Yes, they are all under the same director of elementary schools, same supervisor of elementary schools and same special supervisors, no difference.

Q. Your administrative set-up is entirely one for the operation of the entire school system, is it not?

A. Yes, it's considered twenty-two elementary schools.

Q. Yes. In any particular, whether I have asked you or not, is there the slightest difference in the actual operation and maintenance of the school system between the negro and the white schools the way it's carried on?

A. Nothing done on the basis of color. They are merely treated as individuals.

Q. Do you know whether or not this operation has been [fol. 336] well received in this community?

A. Well, I feel that it has, in the main, been well received.

Q. State whether or not the school system has been commented on by national authorities, educational authorities.

Judge Huxman: Doctor, you need not answer that question. Mr. Goodell, that is not an issue in this case, has nothing to do with the problems concerning the Court.

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Mr. Goodell: I thought they were trying to show we had some poor schools. Maybe not. That is all.

Judge Huxman: You may cross-examine.

Cross examination.

By Mr. Carter:

Q. Mr. McFarland, I think you said that you didn't consider it the function of the Board of Education to go against the prevailing opinion with regard to the maintenance of public schools.

A. I said the social customs of the people. I didn't think it was the purpose of the school system to dictate the social customs of the people who support the schools. That has been our policy.

Q. Now, how do you know that social customs of Topeka require the maintenance of separate schools at the elementary school level?

A. I said we had no objective evidence that the majority [fol. 337] of the people wishes to change in the fundamental structure which we don't have.

Q. Would you say that there is a difference in the social or public opinion or social customs with regard to the maintenance of segregated schools above the elementary school level?

A. I didn't say that.

Q. Would you say, I am asking you a question.

A. I don't know; I wouldn't pass on that. You see, we are operating the schools under essentially the same structure that we took them over in 1942.

Q. But you are operating schools that have a mixed characteristic, mixed characteristics, rather, do you not? You are operating schools that are segregated at the elementary school level, integrated beyond. Now why does the Board of Education feel that they are maintaining their —they are in accord with public opinion by maintaining that type of operation?

A. Well, we have——

Mr. Goodell: Just a minute. Object to this question because it assumes as a part of the question—assumes that

part of this integration is caused by public policy of the board. The Supreme Court decision in the case of Graham vs. Board of Education, decided that there couldn't be a separation in the seventh and eighth grade where we had [fol. 338] a junior and senior set up. There is a policy set up on it of cities of the first class, all except Kansas City, which is controlled by another statute, so it isn't a matter of policy of the board.

Judge Huxman: I doubt if there is very much value to this whole line of questions.

Mr. Goodell: My point is that the law compels them to have integrated system as to junior high and high school.

Judge Huxman: The witness may answer the question.

(The last preceding question was read by the reporter.)

Mr. Goodell: If the Court please, I insist again my objection is proper. He is asking the doctor to distinguish the board forming a policy, saying in the elementary grades they will be separate and in the others it won't; it isn't a matter of choice with them as to junior high and high school. It's fixed by law.

Judge Huxman: The objection will be overruled.

The Witness: The answer is essentially that given by the attorney. The board has had no vote upon whether or not they would segregate the schools above the sixth grade [fol. 339] nor have the people—the public that they represent.

By Mr. Carter:

Q. I see. So, actually, you are not maintaining—you can't really say you are maintaining the schools in accord with social custom. You merely have kept consant the status quo as you found it when you came here. You are maintaining segregated schools merely because they were here when you arrived; that's all you can say, isn't that true?

A. We have, as I stated, no objective evidence that there is any substantial desire for a change among the people that the board represents.

Judge Huxman: May I ask counsel on both sides, assuming that is true, assuming the schools are maintained in

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accordance with social customs and the wishes of the people, or that they are not, what bearing does that have on the right to so maintain them under the Fourteenth Amendment?

Mr. Goodell: Judge Parker in his opinion that was handed down by that court of South Carolina, goes into that very, very carefully.

Judge Huxman: Presently we are not interested in that. I am asking—this is——

Mr. Goodell: Our theory of the equal protection of the laws——

Judge Huxman: Mr. Goodell, the question is what the [fol. 340] Fourteenth Amendment warrants and what it doesn't. We don't care what social customs provide. That is the reason I can't see any use in pursuing this line of argument unduly—this line of questioning.

Mr. Carter: I agree with that, Your Honor, but——

Judge Huxman: Then let's not pursue it too far. I don't want to cut you off because Mr. Goodell opened it up, but don't pursue it unnecessarily.

Mr. Carter: I am not going to pursue it any further, but I thought I shouldn't allow it to remain in the record unchallenged. That is the only reason I have asked the question.

By Mr. Carter:

Q. Now, I have just a few more questions, Mr. McFarland. Are you familiar with J. Murray Lee, who is the dean of the School of Education of the State of Washington; are you familiar with him; do you know him?

A. No, I don't know him.

Q. Do you know his wife, Doris Mae Lee, who is the co-author of "Learning to Read Through Experience"?

A. Do I know her?

Q. Are you familiar——

A. I just know there is such a person.

Q. In a book which both of them collaborated on——

[fol. 341] Mr. Goodell: What did you say? I didn't hear you.

Mr. Carter: Collaborated in writing.

By Mr. Carter:

Q. This statement appears, and I would like to get your views on this: "No longer is the curriculum to be considered a fixed body of subject matter to be learned. We realize only too well that the curriculum for each child is the sum total of all of his experiences which are in any way affected by the school. However rich or valuable any printed course of study may seem to be, the child benefits not at all if he does not have those experiences in classroom."

Now, would you agree or disagree with that statement?

A. Well, you lift one statement like that out of its context in an educational philosophy—it's a little difficult to say whether you would agree with the single statement or not. We would have to know the background of that, what lead up to it.

Q. The statement is—follows a philosophy that the sum total of a child's experience throughout the school—is the curriculum, not merely the subjects in the school. Now, do you or do you not agree with that?

A. I would agree with that in principle, but, of course, you understand when you go to that theory of education that the child is in the public schools a small percentage of [fol. 342] his total living hours. That puts the curriculum over into a field that is largely out of control of the schools.

Q. It puts the curriculum certainly out of control of the school but insofar as the school provides the atmosphere and everything that is part of the curriculum, not only the books but everything else that goes into the—into his experience in the schools, is that right?

A. Anything that would have to do with motivation of learning.

Mr. Carter: That is all.

Judge Huxman: Is that all.

Mr. Carter: That is all.

Judge Huxman: You may step down.

Mr. Goodell: The defendant rests.

Judge Huxman: The defendant rests. Any rebuttal testimony?

Mr. Greenberg: Yes, Your Honor.

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ERNEST MANHEIM, having been first duly sworn, testified on behalf of the plaintiffs in rebuttal as follows:

Direct examination.

By Mr. Greenberg:

Q. Would you please state your full name to the Court.

A. Ernest Manheim.

Q. What is your occupation, Mr. Manheim?

A. Professor of Sociology at the University of Kansas City.

[fol. 343] Q. What degrees do you hold and where were they earned?

A. A Ph.D. in sociology at the University of Leipzig, a Ph.D. in anthropology from the University of London.

Q. What is your field of special interest, Professor Manheim?

A. Social organization, juvenile delinquency and social theory.

Q. Have you published any articles in this particular field? Or any books?

Mr. Goodell: We don't want to interfere but we object to this if this is a repetition, simply cumulative of more expert opinion.

Mr. Greenberg: It is not, Your Honor.

Judge Huxman: What do you propose to rebut by the testimony of this witness? I take it you are qualifying him as an expert. Now just what testimony offered by the defendants are you proposing to rebut?

Mr. Greenberg: The clerk of the School Board stated that to the extent that there was a difference of library holdings between the colored and white schools, it was attributable to P. T. A. donations to the white schools. We intend to show that the maintenance of a segregated school system in Topeka has caused this difference in P. T. A. and community support of the colored as against the white schools.

Mr. Goodell: We object to that.

[fol. 344] Mr. Greenberg: Directly rebuts——

Judge Huxman: Just a minute. The doctor isn't a resident of this community, is he?

Mr. Greenberg: The doctor is not a resident of this community.

Judge Huxman: How could he know whether that is what caused this condition in Topeka?

Mr. Greenberg: Well, the doctor is a man who has studied social forces in nearby communities and, in qualifying as an expert, we believe that he will be competent to generalize from his studies and his experience.

Judge Huxman: How would that qualify him to testify that segregated schools in Topeka is what caused certain voluntary and independent groups to make donations of books to certain schools?

Mr. Greenberg: I don't want to give the doctor's testimony, but——

Judge Huxman: How could it tend to establish that?

Mr. Greenberg: I believe the doctor is going to testify that studies have shown that the distance which community support—the distance that community support is from a particular school determines the force of the community effectiveness of the community support.

Judge Huxman: How long is this testimony going to [fol. 345] take?

Mr. Greenberg: Perhaps five or ten minutes.

Judge Huxman: Frankly, the Court doubts if it is rebuttal testimony. If it's brief, we will give you the benefit of the doubt and let you go ahead. I don't think it rebuts anything.

(The last question was here read by the reporter.)

The Witness: Yes, I have published in my field in sociology six books; one of them deals with juvenile delinquency in Kansas City.

By Mr. Greenberg:

Q. Have you ever made any studies which would enable you to form a conclusion concerning the community support which a community gives to a school?

Mr. Goodell: We object to this as calling not for any fact, pure conjecture and guesswork and conclusion on the part of the witness.

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Judge Huxman: He may answer.

The Witness: Inasmuch as I can generalize from experience in Kansas City, I would tend to say that a school which is far from the clientele's residence, from their parents, is weakened in its position to supervise the conduct of the children, and is—and it is the cooperation between the teachers and the parents tend to be weaker.

[fol. 346] Mr. Goodell: We object to this for the further reason it's not rebuttal. If anything, it's part of their case in chief and, for the further reason, that is opinion——

Judge Huxman: The objection to that question will be sustained. It isn't responsive; it doesn't rebut anything that has been offered in the case.

Mr. Greenberg: Well, Your Honor, I believe that the clerk of the Board of Education did testify that the discrepancy between the white and colored schools was attributable to discrepancies in P. T. A. support. We are trying to show that——

Judge Huxman: Didn't so testify. She testified that these additional books or extra books were the result of donations by P. T. A. organizations; that is what she testified to and——

Mr. Greenberg: I hope to establish by this witness that a weakened P. T. A. is caused by having children and parents great distance from the school which the children attend.

Mr. Goodell: Object to it for the further reason it's outside the scope of the pleadings; it's not an issue raised by the pleadings as being one or any of the grounds of inequality, so it's outside the scope of the issues.

[fol. 347] Judge Huxman: The majority of the Court feels that this testimony is not proper rebuttal testimony from the very nature of the explanation that you have given. The doctor could not testify that the discrimination, if you want to so refer to it, which results in the donation of books in Topeka to one school and not to another is caused by segregation. He could only give that as his theory that that will flow and result from segregation generally. But he knows nothing about Topeka. The objection will be sustained. We will receive no further evidence along this line.

Anything further?

Mr. Carter: We have nothing further.
Judge Huxman: Both parties rest?
Mr. Goodell: Yes, Your Honor.
Mr. Carter: Yes.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Huxman: We perhaps should take a short recess. We would like to ask counsel, is there a desire to argue this case orally?

Mr. Goodell: I would personally, my notion about it, I believe the Court has heard all the testimony, that we could perhaps aid the Court more in a written brief. I would like to submit a written brief, and I can have it ready inside of a week.

Judge Huxman: Does plaintiff desire to argue the case [fol. 348] to the Court?

Mr. Carter: Yes, we do, Your Honor.

Judge Huxman: You shall be afforded that opportunity. Will the defendant then want to argue the case?

Mr. Goodell: We will make a short argument.

Judge Huxman: How much time do you feel you would want to argue this case?

Mr. Carter: We would think, Your Honor, just about a half hour on opening, and we would like to have time for rebuttal.

Judge Huxman: How much time for rebuttal?

Mr. Carter: I should think approximately fifteen minutes.

Judge Huxman: Forty-five minutes, of which you take thirty minutes in the opening argument and fifteen in the closing; and how much does the defendant want?

Mr. Goodell: Twenty or thirty minutes, I think, will be sufficient.

Judge Huxman: We will take a five or ten-minute recess before we start into that phase.

(The court then, at 11:05 o'clock a. m., stood at recess until 11:15 o'clock a. m., at which time the following further proceedings were had:)

[fol. 349] Judge Huxman: Do you gentlemen desire the Court to keep a record of your time or will you do that yourselves?

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Mr. Carter: I will do that, Your Honor.

Judge Huxman: All right, forty-five minutes, thirty for opening, fifteen for closing and, of course, the defendant, while they have only asked for twenty, if they should want not to exceed that, they will be given the same amount.

You may proceed.

Opening Argument on Behalf of Plaintiff

Mr. Carter: Involved in this case is a question of the constitutionality of the state statute, Section 72-1724, of the General Statutes of the State of Kansas which purports to give to the Boards of Education of cities of certain class the power to organize and maintain separate schools for the education of white and colored children, and I think that the reading of the wordage of the statute is very interesting. The statute says that such power as "to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools, except as provided herein; * * *."

Now, I think, that that is very interesting verbiage because, I think, there is a recognition, certainly the lan-[fol. 350] guage is a recognition by the framers of the statute, that the separation at the elementary school level was discrimination and is discrimination.

Now we rest our case on the question of the power of the state. We feel, one, that the state has no authority and no power to make any distinction or any classification among its citizenry based upon race and color alone. We think that this has been settled by the Supreme Court of the United States in a long line of cases which hold that in order for a classification to be constitutional it must be based on a real difference, a real and substantial difference which has pertinence to the legislative objective. The Supreme Court has also held in a series of cases that race and ancestry and color are irrelevant differences and cannot form the basis for any legislative action. The only exception to this provision has been in the cases involving the Japanese war cases which included—involved rights under the Fifth Amendment and the exception has been repeated by the Supreme Court of the United States after

Hirabayashi vs. U. S. and other cases that were decided, Korematsu vs. United States, and the Supreme Court has repeated again and again when it has struck down a legislative or governmental action because it said it was based on race and race alone, the Supreme Court has said that there is absence of compelling necessity to support the [fol. 351] constitutionality of this statute and the only compelling necessity that we have found in the cases is a national emergency which, in the Hirabayashi case, the court decided even though it questioned the constitutionality of the Exclusion Act of the Japanese because of their ancestry; the Supreme Court felt that national interests were of such a nature that they could not interfere with the judgment of the War Department. But that is the only exception to this general theory which I think the Court is familiar with and the principle of law established by the Supreme Court that there can be no distinction, no classification, unless it is based upon a real and substantial difference, and race is not a real and substantial difference.

The other trend of the law is that the rights under the Fourteenth Amendment are individual rights. You cannot take away the individual's rights by classifying him or putting him in a group and therefore saying that we, on the average, treat the group well, therefore the individual, if he suffers he has to suffer because he is a member of the group. The Supreme Court of the United States has taken care of that in a series of cases which I think I need not mention but one particularly is Missouri ex rel Gaines vs. Canada; the other is the recent Sweatt vs. Painter, involving the admission of a negro to the University of Texas. [fol. 352] Another is the Henderson vs. U. S. which involved the right of negroes to eat any place on a dining car without the curtains or signs or distinctions based on race and color.

Now, in all of those cases the argument raised was that we are providing for negroes as a group about as much as we can. We are meeting the demand. It just happens that this individual—if this individual wants to eat in the dining car and the space we have reserved for him is filled, then even though there are vacant seats in the outer part of the dining car, the fact that he has to wait, he is no

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more disadvantaged than a white person who comes into the dining car and the place is filled, and he has to wait. The Supreme Court said in those cases that the Fourteenth Amendment granted individual rights, rights to the individual, and it was no answer to say that because the person was a member of a group or because of his number, because of the numbers of the group, that therefore he should not be accorded this right which the Fourteenth Amendment gives.

Now, I think that those two trends of the law—those are the two trends of the law which presently exist, and those two trends, I think, make it clear that no other conclusion can be reached in this case other than that this statute is unconstitutional.

[fol. 353] I realize that there is a body of law which is classified under the separate but equal doctrine of Plessy vs. Ferguson which would seem to give authority to a state to maintain segregation, but it is our contention, and I will attempt to show—I will attempt to demonstrate to the Court that whatever potency that doctrine may have had that by virtue of the present classification doctrine which has been established by the Supreme Court of the United States by the emphasis and reemphasis of the individual right under the Fourteenth Amendment, the Plessy vs. Ferguson doctrine of separate but equal has been whittled away.

Now, it is interesting, in examining the cases under this doctrine, in the field of education to find that in none of the Supreme Court cases has this doctrine been applied. It was mentioned—the nearest case in which it came to being applied, rather, was a case which was decided sometime ago, I think about 1925, Gong Lum vs. Rice. In that case Mr. Chief Justice Taft assumed that the Supreme Court of the United States had followed and had made as to law the separate but equal doctrine of Plessy vs. Ferguson, but the real problem in that case was not the application of the separate but equal doctrine; the real problem in Gong Lum vs. Rice is whether a person of Chinese extraction who was classified by the state as a negro had [fol. 354] a right to being so classified. The petitioner, the Chinese child, did not question the power of the state to

make a classification; it questioned the use of the power in putting her, as a Chinese, being classified as a negro for purposes of education, so that the problem which we here present as to whether or not the state has the power to classify on the basis of race, was not presented in Gong Lum vs. Rice and certainly was not passed upon. The Gaines case, the Sipuel case, Sweatt case, the McLaurin case, the McKissick vs. Carmichael, and I will merely mention it because it is a more recent case and it may well be that the Court hasn't read it; I am sure that you are familiar with the other cases that I will not have to go into, but in McKissick vs. Carmichael involves the right of a negro to attend the University of North Carolina School of Law. The state maintained a separate and segregated school at the North Carolina College for Negroes. The case was lost in the lower court on the grounds that it would be better for negroes to go to a segregated school than it would be for them to go to the university—to the University of North Carolina. On appeal to the United States Court of Appeals for the Fourth Circuit the judgment of the court below was reversed on authority of the U. S. Supreme Court in Sweatt vs. Painter, and the Supreme Court, on June 4, 1951, refused to review the case. Now, the interesting [fol. 355] thing about that case, if the Court please, is that here in North Carolina one of the oldest negro law schools in the country had been operated. It had been established and had been operating since 1939—the oldest school. It was conceded that the state was making an effort to maintain a school for the education of negroes but, because of the segregation, because that school was segregated, the Court of Appeals held, consistent with the case of Sweatt vs. Painter, the state had no power to make any such distinctions.

Now I think that, if anything, the only argument that can be made with regard to this problem is not whether the law, as it now stands, is for the proposition that the maintenance of separate schools can be maintained by the state. I think that the law, as it now stands with the classification cases, with the individual right under the Fourteenth Amendment, I think that the inevitable conclusion must be

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that segregation, the maintenance by the state of segregated facilities on the basis of race, is unconstitutional.

The question sometimes may arise with regard to whether or not even though this is the law, it is expedient for the Court to reach a decision at this time, and I think that that seems to me to probably be apparently the trend of [fol. 356] the present cases. The United States Supreme Court recently also handled a case involving interstate travel and, in this case, in which it denied to review on May 28, 1951, the Fourth Circuit held that Jim Crow coaches—the separate coaches for negroes and whites on a north-south journey was unconstitutional. The Supreme Court refused to review this. Now I see no distinction between Jim Crow coaches on a north-south journey than between Jim Crow coaches on a south-north journey. The Court made the distinction, and the law as I understand it at the present time, applies only to north-south journies. I think that the distinction was made because the Court felt that it could and should strike down illegal regulations involving racial distinctions of a person who comes from an area in which they do not have to submit to that, going into an area in which they do, even though they pass the imaginary Mason-Dixon Line.

Now, however, I think the facts show that here in Topeka the time is now ripe for decision and for this court to use its power to strike down this statute. The system in Topeka is operated with eighteen schools for white children and four schools for negroes. The white children attend the schools in the territories in which they live. Negroes attend four schools that are located in I think for the most part in the center of town, with one in an area which I believe is called North Topeka. A number of negro children have to be [fol. 357] transported to these schools in buses. We have submitted testimony to show that insofar as the time spent on the bus takes away from the child the opportunity to play and to learn, to play rather, that he is being deprived of something of value to his education, and he is being deprived of this in this instance because the state says that the City of Topeka can, and the City of Topeka has decided to maintain separate schools at the elementary school level.

Now also in the City of Topeka there is a school system which is different from that at the elementary school level. At the junior high school level and the high school level we have mixed schools. Now, defendants have indicated, and I realize that this is because the statute says that there can be no discrimination at the high school level; however, in this type of mixed situation where on one hand you have for only six grades of the same public school system you maintain segregation, with the other six grades you do not maintain segregation, then certainly the interest, whatever interest the state may have in the maintenance of segregation, if it could be argued that it has such an interest, and therefore a court should withhold its authority to strike down that power, whatever interest it has, it seems that the picture of it maintaining in one end of the system for most of the system and not maintaining it in another, in-
[fol. 358] dicates that if there is such an interest, it is of minor importance and should be disregarded.

We maintain, of course, that the state has no power in this area. But this case, I think, is as close to McLaurin vs. The Board of Regents of Oklahoma as any other case that we have been familiar with. If the Court will remember, in that case a negro, or a group of negroes, were admitted to the University of Oklahoma. They were given the same teachers, the same textbooks; they apparently got the same education, that is, in terms of subject matter. But, because they were negroes, they were forced in the classroom to sit at separate seats; they were forced to sit at separate benches in the library; they were forced to eat at separate tables in the cafeteria. In reviewing this case, the United States Supreme Court felt that here was an area in which it was apparent that this type of segregation was ridiculous and meaningless. If McLaurin could be admitted into the classroom, necessarily he should be able to be permitted into the classroom without distinction or difference based upon race and color. The Court found that these arbitrary distinctions, putting him aside, stigmatized him and interfered with his ability to learn and with the learning process.

Now we contend the same thing here. We contend that
[fol. 359] this statute, one, that the state has no power to enforce the statute in the first place, and, two, that if it has

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such power, that by making a difference at the high school level and the junior high level, whatever interest it may have, that interest is not now of any importance because it is clear that there is no distinction between maintaining a power to maintain segregation in the first six grades of school and the power to maintain segregation at the junior high and the high school level. So that with this mixed situation we think that it's even more important that the power of this Court should be exercised in striking down this statute.

We have introduced testimony to show that there are differences, substantial differences, between various of the white schools as contrasted to the negro schools. We have shown that on the average in terms of teacher preparation, subject matter taught, buildings, and so forth, that on the average the school system here, as between the negro and the white schools, there is not too much difference except for this factor: We have shown that 45% of the white children attend schools newer than the newest colored schools and that 66% of them attend in buildings newer than the average age of the negro school, and that on the average the insured value per classroom of the negro school is approximately $4,000 below that of the white school. We have also [fol. 360] shown that in terms of books which are held by the various schools that the white schools maintain a newer supply of books; that the white schools have better books and that therefore the book holdings of the schools, as between negro and white, is substantially different.

Now, the defendants attempt to defend this on the grounds that the P. T. A. is the cause of this difference. It is our contention that in spite of where the books come from and it has been testified that when they get into the school they belong to that particular school; that without regard to where they come from, the fact that they belong to the school and are held by the school is really the factor which makes for the difference and that has to be considered.

We have submitted testimony also to show that the separation of negroes and whites in the elementary school of the school grades of Topeka is harmful to the development of the child, although it has been conceded that the subject-matters taught are the same, and in our definition

of what is a school curriculum we have attempted to point out in the record that the school curriculum is the sum total of the child's experience from the time he leaves home to go to school until the time that he returns, and therefore the fact that negroes have to ride buses, those [fol. 361] who do, and cannot go to the school which is within walking distance of them, therefore they cannot come home for hot lunches, that they are required to travel across the town merely because they are negroes and attend a segregated school and makes it impossible for us to say that the curriculum at the segregated negro schools are equal to those at the white schools.

We have also attempted to establish that, if anything, the maintenance of the segregated system at the first six grades and then integration at the high school, junior high school level, places an added burden upon the child because that is the time that he is meeting the problems of adolescence and attempting to develop into a man or into a woman and that with those additional burdens upon him, we think this is an additional hardship which makes this statute, in our view, unreasonable.

Now, with that in mind we feel that we have sufficiently established that the separation of negroes and whites in the public schools of Topeka is a denial of equal protection because of the Fourteenth Amendment, that this statute which the city or Board of Education under which it purports to operate, is unconstitutional and should be so declared by this Court, and we also contend that by virtue of the facts which we have set in the record with regard to the stigma on the negro child because of race and color [fol. 362] at what is considered the most crucial age of his development, that the injuries which are established here, we have put on evidence to show that these injuries are likely permanent and that they cannot be corrected merely by introducing them into the junior high school at a later age. In fact, we show that it probably by making this introduction to the junior high school on an integrated basis at the adolescent age, probably compounds the injury which has been suffered at the elementary school level and, for these reasons, we think we have established the rights of the plaintiffs for the issuance of the injunction for which

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we have prayed and we submit that this Court should declare this statute to be unconstitutional and order the Board of Education of Topeka to admit all persons into its schools without regard to race or color.

Judge Huxman: In assigning time for argument, we overlooked the State of Kansas represented by the attorney general. That was unintentional. How much time, Mr. McQueary, if any, do you desire to argue in behalf of the constitutionality of the state statute which you are defending here.

Mr. McQueary: If the Court please, I think we can explain our position very fully and amply well in a brief [fol. 363] on the matter of the constitutionality of the statute.

Judge Huxman: All right. You may proceed with the argument.

Do you desire the Court to keep track of your time, or are you going to keep track of your time?

Mr. Brewster: Perhaps you better keep track, Your Honor.

Judge Huxman: How much time do you desire to take in the opening argument, Mr. Brewster?

Mr. Brewster: I would say twenty, twenty-five minutes.

Judge Huxman: Well, now, you say which? I can't keep——

Mr. Brewster: Twenty-five minutes.

Argument on Behalf of Defendants

Your Honor, I would like to touch on one point mentioned by counsel for the plaintiffs, and that is attempting to lay some stress on the fact that the distance traveled by a pupil in attending school has some bearing upon the question before this Court.

There are a number of cases to the effect that the mere fact that certain colored school children must travel farther to reach a colored school than any white child is required to travel to reach the white school, is not necessarily a deprivation of equal advantages. There are a lot of cases on that. They are collected in an annotation in A. L. R. [fol. 364] Then, going to a United States Supreme Court

decision of Gong Lum vs. Rice, in there the Court pointed out that there was no colored school within the district in which this—school for other than whites; that involved a Chinese girl being declared as ineligible to attend a white school; but they did point out in that case that there was a school in the county in which this particular school district was located where she could attend and therefore there could be no objection made on constitutional ground. The distance you travel is immaterial, and I would say that that is especially true in our situation where the entire city of Topeka constitutes a school district and where the evidence, testimony, shows that there are a number of white students who are required to walk to school a greater distance than these colored children who are furnished transportation, and we have the Kansas case in which this question was raised, Reynolds vs. The Board of Education—well, I believe it's the Wright case, and there the Supreme Court pointed out that the question was raised that they had to attend Buchanan School which was twenty blocks farther than a white school they could attend, and our court pointed out the fact that transportation was furnished and therefore the question of distance traveled would have no bearing on the proposition. Now that is all I want to say right [fol. 365] now on distance traveled.

The plaintiffs in this case, of course, are by these cases attempting to have the courts abandon the separate but equal doctrine which was enunciated in the case of Plessy vs. Ferguson, which appears in 163 U. S. 537. It has been mentioned by counsel for the plaintiff, and they mention or contend that the more recent descisions have whittled away the effect of that decision and, of course, in that connection, they rely upon the case of Sweatt vs. Painter, which is the most recent case on this point. I will come to that in just a minute. First, I would like to call attention to the fact that there have been a number of decisions to the effect that establishing separate schools for white and colored children does not violate the constitutional right to equal privileges and immunities if equal advantages are afforded for each class.

Now, defendants admit that there has been engrafted upon this separate but equal doctrine the requirement that

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you must afford equal opportunity, and it's our position that under the facts stipulated to here and the evidence, that there is no real question but what we do afford equal educational opportunities to the colored folks, and we finally get down to there one point and that is that segregation in and [fol. 366] of itself constitutes a discrimination.

School segregation statutes have been before the United States Supreme Court in a number of cases and at no time have they held that these state statutes are unconstitutional.

Now, getting down to the case of Sweatt vs. Painter, we have here the opinion of the District Court of the United States for the Eastern District of South Carolina. This is the opinion of the court and, while it is not published, it is, of course, authority—Harry Briggs, Jr., et al, Plaintiff, vs. R. W. Elliott, et al.

Judge Mellott: You mean that is the last case that came down a year or two ago.

Mr. Brewster: That is correct. This is the opinion of the court, and it was decided June 23, 1951. I would like to first call attention to this Sweatt case. In the opening paragraph of the opinion of that case the Court said this:

"This case and McLaurin vs. Oklahoma State Regents" and cites "present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?" [fol. 367] In other words, the Court specifically restricted that to professional and graduate education in a state university. Then the Court pointed out that broader issues had been urged for their consideration, but adhering to the rule that constitutional questions are made as narrow as possible, and the Court says that was—is not necessary to consider, and the point I am making is that the Sweatt and the McLaurin cases do not in anyway detract from the effect of Plessy vs. Ferguson which is still the law.

Now, reviewing Plessy vs. Ferguson, that is the case which involved the state statute providing for separate railway carriages for white and colored races, and it was a Louisiana statute, and it provided that the passengers be

assigned to the coaches according to their race by the conductor, and the Court held that it did not violate—deprive a colored person of any rights under the Fourteenth Amendment to the federal constitution. That is the case from which stems this separate but equal doctrine which the defendants think is still applicable and which the plaintiffs, of course, are seeking to overturn.

Here's one thing the Court said:

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question [fol. 368] whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, [fol. 369] and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an

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enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."

Judge Huxman: Mr. Brewster, I don't know——

Mr. Brewster: I am about through with that.

Judge Huxman: I was going to say that on the Circuit Court we do not care to have reading from an opinion.

Mr. Brewster: I want to point out that Plessy vs. Ferguson, which establishes the separate but equal doctrine and the basis upon which they go, and that is that this regulation that this is a part of the police power of the state. Now, it has been repeatedly held, and that is part—that is the basis of the decision in the South Carolina case, that each state determines for itself, subject to the observ-[fol. 370] ance of fundamental rights and liberties guaranteed by the federal constitution, how it shall exercise the police power and that the power to legislate with respect to safety, morals, health and general welfare and that in no field—in no field is this right of the several states more clearly recognized than in that of public education.

Well, now, the case—the South Carolina case—bases their decision, and I won't quote a great deal from it on the proposition that it's within the police power of the state to segregate these schools if they want to, but they must provide equal educational facilities.

Now, speaking of the Sweatt vs. Painter case which, of course, it will be found the plaintiffs rely on that to a great extent; that dealt with a professional or graduate school. We are here dealing with an elementary school system which, assuming that the student goes through high school and college, this segregation exists in less than one-half of the normal educational, formal educational, period. "At this level" I would like to quote just briefly from this opinion, "At this level as good education can be afforded in negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student, but of compulsion by the [fol. 371] state."

Now, I would like to also call attention to the fact that in Sweatt vs. Painter the Supreme Court of the United States specifically refused to overrule Plessy vs. Ferguson and, in that respect, I think it strengthens the opinion and shows that the present segregation and separation and equality is still recognized.

Now, there has been testimony to the effect that mixed schools would give a better education. But, on the other hand, it's been indicated that mixed schools might result in additional racial friction due to the fact that the colored student would be greatly outnumbered and you'd still have that inferior feeling.

I would like to, with the Court's permission, quote just a little more from this South Carolina opinion; I just got it this morning or I would have tried to give it without quoting it:

"The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the state in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so, would result not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what [fol. 372] is essentially a legislative matter." In other words continuing the theory that this is a matter of the police power, and the state has the right to make this regulation.

We submit that under the facts which are stipulated, there is established—it is established that there is no inequality of educational facilities and, furthermore, that it is within the province of the state to determine what regulations necessary under its police power which, of course, is to promote the peace and the welfare of the people of that state, and, as far as the opinions of some sociologists or educators are concerned, we are in agreement with what the Court decided in South Carolina that it would not be within the province of a federal court or any federal agency to adopt those views regardless of what the state might consider to be the proper regulation under the police powers.

Judge Huxman: You may proceed, Mr. Goodell.

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Mr. Goodell: I prefer to—if we are given authority to file briefs, I will waive argument.

Judge Huxman: You will waive your argument. All right, the plaintiff may close the argument, then.

Closing Argument on Behalf of Plaintiff

Mr. Carter: Your Honor, I just have a few comments to make.

[fol. 373] I remember the last point that counsel for the defendants made about the statements of sociologists and educators. I would like to point the Court's attention again to the decision in McLaurin vs. The Board of Regents where what was considered in that case to be crucial to the decision was the mental attitude of the negro and the impact of segregation upon him mentally, and therefore it was held that he was deprived of the equal protection of the laws in the segregated educational system.

Now, I have to congratulate the attorneys for the Board of Education on being much more efficient than, at least, I am, because I had hoped that we could have the South Carolina opinion ourselves and that we could quote from the dissent, but we were unable to get it.

Judge Mellott: We have a copy of it.

Mr. Carter: No, thank you. But, at any rate, if the Court please, I think that although these two decisions certainly, McLaurin and Sweatt, were limited, as counsel indicated, to the graduate and professional schools, it was not necessary for the Court to have made any such limitation because that would have been obvious because they applied to graduate and professional schools anyway, but the United States Supreme Court, in a recent case, Rice vs. Arnold, which I don't remember the exact date of the decision, I think it was about October 16, 1950; I don't [fol. 374] believe it's yet reported—that case involved a question of the separate days for the use of a golf course in Miami; negroes were given certain days of the week and whites were given the rest of the time. The matter was appealed through the Florida Supreme Court to the U. S. Supreme Court, and the question raised was whether or not the separation and giving of this separate time to negroes and not permitting them to use the golf course without dis-

crimination based on race or color was a denial of the equal protection clause, the golf course being municipally owned. The Supreme Court took the case, granted certiorari, reversed and remanded in the light of the McLaurin and Sweatt opinions.

Now, I think that that is clear evidence at least that the Supreme Court realized and certainly feels that the decisions and the principles which it enunciated in Sweatt and McLaurin have wide application and cannot be limited in the narrow scope of a professional school or a law school. I believe that what the Supreme Court, of course, in Plessy vs. Ferguson—the Supreme Court refused to overrule Plessy vs. Ferguson, refused to apply it or refused to reexamine it, but I don't believe that counsel for the defendants can take too much hope in that in view of the decision which was reached. The two decisions reached were to the effect that segregation, at least at the level at [fol. 375] which the decision was handed down, were unconstitutional in the law school and in the graduate schools and I might also add that Plessy vs. Ferguson applied to railroads and not to education and, although it has somehow been taken over into the educational field, it is really a railroad case. However, I think that actually what—with the trend of the law, I think that the trend of the law is to such an extent that it is impossible to reach any other decision except that the State of Kansas has no power to order segregation. I think also that here this is no situation—this is not applicable to South Carolina; the two states are entirely different. There is not the vested interest in the maintenance of segregation in Kansas as there is in South Carolina or in Georgia. This is clear, by virtue of the fact that the state forbids it at one level even though it permits it at another, and I think that what should be applied in this case is the rule that at least if the segregation is unconstitutional, and I think that the Supreme Court cases inevitably point to that end, that a declaration of unconstitutionality should be made in an area in which it is ripe. The time is ripe for such a decision to be reached, and I think that certainly in Kansas, with the situation as it is, that the time is now ripe for this Court to strike down the statute here in issue and to declare

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[fol. 376] that the State of Kansas has no power to maintain segregation in its public school system.

Judge Huxman: Before the Court adjourns, the Court wants to compliment the parties on both sides for their fairness in the presentation of this case, the spirit of cooperation exhibited by all, to have a speedy determination of the issues in the trial of the case. I think this case was tried within less than ten days after the issues were made up and concluded, and we feel that we want to have as speedy a determination by the Court as can be handed down, giving counsel an opportunity to file briefs because, if this law is declared unconstitutional, certainly the City of Topeka is—wants to have it done as soon as possible before the beginning of the fall school term and all those matters. So we are all interested in having the matter determined just as expeditiously as it can be done, affording everybody an opportunity to prepare and file their briefs.

Now, the questions are comparatively simple to state and quite difficult to answer. There are only two questions in the case; one is, are the facilities, as I see them, are the facilities which are afforded by Topeka in its separate schools, comparable; that is one question, and the other is, granting that they are, is segregation unconstitutional notwithstanding, in light of the Fourteenth Amendment. As [fol. 377] I get it, those are the two points in the case, is that right?

Mr. Carter: Yes, sir.

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge Huxman: There is nothing else.

Now, ordinarily, of course, the plaintiffs prepare and file their briefs and the defendants have a certain time to reply thereafter, which, of course, would take additional time. I am wondering if you want to invoke that rule or whether, in view of the fact that these two issues are so clear, and the testimony is clear in the minds of all of us, whether you would be willing or feel that you would prefer to proceed without waiting to receive the briefs on the part of the plaintiff. What do you say, Mr. Goodell?

Mr. Goodell: Subject only to this, Your Honor: If coun-

sel chooses to argue points of evidence, I would be a little handicapped to answer them when I didn't know what he was going to argue.

Judge Huxman: You would be given the right for reply brief.

Mr. Goodell: With that exception, I would be perfectly willing to hand mine in at the same time.

Judge Huxman: How much time do you think you need to prepare and file your brief?

[fol. 378] Mr. Goodell: I think a week we can do it in.

Judge Huxman: Well, no need of rushing you to that extent.

Mr. Goodell: Ten days.

Judge Huxman: What do plaintiffs—of course, you have done a lot of work; you have practically got your material assembled on the law, naturally. How long does plaintiff feel that you need to prepare and file your brief?

Mr. Carter: Well, Your Honor, we could, of course, do it within a week, but we would like to have, say, a week from next Monday, which would give us about ten days.

Judge Huxman: Well, let's give the parties—do you want to wait in the preparation of your brief until you receive the record? Of course it will take approximately ten days to get the record. I presume each side will want a record, because, irrespective of the outcome of this litigation, it's headed for the Supreme Court anyway. Do you prefer to wait with your brief until you have a copy of the record? What do you say?

Mr. Goodell: That depends on the turn it takes. As I understand counsel, you are relying now entirely on the question of segregation in itself is discriminatory.

[fol. 379] Mr. Carter: We are relying—of course we are relying on that. I think, Your Honor, that we would not need the record. I think we have our testimony in mind that has been presented.

Mr. Goodell: If that is your point, of course, then——

Judge Huxman: Mr. Goodell, I do not understand the attorneys for plaintiff waive the one point and rely on the other alone.

Mr. Goodell: I——

Judge Huxman: I understand from what they have said

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they practically indicate they do not lean too heavily on this discrimination in the facilities which are furnished.

How much time from today does plaintiff want to file their brief, assuming the record will be ready for you in ten days. We will put it that way. How much time do you want from today?

Mr. Carter: We would like to have ten days, Your Honor.

Judge Huxman: We will give you fifteen days. You understand what I asked was assuming that it will take ten days from now to get the record, how much time from now do you want to file your brief? If you want ten days after the record is furnished, you may take twenty days, of [fol. 380] course, from now.

Mr. Goodell: The time, Your Honor, while I am on that subject——

Mr. Carter: Fifteen days will be ample.

Mr. Goodell: If it's going to be appealed, and I think it will be perhaps, either way this decision goes, the time lag would be such that we couldn't have a determination, I don't believe, by September in the appellate court.

Judge Huxman: Of course there are these factors: Judge Mellott and Judge Hill, both, have heavy schedules left and myself, my schedule isn't as heavy as theirs is for the remaining portion of the summer, but if we defer this matter too long, it runs into the fall when our new terms of court take place, and then it would be difficult for any of us to devote our time to it. We don't want to cut the parties short, but, on the other hand, there is no need of granting more time than you need for the preparation.

Mr. Goodell: It seems to me if he is going to go into evidence, it's pretty awkward to write a brief about evidentiary matters without having a transcript, and it's not satisfactory.

Judge Huxman: We will give you twenty days from today for the filing of your brief, and the reporter has told us [fol. 381] it would be about a week for the preparation of the record so, in any event, if you wanted the record, you will have ten or twelve days, and I will say this: If your briefs don't get in on the twentieth day, you will not be out of court.

Mr. Goodell: That will be satisfactory.

Judge Huxman: Are the parties going to order a copy of the record, each of you; I presume that is your intention.

Mr. Goodell: Yes, we will.

Mr. Carter: Yes, sir.

Judge Huxman: All right.

Mr. Goodell: Your Honor, do I understand we are given the privilege of a reply brief if we desire.

Judge Hill: Certainly.

Judge Huxman: Now, there is one other suggestion that the Court has in mind that you could be very helpful to the Court, and that may take a little additional time; that when you file your brief, to go with it each side file suggested findings or requested findings of fact, on the theory that you are going to prevail in the lawsuit, and conclusions of law.

Judge Mellott: We are required to make them under Rule 52.

Judge Huxman: Yes. We must make them, of course, and [fol. 382] it will be helpful to the Court if we had in mind when we come to consider this case, the idea and the theories of both sides as to the findings of fact; if we have both of them, then we will make our own findings, of course.

You also understand that there are three of us, that we all live in separate cities and if you would file your briefs in triplicate so that each judge can have a copy of the brief, it will expedite matters.

One thing I would like to inquire of my two associates of the district bench, what is your practice with regard to requiring printed or typewritten briefs in cases such as these? Of course in the Circuit Court, as you know, briefs must be printed, but my associates tell me that typewritten briefs are the practice here so that will be the practice in this case.

Judge Mellott: Use some good carbon paper because carbons are hard to read.

Mr. Goodell: We will do that.

Judge Huxman: Judge Hill makes this suggestion, which I have found valuable in my work on the appellate bench: If, when you prepare and submit a requested finding of fact, if you will alongside of it have the page of the record that you claim sustains that request, it will save us a

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tremendous amount of work; otherwise we have to go [fol. 383] through the whole record to see whether there is any warrant in the record for that request. So, if you will do that, that will help the Court.

Judge Mellott: I would like to have you get copies of the court's rules of practice, which are printed, and that will call your attention to the way we want the brief prepared; give us a table of cases and your citations.

Judge Huxman: My associates are more familiar with those rules than I am. It's their court, and they know what the practice is.

Now, I suppose Judge Mellott and Judge Hill, that we should make the same order with respect to all of these requests for brief amicus curiae, that they be filed within the same length of time, within twenty days from today; anybody that has appeared here that wants to file a brief as amicus curiae.

Mr. Goodell: Our notion, if it doesn't interfere with the rules of the court, would be to have the other lawyers join with us in a certain section of the brief.

Judge Huxman: Well, I would certainly prefer—frankly, I have never been very much impressed with this amicus curiae theory of the law. There just isn't such a thing anyhow because an amicus curiae has an active interest on [fol. 384] one side or the other of the litigation and if you could get—that is, however, for you defendants to arrange—if you could get all the parties who have entered an appearance amicus curiae to join with you in the brief, it would save a lot of duplication.

Mr. Goodell: That is what I thought.

Judge Huxman: These issues are sharply drawn. There is a certain line of cases, and it's just a question of analyzing and distinguishing those cases, but, however, I doubt whether we could order that—whether we can order amicus curiae to join with you in a brief.

Mr. Goodell: If it's satisfactory, I meant, I think that is what we will do.

Judge Huxman: That would be much simpler. Anything that the parties have to request? The court will be adjourned subject to further call.

(The court then, at 12:15 o'clock p. m., stood adjourned until further call.)

* * *

REPORTER'S CERTIFICATE (omitted in printing)

[fol. 385] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 386] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Entered August 3, 1951.

HUXMAN, Circuit Judge, delivered the opinion of the Court.

Chapter 72-1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for white students and four schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all negro schools are inferior to those pro-

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vided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes [fol. 387] an inferiority in educational opportunities offered to negroes and that all of this is in violation of due process guaranteed them by the Fourteenth Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition the school district defends the segregation in its schools instituted thereunder.

We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka Schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the [fol. 388] schools there is no willful, intentional or sub-

stantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the subject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court, we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of Plessy v. Ferguson, 163 U. S. 537, the Supreme Court said:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily [fol. 389] imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where

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the political rights of the colored race have been longest and most earnestly enforced."

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of Sweatt v. Painter, 339 U. S. 629, the Supreme Court again refused to review the Plessy case. The Court said:

> "Nor need we reach petitioner's contention that Plessy v. Ferguson should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

Gong Lum v. Rice, 275 U. S. 78, was a grade school segregation case. It involved the segregation law of Mississippi. Gong Lum was a Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "The question here is whether a Chinese citizen of the [fol. 390] United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited Plessy v. Ferguson, supra. The Court also pointed out that the question was the same no matter what the color of the class that was

required to attend separate schools. Thus the Court said: "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow race." The court held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in McLaurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629, show a trend away from the Plessy and Lum cases. McLaurin v. Oklahoma arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admission of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin [fol. 391] was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library; and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.[1]

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[1] The court said: "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an

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In Sweatt v. Painter, 339 U. S. 629, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "We cannot conclude that the education offered petitioner in a separate school is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result [fol. 392] in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the equal protection clause limit the

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advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under this guidance and influence must be directly affected by the education he received. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained."

"It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * * having been admitted to a state supported graduate school, [he] must receive the same treatment at the hands of the state as students of other races."

power of a state to distinguish between students of different races in professional and graduate education in a state university?", and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

We are accordingly of the view that the Plessy and Lum cases, supra, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

[fol. 393] In United States District Court

Findings of Fact and Conclusions of Law—Entered August 3, 1951.

Findings of Fact

I

This is a class action in which plaintiffs seek a decree, declaring Section 72-1724 of the General Statutes of Kansas 1949 to be unconstitutional, insofar as it empowers the Board of Education of the City of Topeka "to organize and maintain separate schools for the education of white and colored children" and an injunction restraining the enforcement, operation and execution of that portion of the statute and of the segregation instituted thereunder by the School Board.

II

This suit arises under the Constitution of the United States and involves more than $3,000 exclusive of interest and costs. It is also a civil action to redress an alleged deprivation, under color of State law, of a right, privilege or immunity secured by the Constitution of the United States providing for an equal rights of citizens and to have the court declare the rights and other legal relations of the interested parties. The Court has jurisdiction of the subject matter and of the parties to the action.

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III

Pursuant to statutory authority contained in Section 72-1724 of the General Statutes of Kansas 1949, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District, eighteen schools for white children and four [fol. 394] for colored children, the latter being located in neighborhoods where the population is predominantly colored. The City of Topeka is one school district. The colored children may attend any one of the four schools established for them, the choice being made either by the children or by their parents.

IV

There is no material difference in the physical facilities in the colored schools and in the white schools and such facilities in the colored schools are not inferior in any material respects to those in the white schools.

V

The educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to and are comparable to those of the white schools.

VI

The courses of study prescribed by the State law are taught in both the colored schools and in the white schools. The prescribed courses of study are identical in both classes of schools.

VII

Transportation to and from school is furnished colored children in the segregated schools without cost to the children or to their parents. No such transportation is furnished to the white children in the segregated schools.

[fol. 395] VIII

Segregation of white and colored children in public schools has a detrimental effect upon the colored children.

The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.

IX

The court finds as facts the stipulated facts and those agreed upon by counsel at the pre-trial and during the course of the trial.

Conclusions of Law

I

This court has jurisdiction of the subject matter and of the parties to the action.[1]

II

We conclude that no discrimination is practiced against plaintiffs in the colored schools set apart for them because of the nature of the physical characteristics of the buildings, the equipment, the curricula, quality of instructors and [fol. 396] instruction or school services furnished and that they are denied no constitutional rights or privileges by reason of any of these matters.

III

Plessy v. Ferguson, 163 U. S. 537, and Gong Lum v. Rice, 275 U. S. 78 upholds the constitutionality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above cited cases have not been overruled by the later cases of McLaurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629.

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[1] Title 28 U.S.C. § 1331; idem § 1343; idem Ch. 151. Title 8 U.S.C. Ch. 3. Title 28 U.S.C. Ch. 155.

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IV

The only question in the case under the record is whether legal segregation in and of itself without more constitutes denial of due process. We are of the view that under the above decisions of the Supreme Court the answer must be in the negative. We accordingly conclude that plaintiffs have suffered no denial of due process by virtue of the manner in which the segregated school system of Topeka, Kansas, is being operated. The relief sought is therefore denied. Judgment will be entered for defendants for costs.

Walter A. Huxman, Circuit Judge, Arthur J. Mellott, Chief District Judge, Delmas C. Hill, District Judge.

[fol. 397] In United States District Court

Degree—Entered August 3, 1951.

Now on this 3rd day of August, 1951 this cause comes regularly on for hearing before the undersigned Judges, constituting a three-judge court, duly convened pursuant to the provisions of Title 28 U. S. C. 2281 and 2284.

The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded.

Now, therefore, it is by the court, considered, ordered, adjudged and decreed that judgment be and it hereby is entered in favor of the defendants.

Walter A. Huxman, Circuit Judge, Arthur J. Mellott, Chief District Judge, Delmas C. Hill, District Judge.

[fol. 398] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed October 1, 1951

Considering themselves aggrieved by the final decree and judgment of this court entered on August 3, 1951, Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an infant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Flem-[fol. 399] ing, their mother and next friend; Donald Andrew Henderson and Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiffs, and that the amount of security be fixed by the order allowing the

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appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, Charles E. Bledsoe, 330 Kansas Avenue, Topeka, Kansas, John J. Scott, Charles S. Scott, 410 Kansas Avenue, Topeka, Kansas, Robert L. Carter, Jack Greenberg, Thurgood Marshall, 20 West 40th Street, New York 18, New York, Counsel for Plaintiffs-Appellants.

[fol. 400] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—filed October 1, 1951.

Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an infant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Fleming, their [fol. 401] mother and next friend; Donald Andrew Hen-

derson and Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, plaintiffs in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered on August 3, 1951.

The District Court erred:

1. In refusing to grant plaintiffs' application for a temporary and permanent injunction restraining the defendants from acting pursuant to Chapter 72-1724 of the General Statutes of Kansas under which they are maintaining separate public elementary schools through the first six grades for Negro children solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate Chapter 72-1724 of the General Statutes of Kansas in that such statute constitutes a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of plaintiffs, after the court found that plaintiffs suffered serious harm and detriment in being required to attend segregated elementary schools in the City of Topeka, and were deprived thereby of benefits they would have received in a racially integrated school system.

Wherefore, plaintiffs pray that the final decree of the [fol. 402] District Court be reversed, and for such other relief as the Court may deem fit and proper.

Charles E. Bledsoe, 330 Kansas Avenue, Topeka, Kansas, Charles S. Scott, John Scott, 410 Kansas Avenue, Topeka, Kansas, Robert L. Carter, Jack Greenberg, Thurgood Marshall, Counsel for Plaintiffs-Appellants.

Dated: September 28, 1951.

BLEED THROUGH

[fol. 403] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Entered October 1, 1951.

Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emanuel, Mrs. Lucinda Todd, Mrs. Iona Richardson, Mrs. Lena Carper, Mrs. Shirley Hodison, Mrs. Alma Lewis, Mrs. Darlene Brown, Mrs. Shirla Fleming, Mrs. Andrew Henderson, Mrs. Vivian Scales, Mrs. Marguerite Emmerson, and Linda Carol Brown, an infant by Oliver Brown, her father and next friend; Victoria Jean Lawton and Carol Kay Lawton, infants, by Mrs. Richard Lawton, their mother and next friend; James Meldon Emanuel, an infant, by Mrs. Sadie Emanuel, his mother and next friend; Nancy Jane Todd, an infant, by Mrs. Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Mrs. Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Mrs. Lena Carper, her mother and next friend; Charles Hodison, an infant, by Mrs. Shirley Hodison, his mother and next friend; Theron Lewis, Martha Jean Lewis, Arthur Lewis and Frances Lewis, infants, by Mrs. Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Mrs. Darlene Brown, her mother and next friend; Duane Dean Fleming and Silas Hardrick Fleming, infants, by Mrs. Shirla Fleming, their mother and next friend; Donald Andrew Henderson and [fol. 404] Vicki Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend; Ruth Ann Scales, an infant, by Mrs. Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Mrs. Marguerite Emmerson, their mother and next friend, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause entered on August 3, 1951, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statements as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and

rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Walter A. Huxman, U. S. Circuit Judge.

Dated: October 1, 1951.

[fol. 405] Citation in usual form showing service on Lester M. Goodell and George Brewster omitted in printing.

[fol. 406] NOTE RE COST BOND

Cost bond in the sum of $500.00, with Fidelity & Deposit Company of Maryland, as surety, was approved by the Clerk and Filed October 1, 1951.

[fols. 407-408] Statement required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing).

[fols. 409-411] Acknowledgment of service (omitted in printing).

[fols. 412-413] PRAECIPE—Filed October 5, 1951 (omitted in printing).

BLEED THROUGH

[fol. 414] In United States District Court

Order Extending Time to File and Docket Record on Appeal in the Supreme Court of the United States—Entered November 5, 1951

Now, on this 5 day of November, 1951, upon the application of Charles S. Scott, one of the attorneys for the plaintiffs, and for good cause shown,

It is hereby ordered that the time within which to file and docket the record on appeal in above action in the Supreme Court of the United States be and it is hereby extended twenty days from November 9, 1951.

Walter A. Huxman, United States Circuit Judge.

[fol. 415] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 416-417] In the Supreme Court of the United States, October Term, 1951, No. 436

[Title omitted]

Statement of Points to Be Relied Upon and Designation of Parts of Record to Be Printed—Filed November 27, 1951

A. Appellants adopt for their statement of points upon which they intend to rely in their appeal to this Court the points contained in their Assignment of Errors heretofore filed.

B. Appellants designate the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

Robert L. Carter, Counsel for Appellants.

[File endorsement omitted.]

[fol. 418] SUPREME COURT OF THE UNITED STATES

No. 436, OCTOBER TERM, 1951

ORDER NOTING PROBABLE JURISDICTION—June 9, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(2734)

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FILED

NOV 19 1951

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No. 8

[redacted] BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

STATEMENT AS TO JURISDICTION

[redacted]

Attorneys for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 436

OLIVER BROWN, MRS RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The opinion of the United States District Court for the District of Kansas is not yet reported. A copy of the

opinion, findings of fact, conclusions of law and final decree are attached hereto as Appendix A.

Jurisdiction

The judgment of the district court was entered on August 3, 1951. A petition for appeal is presented to the District Court herewith, to wit, on September 28, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *McLaurin* v. *Board of Regents,* 339 U. S. 637; *Wilson* v. *Board of Supervisors,* — U. S. —, 94 L. ed. (Ad. Op.) 200.

Questions Presented

1. Whether Chapter 72-1724 of the General Statutes of Kansas, 1949, is unconstitutional in that it gives to defendants-appellees the power to organize and maintain separate public elementary schools for the education of white and colored children in the City of Topeka, Kansas.

2. Whether after having shown that the maintenance of racially segregated elementary schools in Topeka, pursuant to Chapter 72-1724 of the General Statutes of Kansas, 1949, is harmful and deprives them of the benefits they would receive under a racially integrated school system, plaintiffs-appellants are necessarily entitled to the relief prayed for in their complaint.

Statutes Involved

Chapter 72-1724 of the General Statutes of Kansas, 1949, as set forth in Appendix B attached hereto.

Statement

Appellants are here seeking to enjoin appellees from maintaining separate public elementary schools for Negro

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and white pupils in the City of Topeka, pursuant to authority conferred by Chapter 72-1724 of the General Statutes of Kansas, 1949. The asserted right to injunctive relief is based upon the unconstitutionality of Chapter 72-1724, in that the Fourteenth Amendment to the United States Constitution strips the state of power to either authorize or require the maintenance of racially segregated public schools. A district court of three judges was convened, as provided in Title 28, United States Code, Sections 2281 and 2284, and on June 25, 26, 1951 a hearing on the merits took place.

The evidence there presented disclosed that the City of Topeka is divided into eighteen territories for school purposes. One elementary school is maintained by appellees in each of these eighteen territories for the exclusive use of white children, and in addition four separate elementary schools are maintained for the exclusive use of Negro children. Negro children must attend one of the four segregated schools maintained for them, even though they may live considerably closer to one of the schools maintained for white children. Segregation is enforced only in elementary schools which in Topeka ends with the completion of the sixth grade. After the sixth grade a student enters junior high school, which along with senior high schools, is operated as part of a racially integrated school system.

With respect to teacher qualifications, class size, teacher-pupil load and courses prescribed, there is little material difference between the eighteen schools for white children and the four schools for colored children. Appellants introduced evidence to show, however, that on the average the Negro schools were older, of lower insured value per classroom and had inferior library holdings. Evidence was also introduced to show that Negro children, who lived close to Gage, State Street and Oakland schools, which were new,

luxurious, modern educational plants maintained for white children, were required, nonetheless, to travel a considerable distance in order to attend one of the Negro schools which were inferior to these in terms of physical facilities. Forty-five percent of the white children attended schools which were newer than the newest Negro school, and only 14% attended schools older than the oldest Negro school. These differences in physical facilities were brought out in the testimony of Dr. Hugh Speer and Dr. James Buchanan who had made a survey of the schools on behalf of appellants.

Seven additional expert witnesses testified on behalf of appellants. In substance their testimony was that racial segregation for school purposes is unreasonable and arbitrary; that Negro children are relegated to an inferior status by virtue of being required to attend segregated schools, are confused and made personally insecure, and that the legally enforced isolation of Negro children in segregated public schools made it impossible for them to receive educational opportunities equal to those presently available to all other students.

Although the court below, in its findings of fact, found no material difference between the Negro and white schools with respect to physical facilities, it found that the segregation complained of has a detrimental effect upon colored children and that the "impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children, and to deprive them of some of the benefits they would receive in a racially integrated school system."

The district court, on August 3, 1951, entered a final order and decree denying appellants' injunctive relief on the

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grounds that *Plessy* v. *Ferguson*, 163 U. S. 537 and *Gong Lum* v. *Rice*, 275 U. S. 78 upheld the constitutionality of the statute in question and that these cases had not been overruled by *McLaurin* v. *Board of Regents*, 339 U. S. 637 and *Sweatt* v. *Painter*, 339 U. S. 629. Appellants on direct appeal are now seeking a review of this judgment by the Supreme Court of the United States.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised in *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Board of Regents*, 339 U. S. 637 and in *Briggs* v. *Elliott*, now pending before the United States Supreme Court on direct appeal from the United States District Court for the Eastern District of South Carolina. The issues are of vital importance especially at this time because the preservation of strong democratic institutions necessarily depends upon the intelligence and enlightenment of our citizenry. When the educational and mental development of a portion of our population is retarded by state practices which violate the Constitution, it becomes impossible to fully muster the capabilities and energies of the country to meet whatever crises lie ahead.

1. We are here concerned with state power to impose racial segregation in the broad field of public education at the elementary school level. In the *McLaurin* and *Sweatt* cases the United States Supreme Court dealt with the permissible limits of such state power at the professional and graduate school level. The issues in this appeal, however, raise questions of a greater importance and of more basic concern then the question of racial segregation in graduate and professional schools.

The *sine qua non* of education in a democratic society is the teaching of a belief in and loyalty to democratic ideals.

It is at the elementary or primary educational level that children, along with their acquisition of facts and figures, integrate and formulate basic ideas and attitudes about the society in which they live. When these early attitudes are born and fashioned within a segregated educational framework, students of both the majority and minority groups are not only limited in a full and complete interchange of ideas and responses, but are confronted and influenced by value judgments, sanctioned by their society which establishes qualitative distinctions on the basis of race. Education cannot be separated from the social environment in which the child lives. He cannot attend separate schools and learn the meaning of equality.[1]

One eminent authority in the field of educational segregration has summed up the role of the separate Negro school as follows:

> "The separate school is an instrument of social policy and a symbol of inferior status."[2]

Segregated education, particularly at the elementary level, where the emotional aspects of learning are inextricably tied up with the learning process itself, must and does have a definite and deleterious effect upon the Negro child.[3] It is particularly true that when segregation exists

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[1] *The Main Types and Causes of Discrimination* (Memorandum submitted by the Secretary-General, United Nations-Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Lake Success, New York, p. 50.

[2] Charles H. Thompson, "Post War Prospects of Equitable Educational Opportunities for Negroes" in *Race Relations and Human Relations*, Fisk Univ. 1945, p. 86.

[3] Max Deutscher and Isidor Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," Journal of Psychology, 1948; 26; 259-287; David Krech and Richard S. Crutchfield, *Theory and Problems of Social Psychology*, New York, McGraw-Hill, 1948, Chapters XII and XIII; M. Radke "New Trends in the Investigation of Prejudice," Annals of the American Academy of Political Science, 1946, p. 244.

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at the elementary level it is hard to distinguish between fact and fiction—the fiction, in this instance, being an arbitrary classification on the basis of race. A recent study of the development of attitudes towards Negroes concludes that prejudice *begins early in the life span* and develops gradually, and that "attitudes towards Negroes are now chiefly determined not by contact with Negroes, but by contact with prevalent attitudes toward Negroes."[4]

Appellants have demonstrated to the satisfaction of the court below that segregation at the elementary school level prejudices the Negro child in his pursuit of knowledge. It is common knowledge that the number of persons attending public elementary schools is far greater than that attending public graduate and professional schools. It logically follows, therefore, that the injuries which segregation causes in the elementary grades is more far reaching and devastating and affects more people than is the case with respect to graduate and professional education. It affects young children by creating prejudicial attitudes which by virtue of their extreme youth they can in no way identify.[5] Since elementary education is absorbed during the formative years of a child's life, it assumes a peculiar and more important role than education at any other level. It is true that most professions and occupational fields require skills and information that can only be acquired through higher and professional education, but it is not the skill or professional knowledge *alone* that makes a good doctor, lawyer, engineer, or teacher.[6] It is an integrated, intelligent and open-minded personality

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[4] Eugene Horowitiz, "Development of Attitudes Towards Negroes," in *Readings in Social Psychology*, Holt, 1947, pp. 561, 517.

[5] op. cit.

[6] Young B. Smith, *Harlan Fiske Stone: Teacher Scholar and Dean*, Col. Law Review, Vol. XLVI, Sept. 1946.

that can best benefit from education at any level. It is hard, if not impossible, to build a durable building on a weak framework. The educational process is cumulative in nature, a person's "knowledge" or "education" can never be separated from the total personality. If a young student can learn in a democracy and at the same time learn the significance of democracy, he must be able to do so freely—unhampered by such arbitrary and limiting factors as distinctions on the basis of race.[7] Negro children cannot be afforded the opportunity to develop fully their intelligence and their mental capabilities if their training is circumscribed and their development stunted by state practices which, at the very outset of their search for education, places them at a disadvantage with children belonging to other racial groups.

2. Having established that racial segregation in the public elementary schools of Topeka had a detrimental effect upon appellants and other Negro students, affected their motivation to learn, their educational and mental development, and deprived them of benefits which would have been forthcoming in a racially integrated school system, appellants were entitled to the relief prayed for in their complaint under the rationale of the *Sweatt* and *McLaurin* cases. In those cases the United States Supreme Court found that equal educational opportunities in law and in graduate training could not be obtained in a racially segregated educational system.

One of the chief considerations, which led the court to conclude that equal educational opportunities were not offered at the segregated Negro law school in the *Sweatt* case, was that members of racial groups comprising 85%

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[7] Gunnar Myrdal, *An American Dilemma*, Hayes, New York, 1944 (passim).

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of the population of Texas were excluded from its student body. The court said, at page 634:

> ". . . With such a substantial and significant segment of the population excluded, we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas law school."

Thus, without regard to physical facilities, the opinion in the *Sweatt* case means that equal educational opportunities in law cannot be afforded a Negro applicant where he is required to take his training in isolation from law students who are representative of a "substantial and significant segment of the population." It must have been felt in that case, we submit, that a student who obtains an education under circumstances such as to require daily contact and competition with members of racial groups comprising the dominant and more advantaged majority would necessarily receive a better education than a student who must get his training under conditions which would limit him to daily contact and competition from members of a single racial group comprising the state's most disadvantaged minority.

In the *McLaurin* case, although no question of the inequality in physical facilities could have been raised, the court found the state, in requiring McLaurin to sit apart from other students in the classrooms, cafeteria and library solely because of race, handicapped him in his pursuit of effective graduate instruction. "Such restrictions," said the court at page 641, "impair and inhibit his ability to study, to engage in discussions and to exchange views with other students and, in general, to learn his profession."

We take these two decisions to mean that any form of state imposed racial segregation at the graduate and professional school levels of state universities contravenes

the Fourteenth Amendment because such restrictions handicap the applicant in his pursuit of knowledge and necessarily deprive him of equal educational opportunities. This analysis is confirmed by *Wilson* v. *Board of Supervisors*, supra, and *McKissick* v. *Carmichael*, 187 F. 2d 949 (CCA 4th 1951) cert. den. — U.S. —, June 4, 1951.

In the *McLaurin* case, moreover, the court recognized that not only would their decision affect McLaurin personally but that the quality of his education had more far-reaching implications. The court said, at page 641, that as a trainer of others,

> "[t]hose who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates."

Thus the court was not only concerned with the question of McLaurin's personal right to equal educational opportunities but was aware that his inferior training would necessarily mean inferior training for his students. Now, in this case, we are directly confronted with the question with which the Court was indirectly concerned in the *McLaurin* case.

At the outset of the opinion in the *Sweatt* case, at page 631, it was made clear that the court was deciding only the question of the power of the state to distinguish between students of different races in professional and graduate education of state universities. This statement meant no more than that the court was deciding the constitutional question within the narrowest limits essential to the disposition of the case at hand. This is not new but normal Supreme Court procedure, *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-575, and cases cited. The assertion by the Court that it was following this practice and hence deciding

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only the constitutionality of state-imposed segregation at the graduate and professional school levels cannot properly be interpreted to mean that segregation at the elementary school level is thereby validated. Nor did the Court's refusal to reexamine *Plessy* v. *Ferguson* infer that the "separate but equal" doctrine of that case was approved as the yardstick to determine constitutionality of racial segregation in areas other than professional and graduate education. We take this refusal to mean merely that the Court had found segregation unconstitutional at the graduate and professional school levels and, therefore, deemed it unnecessary to meet the question of whether *Plessy* v. *Ferguson* had general application. The Court, without first having facts before it, was in no position to say that segregation in areas other than graduate and professional education was a denial of equal protection of the laws. Where the facts show such denial, the Court, we submit, would strike down segregation as was done in the *McLaurin* and *Sweatt* cases.

Attention is directed to *Rice* v. *Arnold*, 340 U. S. 848, dec. Oct. 17, 1950. That case was reversed and remanded to the Supreme Court of Florida for reexamination in the light of the *Sweatt* and *McLaurin* cases. It is true that this case may not necessarily mean that racial segregation on public golf courses is considered by the Supreme Court as a denial of equal protection of the laws. *Rice* v. *Arnold* does conclusively indicate, we submit, that the Court's statement in the *Sweatt* case with respect to *Plessy* v. *Ferguson* was not intended to imply that the "separate but equal" formula was to be used to dispose of questions involving racial seggation except for graduate and professional schools. Moreover, *Rice* v. *Arnold* indicates that the constitutionality of state sanctioned racial segregation must now be determined by the courts on the basis of an inquiry into its actual effect as was done in the *McLaurin* and *Sweatt* cases. Here the district court made such an inquiry and concluded that

the effect of racial segregation in this case was as pernicious as it had been found to be in the *McLaurin* and *Sweatt* cases. Having determined, in fact, that equal educational opportunities were not afforded in the segregated schools of Topeka, the court, in the light of the *McLaurin* and *Sweatt* cases was obligated to hold that Chapter 72-1724 was unconstitutional and that appellees could not continue to maintain separate elementary schools for Negroes and whites.

3. Chapter 72-1724 of General Statutes of Kansas, 1949, is clearly an arbitrary and unreasonable exercise of state power in violation of the guarantees of the Fourteenth Amendment for the following reasons:

A. This statute authorizes governmental classifications and distinctions based upon race for school purposes. In order for such classifications and distinctions to conform with the requirements of the Federal Constitution, they must be based upon a real or substantial difference which has pertinence to a legitimate legislative objective. *Dominion Hotel* v. *Arizona*, 294 U. S. 265; *Skinner* v. *Oklahoma*, 316 U. S. 535. This statute cannot be sustained under this constitutional yardstick. Certainly, the statute cannot be sustained if based upon race alone. See *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Korematsu* v. *United States*, 323 U. S. 214, 216; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 420; *Oyama* v. *California*, 332 U. S. 633, 640; *Shelley* v. *Kraemer*, 334 U. S. 1, 21, 23.

There is no difference between Negro children and white chilren with respect to ability to learn or to absorb knowledge based upon the racial factor alone. Whatever differences exist in this regard are individual and not racial. This is an uncontroverted scientific fact. See: Testimony of Horace B. English. See also: Rose, *America Divided: Minority Group Relations in the United States* (1948);

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Montague, *Man's Most Dangerous Myth—The Black & White of Rejections for Military Service*, 5 (1944) at 29; Klineberg, *Race Differences*, 343 (1935). Thus, the statute cannot be sustained if based upon a mistaken assumption that such racial differences do in fact exist.

This statute authorizes racial segregation in the elementary grades only. In Topeka, elementary school ends with completion of the sixth grade. Thereafter, at the junior and senior high school level, the Topeka school system is racially integrated. Moreover, the segregation authorized can only be imposed in cities of the first class. Thus, whatever the basis for the classification, about which appellants can only wildly speculate, if not based upon race or ability to learn and absorb knowledge, it must be some factor which is: (1) present in the first six grades of public schools in Kansas, but not present thereafter, and (2) it must be present in some communities in Kansas, but not in others. This is impossible. In short, the statute cannot be sustained under the constitutional formula, as being based on a real and substantial difference which has pertinence to a legitimate legislative objective to which state classifications and distinctions must adhere.

B. This statute cannot be said to sustain an important state interest particularly in view of the fact that Kansas has a history of freedom and equality, and legally enforced segregation is contrary to its deep-rooted traditions and customs.

The General Statutes of Kansas, Annotated, (Corrick) 1949, outlaw discrimination in a wide variety of circumstances.[8] Section 76-307, which applies to schools of arts, engineering, pharmacy, law and medicine, states:

> "No person shall be debarred from membership of the university on account of age, race, sex, or religion."

[8] The statutes cited herein are set forth in Appendix B hereto.

Section 12-713, dealing with planning, zoning and city planning commissions, provided:

> "Nothing herein contained shall be construed as authorizing the governing body to discriminate against any person by reason of race or color."

Section 21-2424 makes it a misdemeanor punishable by a fine of $10 to $10,000 and makes the misdemeanant liable to a suit for damages, for any person to make a distinction on account of race, color or previous condition of servitude in a state university, college or other school of public instruction; in a hotel, boarding house, place of entertainment or amusement for which a license is required by municipal authorities of the state; or in a steamboat, railroad, stagecoach, omnibus, streetcar, or other means of public carriage.

Section 21-2461 provides that no citizen of the United States shall be refused employment in any capacity on the ground of race or color nor be discriminated against in any manner in connection with any public work by or on behalf of the state or any governmental subdivision thereof.

Section 21-2462 provides that the act of which Section 21-2461 is a part shall be included in all contracts made by governmental subdivisions which involve the employment of laborers and shall apply to all contractors and subcontractors.

Section 21-2463 provides that any officer violating the latter two sections shall be punishable by a fine of $50-$1,000 and by imprisonment of not more than six months or both.

House Joint Resolution No. 1 of the House of Representatives of the State of Kansas [L. 1949, Ch. 289, p. 253] states that:

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> ". . . The state of Kansas is traditionally and historically opposed to discrimination against any of its citizens in employment; and
>
> ". . . It is the public policy of this state that all of the citizens of this state are entitled to work without restrictions or limitations based on race, religion, creed or national origin; . . ."

The final and most telling statutory provision in the laws of the State of Kansas is the very statute here under attack, which, by its very terms, recognizes that the distinction herein practiced is what the Fourteenth Amendment was designed to destroy: discrimination. That statute states:

> "No discrimination on account of color shall be made in high schools except as provided herein."

By plain meaning and context, it is clear that this statute recognized that segregation is discrimination.

Conclusion

The importance of the issues raised, the mistaken notion of the district court that *Plessy* v. *Ferguson* and *Gong Lum* v. *Rice* required them to sustain the constitutionality of Chapter 72-1724 of the General Statutes of Kansas, 1949, in spite of their own findings that segregated schools in Topeka were detrimental to appellants and to Negro children generally, the arbitrary and unreasonable nature of the statute and the utter lack of any real state interest in maintaining racially segregated elementary schools in Kansas where legally enforced racial segregation is an anomaly, all present compelling reasons which warrant review of this judgment on appeal by the United States Supreme Court.

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE COURT

HUXMAN, Circuit Judge, delivered the opinion of the Court.

Chapter 72-1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for white students and four schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all negro schools are inferior to those provided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes an inferiority in educational opportunities offered to negroes and that all of this is in violation of due process guaranteed them by the Fourteenth Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition

the school district defends the segregation in its schools instituted thereunder.

We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka Schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the sub-

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ject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court, we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of Plessy v. Ferguson, 163 U. S. 537, the Supreme Court said:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked

to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of Sweatt v. Painter, 339 U. S. 629, the Supreme Court again refused to review the Plessy case. The Court said:

> "Nor need we reach petitioner's contention that Plessy v. Ferguson should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

Gong Lum v. Rice, 275 U. S. 78, was a grade school segregation case. It involved the segregation law of Mississippi. Gong Lum was a Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited Plessy v. Ferguson, supra. The Court also pointed out that the question was the same no matter what the color of the class that was required to attend separate schools. Thus the Court said: Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow race." The court held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in Me-

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Laurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629, show a trend away from the Plessy and Lum cases. McLaurin v. Oklahoma arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admission of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library; and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.[3]

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[3] The court said: "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he received. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained."

"It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. * * * having been admitted to a state supported graduate school, [he] must receive the same treatment at the hands of the state as students of other races."

In Sweatt v. Painter, 339 U.S. 629, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "We cannot conclude that the education offered petitioner in a separate school is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the equal protection clause limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?", and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

We are accordingly of the view that the Plessy and Lum cases, supra, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

Entered August 3, 1951.

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Findings of Fact

I

This is a class action in which plaintiffs seek a decree, declaring Section 72-1724 of the General Statutes of Kansas 1949 to be unconstitutional, insofar as it empowers the Board of Education of the City of Topeka "to organize and maintain separate schools for the education of white and colored children" and an injunction restraining the enforcement, operation and execution of that portion of the statute and of the segregation instituted thereunder by the School Board.

II

This suit arises under the Constitution of the United States and involves more than $3,000 exclusive of interest and costs. It is also a civil action to redress an alleged deprivation, under color of State law, of a right, privilege or immunity secured by the Constitution of the United States providing for equal rights of citizens and to have the court declare the rights and other legal relations of the interested parties. The Court has jurisdiction of the subject matter and of the parties to the action.

III

Pursuant to statutory authority contained in Section 72-1724 of the General Statutes of Kansas 1949, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system for the first six grades. It has established and maintains in the Topeka School District, eighteen schools for white children and four for colored children, the latter being located in neighborhoods where the population is predominantly colored. The City of Topeka is one school district. The colored children may attend any one of the four schools established for them, the choice being made either by the children or by their parents.

IV

There is no material difference in the physical facilities in the colored schools and in the white schools and such facilities in the colored schools are not inferior in any material respect to those in the white schools.

V

The educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to and are comparable to those of the white schools.

VI

The courses of study prescribed by the State law are taught in both the colored schools and in the white schools. The prescribed courses of study are identical in both classes of schools.

VII

Transportation to and from school is furnished colored children in the segregated schools without cost to the children or to their parents. No such transportation is furnished to the white children in the segregated schools.

VIII

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.

IX

The court finds as facts the stipulated facts and those agreed upon by counsel at the pre-trial and during the course of the trial.

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Conclusions of Law

I

This court has jurisdiction of the subject matter and of the parties to the action.[10]

II

We conclude that no discrimination is practiced against plaintiffs in the colored schools set apart for them because of the nature of the physical characteristics of the buildings, the equipment, the curricula, quality of instructors and instruction or school services furnished and that they are denied no constitutional rights or privileges by reason of any of these matters.

III

Plessy v. Ferguson, 163 U.S. 537, and Gong Lum v. Rice, 275 U.S. 78, upholds the constitutionality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above cited cases have not been overruled by the later cases of McLaurin v. Oklahoma, 339 U.S. 637, and Sweatt v. Painter, 339 U.S. 629.

IV

The only question in the case under the record is whether legal segregation in and of itself without more constitutes denial of due process. We are of the view that under the above decisions of the Supreme Court the answer must be in the negative. We accordingly conclude that plaintiffs have suffered no denial of due process by virtue of the manner in which the segregated school system of Topeka, Kan-

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[10] Title 28 U.S.C. § 1331; idem §1343; idem Ch. 151. Title 8 U.S.C. Ch. 3. Title 28 U.S.C. Ch. 155.

sas, is being operated. The relief sought is therefore denied. Judgment will be entered for defendants for costs.

WALTER A. HUXMAN,
Circuit Judge;
ARTHUR J. MELLOTT,
Chief District Judge;
DELMAS C. HILL,
District Judge.

Entered August 3, 1951.

Decree

Now, on this 3rd day of August, 1951 this cause comes regularly on for hearing before the undersigned Judges, constituting a three-judge court duly convened pursuant to the provisions of Title 28 U.S.C. 2281 and 2284.

The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded.

NOW, THEREFORE, IT IS BY THE COURT, considered, ordered, adjudged and decreed that judgment be and it hereby is entered in favor of the defendants.

WALTER A. HUXMAN,
Circuit Judge;
ARTHUR J. MELLOTT,
Chief District Judge;
DELMAS C. HILL,
District Judge.

Entered August 3, 1951.

APPENDIX "B"

General Statutes of Kansas, 1949

72-1724—Public Schools in Cities of First Class.—The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws

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of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kan.; no discrimination on account of color shall be made in high schools except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city."

76-307—Tuition and fees; persons not debarred on account of age, race, sex or religion.— . . . No person shall be debarred from membership of the university on account of age, race, sex, or religion.

12-713—Race discriminations.—Nothing herein contained shall be construed as authorizing the governing body to discriminate against any person by reason of race or color.

21-2424—Denying civil rights on account of race or color; penalty—That if any of the regents or trustees of any state university, college, or other school of public instruction, or the state superintendent, or the owner or owners, agents, trustees or managers in charge of any inn, hotel or boarding house, or any place of entertainment or amusement for which a license is required by any of the municipal authorities of this state, or the owner or owners or person or persons in charge of any steamboat, railroad, stage coach, omnibus, streetcar, or any other means of public carriage for persons or freight within the state, shall make any distinction on account of race, color, or previous condition of servitude, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not less than ten ($10.00) nor more than one thousand ($1,000.00) dollars, and shall also be liable to damages in any court of competent jurisdiction to the person or persons injured thereby.

21-2461—Denying public work employment on account of race or color.—No person a citizen in the United States

shall be refused or denied employment in any capacity on the ground of race or color, nor be discriminated against in any manner by reason thereof, in connection with any public work, or with the contracting for or the performance of any work, labor or service of any kind on any public work by or on behalf of the state of Kansas, or of any department, bureau, commission, board or official thereof, or by or on behalf of any county, city, township, school district or other municipality of said state.

21-2462—The provisions of this act shall apply to and become a part of any contract hereafter made by or on behalf of the state, or of any department, bureau, commission, board or official thereof, or by or on behalf of any county, city, township, school district, or other municipality of said state, with any corporation, association or person or persons, which may involve the employment of laborers, workmen, or mechanics on any public work; and shall apply to contractors, sub-contractors, or other persons doing or contracting to do the whole or a part of any public work contemplated by said contract.

21-2463—Any officer of the state of Kansas or of any county, city, township, school district, or other municipality, or any person acting under or for such officer, or any contractor, sub-contractor, or other person violating the provisions of this act shall for each offense be punished by fine of not less than fifty ($50.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment of not more than six (6) months or by both fine and imprisonment.

House Joint Resolution No. 1—Approved April 5, 1949

A joint Resolution creating a temporary commission to study and make a report on acts of employment discrimination against citizens because of race, creed, color, religion or national origin, prescribing its powers and duties and making appropriations therefor.

Whereas, It has been brought to the attention of the legislature of the State of Kansas that probable cause exists for the belief that acts of discrimination in employment are

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being perpetrated against some of the citizens of the United States because of race, creed, color, religion or national origin; and

Whereas, The state of Kansas is traditionally and historically opposed to discrimination against any of its citizens in employment; and

Whereas, It is the public policy of this state that all of the citizens of this state are entitled to work without restrictions or limitations based on race, religion, creed or national origin; and

Whereas,The legislature does not have sufficient information upon which to enact adequate and proper laws and there is a difference of opinion as to whether the alleged discriminatory employment conditions actually exist: Now, therefore

Be it resolved by the House of Representatives of the State of Kansas, the Senate agreeing thereto:

§ 1. There is hereby created a temporary commission, hereinafter referred to as the commission, to be known as the "Kansas commission against employment discrimination" consisting of five (5) members to be appointed by the governor.

§ 2. The commission shall organize and elect a chairman, vice-chairman and secretary on or before June 1, 1949, and is hereby authorized to hold such meeting at such times and places within this state as may be necessary to carry out the provisions of this resolution. The commission shall complete its duties as speedily as possible and shall submit its report to the governor and to the members of the Kansas legislative council on or before October 15, 1940.

§ 3. The commission shall have full power and authority to receive and investigate complaints and to hold hearings relative to alleged discrimination in employment of persons because of race, creed, color or national origin.

§ 4. The commission is hereby authorized to employ such clerical and other assistants as may be necessary to enable

it to properly carry out the provisions of this resolution and to fix their compensation.

§ 5. The members of the commission shall receive as compensation for their services the sum of fifteen dollars ($15) per diem and their actual and necessary expenses for time actually spent in carrying out the provisions of this resolution: *Provided*, That in no case shall any member receive more than a total of five hundred dollars ($500) as per diem allowance.

§ 6. The commission shall have all the powers of the legislative committee as provided by law, and shall have power to do all things necessary to carry out the intent and purposes of this resolution and the preamble thereto.

§ 7. There is hereby appropriated to the Kansas commission against discrimination, out of any moneys in the state treasury not otherwise appropriated, the sum of five hundred dollars ($500) for the fiscal year ending June 30, 1949, and the sum of three thousand five hundred dollars ($3,500) for the fiscal year ending June 30, 1950, for the purpose of carrying out the provisions of this resolution: *Provided*, That any unexpended and unencumbered balances of said appropriations as of June 30, 1949, and June 30, 1950, respectively, are hereby reappropriated for the same purposes for the next succeeding fiscal year.

§ 8. The auditor of state shall draw his warrants upon the state treasurer for the purposes provided for in this resolution upon duly itemized vouchers, executed as now or may hereafter be provided for by law, assigned in his office and approved by the chairman of the Kansas commission against discrimination.

§ 9. This act shall take effect and be in force from and after its publication in the official state paper.

Filed October 1, 1951.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 8 1

OLIVER BROWN, MRS. RICHARD LAWTON,
MRS. SADIE EMMANUEL, *et al.*,
Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE
COUNTY, KANSAS, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

BRIEF FOR APPELLANTS

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IN THE

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October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the statutory three-judge-District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2201(b).

Questions Presented

1. Whether the State of Kansas has power to enforce a state statute pursuant to which racially segregated public elementary schools are maintained.

2. Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

The Law of Kansas and the Statute Involved

All boards of education, superintendents of schools and school districts in the state are prohibited from using race as a factor in affording educational opportunities in the public schools within their respective jurisdictions unless expressly empowered to do so by statute. *Knox* v. *Board of Education,* 54 K. 152, 25 P. 616 (1891); *Cartwright* v. *Board of Education,* 73 K. 32, 84 P. 382 (1906); *Rowles* v. *Board of Education,* 76 K. 361, 91 P. 88 (1907); *Woolridge, et al.* v. *Board of Education,* 98 K. 397, 157 P. 1184 (1916); *Thurman-Watts* v. *Board of Education,* 115 K. 328, 222 P. 123 (1924); *Webb* v. *School District,* 167 K. 395, 206 P. 2d 1066 (1949).

Segregated elementary schools in cities of the first class are maintained solely pursuant to authority of Chapter 72-1724 of the General Statutes of Kansas, 1949, which reads as follows:

> "Powers of board; separate schools for white and colored children; manual training. The board of education shall have power to elect their own

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officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kans.; no discrimination on account of color shall be made in high schools except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city. (G. S. 1868, Ch. 18, § 75; L. 1879, Ch. 81, § 1; L. 1905, Ch. 414, § 1; Feb. 28; R. S. 1923, § 72-1724.)"

Statement of the Case

Appellants are of Negro origin and are citizens of the United States and of the State of Kansas (R. 3-4). Infant appellants are children eligible to attend and are now attending elementary schools in Topeka, Kansas, a city of the first class within the meaning of Chapter 72-1724, General Statutes of Kansas, 1949, hereinafter referred to as the statute. Adult appellants are parents of minor appellants and are required by law to send their respective children to public schools designated by appellees (R. 3-4). Appellees are state officers empowered by state law to maintain and operate the public schools of Topeka, Kansas.

For elementary school purposes, the City of Topeka is divided into 18 geographical divisions designated as territories (R. 24). In each of these territories one elementary school services white children exclusively (R. 24). In addition, four schools are maintained for the use of Negro children exclusively (R. 11, 12). These racial distinctions

are enforced pursuant to the statute. In accordance with the terms of the statute there is no segregation of Negro and white children in junior and senior high schools (R. 12).

On March 22, 1951, appellants instituted the instant action seeking to restrain the enforcement, operation and execution of the statute on the ground that it deprived them of equal educational opportunities within the meaning of the Fourteenth Amendment (R. 2-7). In their answer, appellees admitted that they acted pursuant to the statute, and that infant appellants were not eligible to attend any of the 18 white elementary schools solely because of their race and color (R. 12). The Attorney General of the State of Kansas filed a separate answer for the specific purpose of defending the constitutional validity of the statute in question (R. 14).

Thereupon, the court below was convened in accordance with Title 28, United States Code, § 2284. On June 25-26, a trial on the merits took place (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), its findings of fact (R. 244-246), and conclusions of law (R. 246-247), and entered a final judgment and decree in appellees' favor denying the injunctive relief sought (R. 247).

Specifications of Error

The District Court erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces

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a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

Summary of Argument

The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens.

Racial segregation in public schools reduces the benefits of public education to one group solely on the basis of race and color and is a constitutionally proscribed distinction. Even assuming that the segregated schools attended by appellants are not inferior to other elementary schools in Topeka with respect to physical facilities, instruction and courses of study, unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. Such injury and inequality are established as facts on this appeal by the uncontested findings of the District Court.

The District Court reasoned that it could not rectify the inequality that it had found because of this Court's decisions in *Plessy* v. *Ferguson,* 163 U. S. 537 and *Gong Lum* v. *Rice,* 275 U. S. 78. This Court has already decided that the *Plessy* case is not in point. Reliance upon *Gong Lum* v. *Rice* is mistaken since the basic assumption of that case is the existence of equality while no such assumption

can be made here in the face of the established facts. Moreover, more recent decisions of this Court, most notably *Sweatt* v. *Painter,* 339 U. S. 629 and *McLaurin* v. *Board of Regents,* 339 U. S. 637, clearly show that such hurtful consequences of segregated schools as appear here constitute a denial of equal educational opportunities in violation of the Fourteenth Amendment. Therefore, the court below erred in denying the relief prayed by appellants.

ARGUMENT

I

The State of Kansas in affording opportunities for elementary education to its citizens has no power under the Constitution of the United States to impose racial restrictions and distinctions.

While the State of Kansas has undoubted power to confer benefits or impose disabilities upon selected groups of citizens in the normal execution of governmental functions, it must conform to constitutional standards in the exercise of this authority. These standards may be generally characterized as a requirement that the state's action be reasonable. Reasonableness in a constitutional sense is determined by examining the action of the state to discover whether the distinctions or restrictions in issue are in fact based upon real differences pertinent to a lawful legislative objective. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Asbury Hospital* v. *Cass County,* 326 U. S. 207; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580; *Dominion Hotel* v. *Arizona,* 249 U. S. 265.

When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of

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that arbitrariness and capriciousness constitutionally impermissive under our system of government. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Skinner* v. *Oklahoma,* 316 U. S. 535. A racial criterion is a constitutional irrelevance, *Edwards* v. *California,* 314 U. S. 160, 184, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction. *Buchanan* v. *Warley,* 245 U. S. 60; *Morgan* v. *Virginia,* 328 U. S. 373. Only because it was a war measure designed to cope with a grave national emergency was the federal government permitted to level restrictions against persons of enemy descent. *Hirabayashi* v. *United States,* 320 U. S. 81; *Oyama* v. *California,* 332 U. S. 633. This action, "odious," *Hirabayashi* v. *United States, supra,* at page 100, and "suspect," *Korematsu* v. *United States,* 323 U. S. 214, 216, even in times of national peril, must cease as soon as that peril is past. *Ex Parte Endo,* 323 U. S. 283.

This Court has found violation of the equal protection clause in racial distinctions and restrictions imposed by the states in selection for jury service, *Shepherd* v. *Florida,* 341 U. S. 50; ownership and occupancy of real property, *Shelley* v. *Kramer,* 334 U. S. 1; *Buchanan* v. *Warley, supra*; gainful employment, *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; voting, *Nixon* v. *Condon,* 286 U. S. 73; and graduate and professional education. *McLaurin* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.* The commerce clause in proscribing the imposition of racial distinctions and restrictions in the field of interstate travel is a further limitation of state power in this regard. *Morgan* v. *Virginia,* 328 U. S. 373.

Since 1940, in an unbroken line of decisions, this Court has clearly enunciated the doctrine that the state may not validly impose distinctions and restrictions among its citizens based upon race or color alone in each field of governmental activity where question has been raised.

Smith v. *Allwright,* 321 U. S. 649; *Sipuel* v. *Board of Education,* 332 U. S. 631; *Sweatt* v. *Painter, supra; Pierre* v. *Louisiana,* 306 U. S. 354; *Hill* v. *Texas,* 316 U. S. 400; *Morgan* v. *Virginia, supra; McLaurin* v. *Board of Regents, supra; Oyama* v. *California, supra; Takahashi* v. *Fish and Game Commission, supra; Shelley* v. *Kraemer, supra; Shepherd* v. *Florida, supra; Cassell* v. *Texas,* 339 U. S. 282. On the other hand, when the state has sought to protect its citizenry against racial discrimination and prejudice, its action has been consistently upheld, *Railway Mail Association* v. *Corsi,* 326 U. S. 88, even though taken in the field of foreign commerce. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28.

It follows, therefore, that under this doctrine, the State of Kansas which by statutory sanctions seeks to subject appellants, in their pursuit of elementary education, to distinctions based upon race or color alone, is here attempting to exceed the constitutional limits to its authority. For that racial distinction which has been held arbitrary in so many other areas of governmental activity is no more appropriate and can be no more reasonable in public education.

II

The court below, having found that appellants were denied equal educational opportunities by virtue of the segregated school system, erred in denying the relief prayed.

The court below made the following finding of fact:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating

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> the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

This finding is based upon uncontradicted testimony that conclusively demonstrates that racial segregation injures infant appellants in denying them the opportunity available to all other racial groups to learn to live, work and cooperate with children representative of approximately 90% of the population of the society in which they live (R. 216); to develop citizenship skills; and to adjust themselves personally and socially in a setting comprising a cross-section of the dominant population (R. 132). The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege (R. 176); interferes with his motivation for learning (R. 171); and instills in him a feeling of inferiority (R. 169) resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society (R. 165). Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority (R. 177), and where, as here, the state enforces segregation, the communuity at large is supported in or converted to the belief that this myth has substance in fact (R. 156, 169, 177). It was testified that because of the peculiar educational system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects (R. 172) even though there is a change to integrated schools at the upper levels.

That these conclusions are the consensus of social scientists is evidenced by the appendix filed herewith. Indeed, the findings of the court that segregation constitutes discrimination are supported on the face of the statute itself where it states that: " • • • no discrimination on account of color shall be made in high schools *except as provided herein* • • • " (emphasis supplied).

Under the Fourteenth Amendment equality of educational opportunities necessitates an evaluation of all factors affecting the educational process. *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.* Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.

In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students. It necessarily follows, therefore, that the court should have concluded as a matter of law that appellants were deprived of their right to equal educational opportunities in violation of the equal protection clause of the Fourteenth Amendment.

Under the mistaken notion that *Plessy* v. *Ferguson* and *Gong Lum* v. *Rice* were controlling with respect to the validity of racial distinctions in elementary education, the trial court refused to conclude that appellants were here denied equal educational opportunities in violation of their constitutional rights. Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying:

> "*Plessy* v. *Ferguson,* 163 U. S. 537, and *Gong Lum* v. *Rice,* 275 U. S. 78, uphold the constitution-

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> ality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above-cited cases have not been overruled by the later case of *McLaurin* v. *Oklahoma*, 339 U. S. 637, and *Sweatt* v. *Painter*, 339 U. S. 629."

Plessy v. *Ferguson* is not applicable. Whatever doubts may once have existed in this respect were removed by this Court in *Sweatt* v. *Painter, supra,* at page 635, 636.

Gong Lum v. *Rice* is irrelevant to the issues in this case. There, a child of Chinese parentage was denied admission to a school maintained exclusively for white children and was ordered to attend a school for Negro children. The power of the state to make racial distinctions in its school system was not in issue. Petitioner contended that she had a constitutional right to go to school with white children, and that in being compelled to attend school with Negroes, the state had deprived her of the equal protection of the laws.

Further, there was no showing that her educational opportunities had been diminished as a result of the state's compulsion, and it was assumed by the Court that equality in fact existed. There the petitioner was not inveighing against the system, but that its application resulted in her classification as a Negro rather than as a white person, and indeed by so much conceded the propriety of the system itself. Were this not true, this Court would not have found basis for holding that the issue raised was one "which has been many times decided to be within the constitutional power of the state" and, therefore, did not "call for very full argument and consideration."

In short, she raised no issue with respect to the state's power to enforce racial classifications, as do appellants here. Rather, her objection went only to her treatment under the classification. This case, therefore, cannot be pointed to as a controlling precedent covering the instant case in which the constitutionality of the system itself is the basis for attack and in which it is shown the inequality in fact exists.

In any event the assumptions in the *Gong Lum* case have since been rejected by this Court. In the *Gong Lum* case, without "full argument and consideration," the Court assumed the state had power to make racial distinctions in its public schools without violating the equal protection clause of the Fourteenth Amendment and assumed the state and lower federal court cases cited in support of this assumed state power had been correctly decided. Language in *Plessy* v. *Ferguson* was cited in support of these assumptions. These assumptions upon full argument and consideration were rejected in the *McLaurin* and *Sweatt* cases in relation to racial distinctions in state graduate and professional education. And, according to those cases, *Plessy* v. *Ferguson,* is not controlling for the purpose of determining the state's power to enforce racial segregation in public schools.

Thus, the very basis of the decision in the *Gong Lum* case has been destroyed. We submit, therefore, that this Court has considered the basic issue involved here only in those cases dealing with racial distinctions in education at the graduate and professional levels. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Education, supra; Fisher* v. *Hurst,* 333 U. S. 147; *Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.*

In the *McLaurin* and *Sweatt* cases, this Court measured the effect of racial restrictions upon the educational development of the individual affected, and took into account the

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community's actual evaluation of the schools involved. In the instant case, the court below found as a fact that racial segregation in elementary education denoted the inferiority of Negro children and retarded their educational and mental development. Thus the same factors which led to the result reached in the *McLaurin* and *Sweatt* cases are present. Their underlying principles, based upon sound analyses, control the instant case.

Conclusion

In light of the foregoing, we respectfully submit that appellants have been denied their rights to equal educational opportunities within the meaning of the Fourteenth Amendment and that the judgment of the court below should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1952

No. ~~8~~ 1

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*

No. ~~101~~ 2

HARRY BRIGGS, JR., *et al.*,

Appellants,

vs.

R. W. ELLIOTT, Chairman, J. D. CARSON, *et al.*, Members of Board of Trustees of School District No. 22, Clarendon County, S. C., *et al.*

No. ~~101~~ 4 3

DOROTHY E. DAVIS, BERTHA M. DAVIS and INEZ D. DAVIS, etc., *et al.*,

Appellants,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *et al.*

APPENDIX TO APPELLANTS' BRIEFS

The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement

Statement of Counsel

The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals. As a summary of the best available scientific evidence relative to the effects of racial segregation on the individual, we file it herewith as an appendix to our briefs.

Robert L. Carter,
Thurgood Marshall,
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Counsel for Appellants.

IN THE

Supreme Court of the United States

October Term, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*,

Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*

No. 101

HARRY BRIGGS, JR., *et al.*,

Appellants,

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R. W. ELLIOTT, Chairman, J. D. CARSON, *et al.*, Members of Board of Trustees of School District No. 22, Clarendon County, S. C., *et al.*

No. 191

DOROTHY E. DAVIS, BERTHA M. DAVIS and INEZ D. DAVIS, etc., *et al.*,

Appellants,

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COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *et al.*

APPENDIX TO APPELLANTS' BRIEFS

The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement

I

The problem of the segregation of racial and ethnic groups constitutes one of the major problems facing the

American people today. It seems desirable, therefore, to summarize the contributions which contemporary social science can make toward its resolution. There are, of course, moral and legal issues involved with respect to which the signers of the present statement cannot speak with any special authority and which must be taken into account in the solution of the problem. There are, however, also factual issues involved with respect to which certain conclusions seem to be justified on the basis of the available scientific evidence. It is with these issues only that this paper is concerned. Some of the issues have to do with the consequences of segregation, some with the problems of changing from segregated to unsegregated practices. These two groups of issues will be dealt with in separate sections below. It is necessary, first, however, to define and delimit the problem to be discussed.

Definitions

For purposes of the present statement, *segregation* refers to that restriction of opportunities for different types of associations between the members of one racial, religious, national or geographic origin, or linguistic group and those of other groups, which results from or is supported by the action of any official body or agency representing some branch of government. We are not here concerned with such segregation as arises from the free movements of individuals which are neither enforced nor supported by official bodies, nor with the segregation of criminals or of individuals with communicable diseases which aims at protecting society from those who might harm it.

Where the action takes place in a social milieu in which the groups involved do not enjoy equal social status, the group that is of lesser social status will be referred to as the *segregated* group.

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In dealing with the question of the effects of segregation, it must be recognized that these effects do not take place in a vacuum, but in a social context. The segregation of Negroes and of other groups in the United States takes place in a social milieu in which "race" prejudice and discrimination exist. It is questionable in the view of some students of the problem whether it is possible to have segregation without substantial discrimination. Myrdal[1] states: "Segregation * * * is financially possible and, indeed, a device of economy only as it is combined with substantial discrimination" (p. 629). The imbededness of segregation in such a context makes it difficult to disentangle the effects of segregation *per se* from the effects of the context. Similarly, it is difficult to disentangle the effects of segregation from the effects of a pattern of social disorganization commonly associated with it and reflected in high disease and mortality rates, crime and delinquency, poor housing, disrupted family life and general substandard living conditions. We shall, however, return to this problem after consideration of the observable effects of the total social complex in which segregation is a major component.

II

At the recent Mid-century White House Conference on Children and Youth, a fact-finding report on the effects of prejudice, discrimination and segregation on the personality development of children was prepared as a basis for some of the deliberations.[2] This report brought together the available social science and psychological studies which were related to the problem of how racial and religious pre-

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[1] Myrdal, G., *An American Dilemma*, 1944.

[2] Clark, K. B., *Effect of Prejudice and Discrimination on Personality Development*, Fact Finding Report Mid-century White House Conference on Children and Youth, Children's Bureau, Federal Security Agency, 1950 (mimeographed).

judices influenced the development of a healthy personality. It highlighted the fact that segregation, prejudices and discriminations, and their social concomitants potentially damage the personality of all children—the children of the majority group in a somewhat different way than the more obviously damaged children of the minority group.

The report indicates that as minority group children learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation. Many of them become confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others. Under these conditions, the minority group child is thrown into a conflict with regard to his feelings about himself and his group. He wonders whether his group and he himself are worthy of no more respect than they receive. This conflict and confusion leads to self-hatred and rejection of his own group.

The report goes on to point out that these children must find ways with which to cope with this conflict. Not every child, of course, reacts with the same patterns of behavior. The particular pattern depends upon many interrelated factors, among which are: the stability and quality of his family relations; the social and economic class to which he belongs; the cultural and educational background of his parents; the particular minority group to which he belongs; his personal characteristics, intelligence, special talents, and personality pattern.

Some children, usually of the lower socio-economic classes, may react by overt aggressions and hostility

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directed toward their own group or members of the dominant group.[3] Anti-social and delinquent behavior may often be interpreted as reactions to these racial frustrations. These reactions are self-destructive in that the larger society not only punishes those who commit them, but often interprets such aggressive and anti-social behavior as justification for continuing prejudice and segregation.

Middle class and upper class minority group children are likely to react to their racial frustrations and conflicts by withdrawal and submissive behavior. Or, they may react with compensatory and rigid conformity to the prevailing middle class values and standards and an aggressive determination to succeed in these terms in spite of the handicap of their minority status.

The report indicates that minority group children of all social and economic classes often react with a generally defeatist attitude and a lowering of personal ambitions. This, for example, is reflected in a lowering of pupil morale and a depression of the educational aspiration level among minority group children in segregated schools. In producing such effects, segregated schools impair the ability of the child to profit from the educational opportunities provided him.

Many minority group children of all classes also tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist.

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[3] Brenman, M., The Relationship Between Minority Group Identification in A Group of Urban Middle Class Negro Girls, *J. Soc. Psychol.*, 1940, 11, 171-197; Brenman, M., Minority Group Membership and Religious, Psychosexual and Social Patterns in A Group of Middle-Class Negro Girls, *J. Soc. Psychol.* 1940, 12, 179-196; Brenman, M., Urban Lower-Class Negro Girls, *Psychiatry*, 1943, 6, 307-324; Davis, A., The Socialization of the American Negro Child and Adolescent, *J. Negro Educ.*, 1939, 8, 264-275.

The report concludes that while the range of individual differences among members of a rejected minority group is as wide as among other peoples, the evidence suggests that all of these children are unnecessarily encumbered in some ways by segregation and its concomitants.

With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture permits and, at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups.[4]

The report indicates further that confusion, conflict, moral cynicism, and disrespect for authority may arise in majority group children as a consequence of being taught the moral, religious and democratic principles of the brotherhood of man and the importance of justice and fair play by the same persons and institutions who, in their support of racial segregation and related practices, seem to be acting in a prejudiced and discriminatory manner. Some individuals may attempt to resolve this conflict by intensifying their hostility toward the minority group. Others may react by guilt feelings which are not necessarily reflected in more humane attitudes toward the minority group. Still

[4] Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality*, 1951.

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others react by developing an unwholesome, rigid, and uncritical idealization of all authority figures—their parents, strong political and economic leaders. As described in *The Authoritarian Personality,*[5] they despise the weak, while they obsequiously and unquestioningly conform to the demands of the strong whom they also, paradoxically, subconsciously hate.

With respect to the setting in which these difficulties develop, the report emphasized the role of the home, the school, and other social institutions. Studies [6] have shown that from the earliest school years children are not only aware of the status differences among different groups in the society but begin to react with the patterns described above.

Conclusions similar to those reached by the Mid-century White House Conference Report have been stated by other social scientists who have concerned themselves with this problem. The following are some examples of these conclusions:

Segregation imposes upon individuals a distorted sense of social reality.[7]

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[5] Adorno, T. W.; Frenkel-Brunswik, E.; Levinson, D. J.; Sanford, R. N., *The Authoritarian Personality,* 1951.

[6] Clark, K. B. & Clark, M. P., Emotional Factors in Racial Identification and Preference in Negro Children, *J. Negro Educ.,* 1950, 19, 341-350; Clark, K. B. & Clark, M. P., Racial Identification and Preference in Negro Children, *Readings in Social Psychology,* Ed. by Newcomb & Hartley, 1947; Radke, M.; Trager, H.; Davis, H., Social Perceptions and Attitudes of Children, *Genetic Psychol. Monog.,* 1949, 40, 327-447; Radke, M.; Trager, H.; Children's Perceptions of the Social Role of Negroes and Whites, *J. Psychol.,* 1950, 29, 3-33.

[7] Reid, Ira, What Segregated Areas Mean; Brameld, T., Educational Cost, *Discrimination and National Welfare,* Ed. by MacIver, R. M., 1949.

Segregation leads to a blockage in the communications and interaction between the two groups. Such blockages tend to increase mutual suspicion, distrust and hostility.[8]

Segregation not only perpetuates rigid stereotypes and reinforces negative attitudes toward members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur.[9]

We return now to the question, deferred earlier, of what it is about the total society complex of which segregation is one feature that produces the effects described above—or, more precisely, to the question of whether we can justifiably conclude that, as only one feature of a complex social setting, segregation is in fact a significantly contributing factor to these effects.

To answer this question, it is necessary to bring to bear the general fund of psychological and sociological knowledge concerning the role of various environmental influences in producing feelings of inferiority, confusions in personal roles, various types of basic personality structures and the various forms of personal and social disorganization.

On the basis of this general fund of knowledge, it seems likely that feelings of inferiority and doubts about personal worth are attributable to living in an underprivileged environment only insofar as the latter is itself perceived as an indicator of low social status and as a symbol of inferiority. In other words, one of the important determinants in producing such feelings is the awareness of social status difference. While there are many other factors that serve as reminders of the differences in social status, there can be little doubt that the fact of enforced segregation is a major factor.[10]

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[8] Frazier, E., *The Negro in the United States*, 1949; Krech, D. & Crutchfield, R. S., *Theory and Problems of Social Psychology*, 1948; Newcomb, T., *Social Psychology*, 1950.

[9] Lee, A. McClung and Humphrey, N. D., *Race Riot*, 1943.

[10] Frazier, E., *The Negro in the United States*, 1949; Myrdal, G., *An American Dilemma*, 1944.

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This seems to be true for the following reasons among others: (1) because enforced segregation results from the decision of the majority group without the consent of the segregated and is commonly so perceived; and (2) because historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.

In addition, enforced segregation gives official recognition and sanction to these other factors of the social complex, and thereby enhances the effects of the latter in creating the awareness of social status differences and feelings of inferiority.[11] The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter.

Not all of the psychological traits which are commonly observed in the social complex under discussion can be related so directly to the awareness of status differences—which in turn is, as we have already noted, materially contributed to by the practices of segregation. Thus, the low level of aspiration and defeatism so commonly observed in segregated groups is undoubtedly related to the level of self-evaluation; but it is also, in some measure, related among other things to one's expectations with regard to opportunities for achievement and, having achieved, to the opportunities for making use of these achievements. Similarly, the hypersensitivity and anxiety displayed by many minority group children about their

[11] Reid, Ira. What Segregated Areas Mean, *Discrimination and National Welfare*, Ed. by MacIver, R. M., 1949.

relations with the larger society probably reflects their awareness of status differences; but it may also be influenced by the relative absence of opportunities for equal status contact which would provide correctives for prevailing unrealistic stereotypes.

The preceding view is consistent with the opinion stated by a large majority (90%) of social scientists who replied to a questionaire concerning the probable effects of enforced segregation under conditions of equal facilities. This opinion was that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group.[12]

Similar considerations apply to the question of what features of the social complex of which segregation is a part contribute to the development of the traits which have been observed in majority group members. Some of these are probably quite closely related to the awareness of status differences, to which, as has already been pointed out, segregation makes a material contribution. Others have a more complicated relationship to the total social setting. Thus, the acquisition of an unrealistic basis for self-evaluation as a consequence of majority group membership probably reflects fairly closely the awareness of status differences. On the other hand, unrealistic fears and hatreds of minority groups, as in the case of the converse phenomenon among minority group members, are probably significantly influenced as well by the lack of opportunities for equal status contact.

With reference to the probable effects of segregation under conditions of equal facilities on majority group members, many of the social scientists who responded to the poll in the survey cited above felt that the evidence is

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[12] Deutscher, M. and Chein, I., The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, *J. Psychol.*, 1948, 26, 259-287.

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less convincing than with regard to the probable effects of such segregation on minority group members, and the effects are possibly less widespread. Nonetheless, more than 80% stated it as their opinion that the effects of such segregation are psychologically detrimental to the majority group members.[13]

It may be noted that many of these social scientists supported their opinions on the effects of segregation on both majority and minority groups by reference to one or another or to several of the following four lines of published and unpublished evidence.[14] First, studies of children throw light on the relative priority of the awareness of status differentials and related factors as compared to the awareness of differences in facilities. On this basis, it is possible to infer some of the consequences of segregation as distinct from the influence of inequalities of facilities. Second, clinical studies and depth interviews throw light on the genetic sources and causal sequences of various patterns of psychological reaction; and, again, certain inferences are possible with respect to the effects of segregation *per se*. Third, there actually are some relevant but relatively rare instances of segregation with equal or even superior facilities, as in the cases of certain Indian reservations. Fourth, since there are inequalities of facilities in racially and ethnically homogeneous groups, it is possible to infer the kinds of effects attributable to such inequalities in the absence of effects of segregation and, by a kind of subtraction to estimate the effects of segregation *per se* in situations where one finds both segregation and unequal facilities.

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[13] Deutscher, M. and Chein, I., The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, *J. Psychol.*, 1948, 26, 259-287.

[14] Chein, I., What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, *International J. Opinion and Attitude Res.*, 1949, 2, 229-234.

III

Segregation is at present a social reality. Questions may be raised, therefore, as to what are the likely consequences of desegregation.

One such question asks whether the inclusion of an intellectually inferior group may jeopardize the education of the more intelligent group by lowering educational standards or damage the less intelligent group by placing it in a situation where it is at a marked competitive disadvantage. Behind this question is the assumption, which is examined below, that the presently segregated groups actually are inferior intellectually.

The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences.[15] It has been found, for instance, that the differences between the average intelligence test scores of Negro and white children decrease, and the overlap of the distributions increases, proportionately to the number of years that the Negro children have lived in the North.[16] Related studies have shown that this change cannot be explained by the hypothesis of selective migration.[17] It seems clear, therefore, that fears based on the assumption of innate racial differences in intelligence are not well founded.

It may also be noted in passing that the argument regarding the intellectual inferiority of one group as compared to another is, as applied to schools, essentially an

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[15] Klineberg, O., *Characteristics of American Negro*, 1945; Klineberg, O., *Race Differences*, 1936.

[16] Klineberg, O., *Negro Intelligence and Selective Migration*, 1935.

[17] Klineberg, O., *Negro Intelligence and Selective Migration*, 1935.

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argument for homogeneous groupings of children by intelligence rather than by race. Since even those who believe that there are innate differences between Negroes and whites in America in average intelligence grant that considerable overlap between the two groups exists, it would follow that it may be expedient to group together the superior whites and Negroes, the average whites and Negroes, and so on. Actually, many educators have come to doubt the wisdom of class groupings made homogeneous solely on the basis of intelligence.[18] Those who are opposed to such homogeneous grouping believe that this type of segregation, too, appears to create generalized feelings of inferiority in the child who attends a below average class, leads to undesirable emotional consequences in the education of the gifted child, and reduces learning opportunities which result from the interaction of individuals with varied gifts.

A second problem that comes up in an evaluation of the possible consequences of desegregation involves the question of whether segregation prevents or stimulates interracial tension and conflict and the corollary question of whether desegregation has one or the other effect.

The most direct evidence available on this problem comes from observations and systematic study of instances in which desegregation has occurred. Comprehensive reviews of such instances [19] clearly establish the fact that desegrega-

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[18] Brooks, J. J., Interage Grouping on Trial-Continuous Learning, *Bulletin #87, Association for Childhood Education*, 1951; Lane, R. H., Teacher in Modern Elementary School, 1941; Educational Policies Commission of the National Education Association and the American Association of School Administration Report in *Education For All Americans*, published by the N. E. A. 1948.

[19] Delano, W., Grade School Segregation: The Latest Attack on Racial Discrimination, *Yale Law Journal*, 1952, 61, 5, 730-744; Rose, A., The Influence of Legislation on Prejudice; Chapter 53 in *Race Prejudice and Discrimination*, Ed. by Rose, A., 1951; Rose, A., *Studies in Reduction of Prejudice*, Amer. Council on Race Relations, 1948.

tion has been carried out successfully in a variety of situations although outbreaks of violence had been commonly predicted. Extensive desegregation has taken place without major incidents in the armed services in both Northern and Southern installations and involving officers and enlisted men from all parts of the country, including the South.[20] Similar changes have been noted in housing[21] and industry.[22] During the last war, many factories both in the North and South hired Negroes on a non-segregated, nondiscriminatory basis. While a few strikes occurred, refusal

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[20] Kenworthy, E. W., The Case Against Army Segregation, *Annals of the American Academy of Political and Social Science,* 1951, 275, 27-33; Nelson, Lt. D. D., *The Integration of the Negro in the U. S. Navy,* 1951; Opinions About Negro Infantry Platoons in White Companies in Several Divisions, *Information and Education Division, U. S. War Department, Report No. B-157,* 1945.

[21] Conover, R. D., *Race Relations at Codornices Village, Berkeley-Albany, California: A Report of the Attempt to Break Down the Segregated Pattern on A Directly Managed Housing Project,* Housing and Home Finance Agency, Public Housing Administration, Region I, December 1947 (mimeographed); Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects: A Guide for Local Housing Authorities on How to Do It,* Public Housing Administration, New York Field Office (mimeographed)

[22] Minard, R. D., The Pattern of Race Relationships in the Pocahontas Coal Field, *J. Social Issues,* 1952, 8, 29-44; Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P, *Negro Labor, A National Problem,* 1941.

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by management and unions to yield quelled all strikes within a few days.[23].

Relevant to this general problem is a comprehensive study of urban race riots which found that race riots occurred in segregated neighborhoods, whereas there was no violence in sections of the city where the two races lived, worked and attended school together.[24]

Under certain circumstances desegregation not only proceeds without major difficulties, but has been observed to lead to the emergence of more favorable attitudes and friendlier relations between races. Relevant studies may be cited with respect to housing, [25] employment,[26] the armed

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[23] Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P, *Negro Labor, A National Problem,* 1941.

[24] Lee, A. McClung and Humphrey, N. D., *Race Riot,* 1943; Lee, A. McClung, Race Riots Aren't Necessary, *Public Affairs Pamphlet,* 1945.

[25] Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Merton, R. K.; West, P. S.; Jahoda, M., *Social Fictions and Social Facts: The Dynamics of Race Relations in Hilltown,* Bureau of Applied Social Research Columbia, Univ., 1949 (mimeographed); Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How To Do It.,* Public Housing Administration, New York Field Office (mimeographed); Wilner, D. M.; Walkley, R. P.; and Cook, S. W., Intergroup Contact and Ethnic Attitudes in Public Housing Projects, *J. Social Issues,* 1952, 8, 45-69.

[26] Harding, J., and Hogrefe, R., Attitudes of White Department Store Employees Toward Negro Co-workers, *J. Social Issues,* 1952, 8, 19-28; Southall, S. E., *Industry's Unfinished Business,* 1951; Weaver, G. L-P., *Negro Labor, A National Problem,* 1941.

services [27] and merchant marine,[28] recreation agency,[29] and general community life.[30]

Much depends, however, on the circumstances under which members of previously segregated groups first come in contact with others in unsegregated situations. Available evidence suggests, first, that there is less likelihood of unfriendly relations when the change is simultaneously introduced into all units of a social institution to which it is applicable—*e.g.*, all of the schools in a school system or all of the shops in a given factory.[31] When factories introduced Negroes in only some shops but not in others the prejudiced workers tended to classify the desegregated

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[27] Kenworthy, E. W., The Case Against Army Segregation, *Annals of the American Academy of Political and Social Science*, 1951, 275, 27-33; Nelson, Lt. D. D., *The Integration of the Negro in the U. S. Navy*, 1951; Stouffer, S., et al., *The American Soldier*, Vol. I, Chap. 19, A Note on Negro Troops in Combat, 1949; Watson, G., *Action for Unity*, 1947; Opinions About Negro Infantry Platoons in White Companies in Several Divisions, *Information and Education Division, U. S. War Department, Report No. B-157*, 1945.

[28] Brophy, I. N., The Luxury of Anti-Negro Prejudice, *Public Opinion Quarterly*, 1946, 9, 456-466 (Integration in Merchant Marine); Watson, G., *Action for Unity*, 1947.

[29] Williams, D. H., *The Effects of an Interracial Project Upon the Attitudes of Negro and White Girls Within the Young Women's Christian Association*, Unpublished M. A. thesis, Columbia University, 1934.

[30] Dean, J. P., *Situational Factors in Intergroup Relations: A Research Progress Report.* Paper Presented to American Sociological Society, 12/28/49 (mimeographed); Irish, D. P., Reactions of Residents of Boulder, Colorado, to the Introduction of Japanese Into the Community, *J. Social Issues*, 1952, 8, 10-17.

[31] Minard, R. D., The Pattern of Race Relationships in the Pocahontas Coal Field, *J. Social Issues*, 1952, 8, 29-44; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It*, Public Housing Administration, New York Field Office (mimeographed).

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shops as inferior, "Negro work." Such objections were not raised when complete integration was introduced.

The available evidence also suggests the importance of consistent and firm enforcement of the new policy by those in authority.[32] It indicates also the importance of such factors as: the absence of competition for a limited number of facilities or benefits;[33] the possibility of contacts which permit individuals to learn about one another as individuals;[34] and the possibility of equivalence of positions and functions among all of the participants within the unsegregated situation.[35] These conditions can generally be satisfied in a number of situations, as in the armed services, public housing developments, and public schools.

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[32] Deutsch, M. and Collins, M. E., *Interracial Housing, A Psychological Study of A Social Experiment,* 1951; Feldman, H., The Technique of Introducing Negroes Into the Plant, *Personnel,* 1942, 19, 461-466; Rutledge, E., *Integration of Racial Minorities in Public Housing Projects; A Guide for Local Housing Authorities on How to Do It,* Public Housing Administration, New York Field Office (mimeographed); Southall, S. E., *Industry's Unfinished Business,* 1951; Watson, G., *Action for Unity,* 1947.

[33] Lee, A. McClung and Humphrey, N. D., *Race Riot,* 1943; Williams, R., Jr., *The Reduction of Intergroup Tensions,* Social Science Research Council, New York, 1947; Windner, A. E., *White Attitudes Towards Negro-White Interaction In An Area of Changing Racial Composition.* Paper Delivered at the Sixtieth Annual Meeting of the American Psychological Association, Washington, September 1952.

[34] Wilner, D. M.; Walkley, R. P.; and Cook, S. W., Intergroup Contact and Ethnic Attitudes in Public Housing Projects, *J. Social Issues,* 1952, 8, 45-69.

[35] Allport, G. W., and Kramer, B., Some Roots of Prejudice, *J. Psychol.,* 1946, *22,* 9-39; Watson, J., Some Social and Psychological Situations Related to Change in Attitude, *Human Relations,* 1950, 3, 1.

IV

The problem with which we have here attempted to deal is admittedly on the frontiers of scientific knowledge. Inevitably, there must be some differences of opinion among us concerning the conclusiveness of certain items of evidence, and concerning the particular choice of words and placement of emphasis in the preceding statement. We are nonetheless in agreement that this statement is substantially correct and justified by the evidence, and the differences among us, if any, are of a relatively minor order and would not materially influence the preceding conclusions.

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IN THE

Supreme Court of the United States

October Term, 1953

Office - Supreme Court, U.S.
NOV 16 1953
HAROLD B. WILLEY, Clerk

No. 1

OLIVER BROWN, ET AL., *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants.*

vs.

R. W. ELLIOTT, ET AL., *Appellees.*

No. ~~4~~ 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARDS COUNTY, *Appellees.*

No. ~~10~~ 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

vs.

ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1953

—o—

No. 1

OLIVER BROWN, *et al.*, *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, *et al.*, *Appellees.*

No. 2

HARRY BRIGGS, JR., *et al.*, *Appellants,*

vs.

R. W. ELLIOTT, *et al.*, *Appellees.*

No. 4

DOROTHY E. DAVIS, *et al.*, *Appellants,*

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, *et al.*, *Appellees.*

No. 10

FRANCIS B. GEBHART, *et al.*, *Petitioners,*

vs.

ETHEL LOUISE BELTON, *et al.*, *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY.

—o—

BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT

Explanatory Statement

One brief is being filed in these four cases. They fundamentally involve the same questions and issues. As an aid to the Court, we are restating below a full history of each case.

NO. 1

Opinion Below

The opinion of the statutory three-judge District Court for the District of Kansas (R. 238-244) is reported at 98 F. Supp. 797.

Jurisdiction

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro students eligible to attend and attending elementary schools in Topeka, Kansas, and their parents (R. 3-4). Appellees are state officers empowered to maintain and operate the public schools of Topeka, Kansas (R. 4-5). On March 22, 1951, appellants commenced this class action against appellees to restrain them from enforcing and executing that part of Chapter 72-1724, General Statutes of Kansas, 1949, which permitted racial segregation in public elementary schools, on the ground that it violated the Fourteenth Amendment by depriving the infant appellants of equal educational opportunities (R. 2-7), and for a judgment declaring that the

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practice of appellees under said statute of maintaining and operating racially segregated elementary schools is in violation of the Fourteenth Amendment.

Appellees admitted in their answer that they acted pursuant to the statute and that, solely because of their color, the infant appellants were not eligible to attend any of the elementary schools maintained exclusively for white students (R. 12). The Attorney General of the State of Kansas filed a separate answer specifically to defend the constitutional validity of the statute (R. 14).

The court below was convened in accordance with Title 28, United States Code, § 2284, and, on June 25-26, a trial on the merits was held (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion (R. 238-244), findings of fact (R. 244-246) and conclusions of law (R. 246-247) and entered a final judgment denying the injunctive relief sought (R. 247).

Specification of Errors

The court below erred:

1. In refusing to grant appellants' application for a permanent injunction to restrain appellees from acting pursuant to the statute under which they are maintaining separate public elementary schools for Negro children, solely because of their race and color.

2. In refusing to hold that the State of Kansas is without authority to promulgate the statute because it enforces a classification based upon race and color which is violative of the Constitution of the United States.

3. In refusing to enter judgment in favor of appellants after finding that enforced attendance at racially segregated elementary schools was detrimental and deprived them of educational opportunities equal to those available to white children.

NO. 2

Opinions Below

The majority and dissenting opinions of the statutory three-judge District Court for the Eastern District of South Carolina on the first hearing (R. 176-209) are reported in 98 F. Supp. 529-548. The opinion on the second hearing (R. 301-306) is reported in 103 F. Supp. 920-923.

Jurisdiction

The judgment of the court below was entered on March 13, 1952 (R. 306). A petition for appeal was filed below and allowed on May 10, 1952 (R. 309). Probable jurisdiction was noted on June 9, 1952 (R. 316). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

Statement of the Case

Appellants are Negro children who reside in and are eligible to attend the public schools of School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians (R. 4-5). Appellees are the public school officials of said district who, as officers of the state, maintain and operate the public schools of that district (R. 5-6). On December 22, 1950, appellants commenced this class action against appellees to enjoin enforcement of Article XI, Section 7, of the Constitution of South Carolina and Section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of races in public schools, on the ground that they deny to appellants the equal protection of the laws secured by the Fourteenth Amendment, and for a judgment declaring that said laws violate the Fourteenth Amendment and are invalid (R. 2-11).

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Appellees in their answer admitted adherence to the said constitutional and statutory provisions requiring racial segregation in public schools and asserted that such provisions were a reasonable exercise of the police powers of the state and, therefore, were valid (R. 13-17).

A three-judge District Court was convened, pursuant to Title 28, United States Code, §§ 2284, and on July 25, 1951, a trial on the merits was held (R. 30 *et seq.*). On June 23, 1951, the court below filed its opinion (R. 176) and entered a final decree (R. 209): (1) upholding the constitutional validity of the contested state constitutional and statutory provisions; (2) denying the injunctive relief which was sought; (3) requiring appellees to furnish to appellants educational facilities equal to those furnished to white students; and (4) requiring appellees within six months to file a report of action taken toward that end.

An appeal from this judgment was allowed by this Court on July 20, 1951. The report required by the decree of the court below was filed on December 21, 1951, and subsequently forwarded to this Court. On January 28, 1952, this Court vacated the judgment of the court below and remanded the case for the purpose of obtaining the views of the court below on the additional facts in the record and to give it the opportunity to take such action as it might deem appropriate in light of the report. 342 U. S. 350. Mr. Justice Black and Mr. Justice Douglas dissented on the ground that the additional facts in the report were "wholly irrelevant to the constitutional questions presented by the appeal to this Court". 342 U. S. 350.

Pursuant to the mandate of this Court, a second trial was held in the court below on March 3, 1953 (R. 271), at which time the appellees filed an additional report showing progress made since the filing of the original report (R. 273). On March 13, 1952, the court below filed its opinion (R. 301) and entered a final decree (R. 306) again upholding the validity of the contested constitutional and statutory provisions, denying the injunctive relief re-

quested and requiring appellees to afford to appellants educational facilities equal to those afforded to white students.

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of the laws of South Carolina requiring racial segregation in the public schools of Clarendon County on the ground that these laws violate rights secured under the equal protection clause of the Fourteenth Amendment.

2. In refusing to grant to appellants immediate and effective relief against the unconstitutional practice of excluding appellants from an opportunity to share the public school facilities of Clarendon County on an equal basis with other students without regard to race or color.

3. In predicating its decision on the doctrine of *Plessy* v. *Ferguson* and in disregarding the rationale of *Sweatt* v. *Painter* and *McLaurin* v. *Board of Regents.*

NO. 4

Opinion Below

The opinion of the statutory three-judge District Court for the Eastern District of Virginia (R. 617-623) is reported at 103 F. Supp. 337-341.

Jurisdiction

The judgment of the court below was entered on March 7, 1952 (R. 623). A petition for appeal was filed below and allowed on May 5, 1952 (R. 625, 630, 683). Probable jurisdiction was noted on October 8, 1952. —U. S. —, 97 L. ed. (Advance p. 27). Jurisdiction of this Court rests on Title 28, United States Code, §§ 1253 and 2101(b).

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Statement of the Case

Appellants, high school students residing in Prince Edward County, Virginia, and their parents and guardians, brought a class action against appellees, the County School Board and the Division Superintendent of Schools on May 23, 1951. The complaint (R. 5-30) alleged that said appellees maintained separate public secondary schools for Negro and white children pursuant to Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, section 22-221, of the Code of Virginia of 1950; that the Negro school was inferior and unequal to the white schools; and that it was impossible for the infant appellants to secure educational opportunities or facilities equal to those afforded white children similarly situated as long as said appellees enforce said laws or pursued a policy of racial segregation. It sought a judgment declaratory of the invalidity of said laws as a denial of rights secured by the due process and equal protection clauses of the Fourteenth Amendment, and an injunction restraining said appellees from enforcing said laws and from making any distinction based on race or color among children attending the secondary schools of the County.

Appellees admitted maintenance of said schools, enforcement of said laws, and inequalities as to physical plant and equipment, but denied that the segregation violated the Constitution (R. 32-36). Appellee, the Commonwealth of Virginia, intervened (R. 37) and made the same admissions and defense (R. 37-39).

On March 7, 1952, a three-judge District Court found the Negro school inferior in plant, facilities, curricula and means of transportation (R. 622-623) and ordered appellees forthwith to provide "substantially" equal curricula and transportation facilities and to "proceed with all reasonable diligence and dispatch to remove" the existing inequality "by building, furnishing and providing a high school building and facilities for Negro students" (R. 624). It refused to enjoin enforcement of the constitutional and

statutory segregation provisions on the grounds: (1) that appellants' evidence as to the effects of educational segregation did not overbalance appellees', and that it accepted as "apt and able precedent" *Briggs* v. *Elliott*, 98 F. Supp. 529 (E. D. S. C. 1951) and *Carr* v. *Corning*, 182 F. 2d 14 (C. A. D. C. 1950) which "refused to decree that segregation be abolished incontinently" (R. 619); (2) that nullification of the segregation provisions was unwarranted in view of evidence that racial segregation was not based on prejudice or caprice but, rather, was "one of the ways of life in Virginia" (R. 620); (3) that segregation has begotten greater opportunities for the Negro (R. 621); (4) that elimination of segregation would lessen interest in and financial support of public schools (R. 621); and (5) that, finding "no hurt or harm to either race," it was not for the court "to adjudge the policy as right or wrong" (R. 621-622).

Specification of Errors

The court below erred:

1. In refusing to enjoin the enforcement of Article IX, Section 140 of the Constitution of Virginia, and Title 22, Chapter 12, Article 1, Section 22-221, of the Code of Virginia of 1950, upon the grounds that these laws violate rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to forthwith restrain appellees from using race as a factor in determining the assignment of public secondary educational facilities in Prince Edward County, Virginia, after it had found that appellants are denied equality of buildings, facilities, curricula and means of transportation in violation of the due process and equal protection clauses of the Fourteenth Amendment.

3. In refusing to hold that appellants are entitled to equality in all aspects of the public secondary educational

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process, in addition to equality in physical facilities and curricula.

4. In issuing a decree ordering appellees to equalize secondary school facilities in the County where such decree cannot be effectively enforced without involving the court in the daily operation and supervision of schools.

NO. 10

Opinions Below

The opinion of the Chancellor of the State of Delaware (A. 338) is reported at 87 A. (2d) 862. The opinion of the Supreme Court of Delaware (R. 37) is reported at 91 A. (2d) 137.*

Jurisdiction

The judgment of the court below was entered on August 28, 1952 (R. 37). On November 13, 1952 petition for writ of certiorari was filed herein. On November 20, 1952, respondents waived the filing of a brief in opposition to the petition for writ of certiorari and moved that, if certiorari were granted, the argument be advanced and heard immediately following argument in Nos. 8, 101 and 191. On November 24, 1952, the petition for writ of certiorari and motion to advance were granted. — U. S. —; 97 L. ed. (Advance, p. 124). Jurisdiction of this Court rests upon Title 28, United States Code, § 1257(3).

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* The record in this case consists of five separate parts: appendix to petitioners' brief in the court below, the supplement thereto, appendix to respondents' brief in the court below, the supplement thereto, and the record of proceedings in the Supreme Court of Delaware. These will be referred to in respondents' brief as follows:

Appendix to petitioners' brief below will be indicated by A; the supplement to the petitioners' appendix below will be referred to as SA; respondents' appendix below will be referred to as RA; the supplement to respondents' appendix below will be referred to as RSA; the record of proceedings in the Supreme Court of Delaware will be referred to as R.

Statement of the Case

No. 10 arises from two separate class actions filed in the Court of Chancery of the State of Delaware by Negro school children and their guardians seeking admittance of the children to two public schools maintained by petitioners exclusively for white children in New Castle County, Delaware. In the courts below, plaintiffs prevailed, and they and members of their class are now attending the schools to which they sought admission, an application for stay of final order having been denied. (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27). Thus, in this case, unlike the other school segregation cases now under consideration, plaintiffs are respondents in this Court. Nevertheless, they file their brief at this time along with appellants in Numbers 1, 2 and 4, because, on the fundamental issues, they take the same position as do those appellants, and because they believe that by so filing they will facilitate the Court's consideration of the matters at bar.

The complaint (A 3-13) in one of the two cases from which No. 10 arises, alleged that respondents residing in the Claymont Special School District were refused admittance to the Claymont High School maintained by petitioner-members of the State Board of Education and members of the Board of Education of the Claymont Special School District solely because of respondents' color. Because of this, these respondents were compelled to attend Howard High School (RA 47), a public school for Negroes only, in Wilmington, Delaware. Howard High School is operated and controlled by the Corporate Board of Public Education in Wilmington, not a party to this case (A 314-15, 352; R 57, RA 203). The second complaint (A 14-30) out of which No. 448 arises alleged that respondent was excluded from Hockessin School No. 29, a public elementary school maintained for white children only, by petitioner-members of the State Board of Education and petitioner-

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members of the Board of School Trustees of Hockessin School No. 29. Respondent and the class she represented at the time of the complaint, attended Hockessin School No. 107, maintained solely for Negroes by the State Board of Education. Respondents in both complaints asserted that the aforesaid state-imposed racial segregation required by Par. 2631, Revised Code of Delaware, 1935, and Article X, Section 1 of the Constitution of Delaware: (1) compelled them to attend schools substantially inferior to those for white children to which admittance was sought; and (2) injured their mental health, impeded their mental and personality development and made inferior their educational opportunity as compared with that offered by the state to white children similarly situated. Such treatment, respondents asserted, is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioners' answers (A 31-33, A 34-37) defended the exclusion: (1) upon mandatory constitutional and statutory provisions of the State of Delaware which require separate public schools for white and colored children; and (2) upon the fact that the educational opportunities offered respondents were equal to those offered white children similarly situated.

The two cases were consolidated and tried before the Chancellor. In an opinion (A 348-356; 87 A. (2d) 862) filed on April 1, 1952, the Chancellor found as a fact that in "our Delaware society" segregation in education practiced by petitioners "itself results in Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." However, the Chancellor denied respondents' prayers for a judgment on this ground and refused to declare that the Delaware constitutional and statutory provisions violated respondents' right to equal protection. But the Chancellor did award respondents the relief which they requested because other in-

equalities were found to exist. These included, in the high school, teacher training, pupil-teacher ratio, extra-curricular activities, physical plant and esthetic considerations, and time and distance involved in travel. As to the elementary schools in question, the court found the Negro facilities inferior in building and site, esthetic considerations, teacher preparation and transportation facilities. A more detailed exposition of the facts upon which these findings were based is set forth in respondents' Brief in No. 448, October Term, 1952, pp. 27-44.

The Chancellor, as stated above, ordered that respondents be granted immediate relief in the only way that it was then available, that is, by admission to the superior facilities. On August 28, 1952, the Supreme Court of Delaware affirmed. 91 A. (2d) 137. Its findings on some of the facts were somewhat different than the Chancellor's but, on the whole, it agreed with him. Upholding the Chancellor's determination that the requested relief could not be granted because of the harmful psychological effect of racial segregation, it did not otherwise review his factual findings in this regard. Denying petitioners' plea for time to equalize the facilities in question, the Supreme Court held that in the high school case: (1) a decree ordering petitioners to equalize the facilities in question could have no effect on the legal entity having control of the Wilmington public schools which was not a party to the cause; and (2) that the court did not see how it could supervise and control the expenditure of state funds in a matter committed to the administrative discretion of school authorities. Finally, the court held that it could not issue a decree which would, in effect, deny to plaintiffs what it had held they rightfully deserved. As to the elementary school, the court also noted that defendants had not assumed the burden of showing to what extent remedial legislation had improved or could improve conditions in the future. Alluding to its antecedent discussion of the question of

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relief for high school respondents, it affirmed the Chancellor's finding on this issue also.

Stay of the order was denied by the Chancellor and by the Supreme Court of Delaware (Brief of Respondents, No. 448, October Term, 1952, pp. 25-27) and respondents and members of their class are now enjoying their second year of equal educational opportunities under the decree.

This Court's Order

These four cases were argued and submitted to the Court on December 9-11, 1952. Thereafter, on June 8, 1953, this Court entered its order for reargument, as follows, — U. S. —; 97 L. ed. (Advance p. 956):

> *"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:*
>
> *"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?*
>
> *"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment*
>
> *"(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or*
>
> *"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?*

"3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

On August 4, 1953, upon motion of the Attorney General of the United States and without objection by the parties,

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this Court entered its order postponing the date assigned for reargument of these cases until December 7, 1953.

Summary of Argument

These cases consolidated for argument before this Court present in different factual contexts essentially the same ultimate legal questions.

The substantive question common to all is whether a state can, consistently with the Constitution, exclude children, solely on the ground that they are Negroes, from public schools which otherwise they would be qualified to attend. It is the thesis of this brief, submitted on behalf of the excluded children, that the answer to the question is in the negative: the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race. Both the legal precedents and the judicial theories, discussed in Part I hereof, and the evidence concerning the intent of the framers of the Fourteenth Amendment and the understanding of the Congress and the ratifying states, developed in Part II hereof, support this proposition.

Denying this thesis, the school authorities, relying in part on language originating in this Court's opinion in *Plessy* v. *Ferguson*, 163 U. S. 537, urge that exclusion of Negroes, *qua* Negroes, from designated public schools is permissible when the excluded children are afforded admittance to other schools especially reserved for Negroes, *qua* Negroes, if such schools are equal.

The procedural question common to all the cases is the role to be played, and the time-table to be followed, by this Court and the lower courts in directing an end to the challenged exclusion, in the event that this Court determines, with respect to the substantive question, that exclusion of Negroes, *qua* Negroes, from public schools contravenes the Constitution.

The importance to our American democracy of the substantive question can hardly be overstated. The question is whether a nation founded on the proposition that "all men are created equal" is honoring its commitments to grant "due process of law" and "the equal protection of the laws" to all within its borders when it, or one of its constituent states, confers or denies benefits on the basis of color or race.

1. Distinctions drawn by state authorities on the basis of color or race violate the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60. This has been held to be true even as to the conduct of public educational institutions. *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. Whatever other purposes the Fourteenth Amendment may have had, it is indisputable that its primary purpose was to complete the emancipation provided by the Thirteenth Amendment by ensuring to the Negro equality before the law. The *Slaughter-House Cases*, 16 Wall. 36; *Strauder* v. *West Virginia*, 100 U. S. 303.

2. Even if the Fourteenth Amendment did not *per se* invalidate racial distinctions as a matter of law, the racial segregation challenged in the instant cases would run afoul of the conventional test established for application of the equal protection clause because the racial classifications here have no reasonable relation to any valid legislative purpose. See *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Truax* v. *Raich*, 239 U. S. 33; *Smith* v. *Cahoon*, 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 535. See also *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 192; *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192.

3. Appraisal of the facts requires rejection of the contention of the school authorities. The educational detriment involved in racially constricting a student's associations has already been recognized by this Court.

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Sweatt v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

4. The argument that the requirements of the Fourteenth Amendment are met by providing alternative schools rests, finally, on reiteration of the separate but equal doctrine enunciated in *Plessy* v. *Ferguson*.

Were these ordinary cases, it might be enough to say that the *Plessy* case can be distinguished—that it involved only segregation in transportation. But these are not ordinary cases, and in deference to their importance it seems more fitting to meet the *Plessy* doctrine head-on and to declare that doctrine erroneous.

Candor requires recognition that the plain purpose and effect of segregated education is to perpetuate an inferior status for Negroes which is America's sorry heritage from slavery. But the primary purpose of the Fourteenth Amendment was to deprive the states of *all* power to perpetuate such a caste system.

5. The first and second of the five questions propounded by this Court requested enlightment as to whether the Congress which submitted, and the state legislatures and conventions which ratified, the Fourteenth Amendment contemplated or understood that it would prohibit segregation in public schools, either of its own force or through subsequent legislative or judicial action. The evidence, both in Congress and in the legislatures of the ratifying states, reflects the substantial intent of the Amendment's proponents and the substantial understanding of its opponents that the Fourteenth Amendment would, of its own force, proscribe all forms of state-imposed racial distinctions, thus necessarily including all racial segregation in public education.

The Fourteenth Amendment was actually the culmination of the determined efforts of the Radical Republican majority in Congress to incorporate into our fundamental law the well-defined equalitarian principle of complete

equality for all without regard to race or color. The debates in the 39th Congress and succeeding Congresses clearly reveal the intention that the Fourteenth Amendment would work a revolutionary change in our state-federal relationship by denying to the states the power to distinguish on the basis of race.

The Civil Rights Bill of 1866, as originally proposed, possessed scope sufficiently broad in the opinion of many Congressmen to entirely destroy all state legislation based on race. A great majority of the Republican Radicals—who later formulated the Fourteenth Amendment—understood and intended that the Bill would prohibit segregated schools. Opponents of the measure shared this understanding. The scope of this legislation was narrowed because it was known that the Fourteenth Amendment was in process of preparation and would itself have scope exceeding that of the original draft of the Civil Rights Bill.

6. The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color. The intention of the framers with respect to any specific example of caste state action—in the instant cases, segregated education—cannot be determined solely on the basis of a tabulation of contemporaneous statements mentioning the specific practice. The framers were formulating a constitutional provision setting broad standards for determination of the relationship of the state to the individual. In the nature of things they could not list all the specific categories of existing and prospective state activity which were to come within the constitutional prohibitions. The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence. So far as there was consideration of the Amendment's impact upon the undeveloped educational systems then existing, both proponents and opponents of the Amend-

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ment understood that it would proscribe all racial segregation in public education.

7. While the Amendment conferred upon Congress the power to enforce its prohibitions, members of the 39th Congress and those of subsequent Congresses made it clear that the framers understood and intended that the Fourteenth Amendment was self-executing and particularly pointed out that the federal judiciary had authority to enforce its prohibitions without Congressional implementation.

8. The evidence as to the understanding of the states is equally convincing. Each of the eleven states that had seceded from the Union ratified the Amendment, and concurrently eliminated racial distinctions from its laws, and adopted a constitution free of requirement or specific authorization of segregated schools. Many rejected proposals for segregated schools, and none enacted a school segregation law until after readmission. The significance of these facts is manifest from the consideration that ten of these states, which were required, as a condition of readmission, to ratify the Amendment and to modify their constitutions and laws in conformity therewith, considered that the Amendment required them to remove all racial distinctions from their existing and prospective laws, including those pertaining to public education.

Twenty-two of the twenty-six Union states also ratified the Amendment. Although unfettered by congressional surveillance, the overwhelming majority of the Union states acted with an understanding that it prohibited racially segregated schools and necessitated conformity of their school laws to secure consistency with that understanding.

9. In short, the historical evidence fully sustains this Court's conclusion in the *Slaughter Houses Cases*, 16 Wall. 61, 81, that the Fourteenth Amendment was designed to take from the states all power to enforce caste or class distinctions.

10. The Court in its fourth and fifth questions assumes that segregation is declared unconstitutional and inquires as to whether relief should be granted immediately or gradually. Appellants, recognizing the possibility of delay of a purely administrative character, do not ask for the impossible. No cogent reasons justifying further exercise of equitable discretion, however, have as yet been produced.

It has been indirectly suggested in the briefs and oral argument of appellees that some such reasons exist. Two plans were suggested by the United States in its Brief as *Amicus Curiae*. We have analyzed each of these plans as well as appellees' briefs and oral argument and find nothing there of sufficient merit on which this Court, in the exercise of its equity power, could predicate a decree permitting an effective gradual adjustment from segregated to non-segregated school systems. Nor have we been able to find any other reasons or plans sufficient to warrant the exercise of such equitable discretion in these cases. Therefore, in the present posture of these cases, appellants are unable to suggest any compelling reasons for this Court to postpone relief.

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ARGUMENT

PART ONE

The question of judicial power to abolish segregated schools is basic to the issues involved in these cases and for that reason we have undertaken to analyze it at the outset before dealing with the other matters raised by the Court, although formally this means that the first section of this brief comprehends Question No. 3:

> *On the assumption that the answers to question 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?*

I.

Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinctions based upon race or color in affording educational opportunities in the public schools.

This Court in a long line of decisions has made it plain that the Fourteenth Amendment prohibits a state from making racial distinctions in the exercise of governmental power. Time and again this Court has held that if a state's power has been exercised in such a way as to deprive a Negro of a right which he would have freely enjoyed if he had been white, then that state's action violated the Fourteenth Amendment.

In *Shelley* v. *Kraemer*, 334 U. S. 1, for example, an unanimous Court held that States of Missouri and Michigan had violated the 14th Amendment when their courts ruled that a Negro could not own real property whose ownership it was admitted the state law would have protected him in, had he been white. This, despite the fact

that the state court was doing no more than enforcing a private agreement running with the land. The sole basis for the decision, then, was that the Fourteenth Amendment compels the states to be color blind in exercising their power and authority.

Buchanan v. *Warley,* 245 U. S. 60, was an earlier decision to the same effect. There, this Court invalidated a Louisville, Kentucky ordinance which required racial residential segregation. Though it applied to Negro and white alike, the Court rightly recognized that the ordinance was an exercise of the state's power based on race and race alone. This, the Court ruled, was a violation of the Fourteenth Amendment. To the same effect is *Barrows* v. *Jackson,* — U. S. —, 97 L. ed. Advance p. 261). And see *Oyama* v. *California,* 332 U. S. 633.

This Court has applied the same rigorous requirement to the exercise of the state's power in providing public education. Beginning with *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, this Court has uniformly ruled that the Fourteenth Amendment prohibits a state from using race or color as the determinant of the quantum, quality or type of education and the place at which education is to be afforded. Most recently, this Court in *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, held that rules which made distinctions among students in the same school solely on the basis of color were forbidden by the Fourteenth Amendment. Thus, this Court has made it plain that no state may use color or race as the axis upon which the state's power turns, and the conduct of the public education system has not been excepted from this ban.

This judicial recognition that race is an irrational basis for governmental action under our Constitution has been manifested in many decisions and opinions of this Court. In *Yick Wo* v. *Hopkins,* 118 U. S. 356, this Court struck down local administrative action which differentiated between whites and Chinese. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, Chief Justice Stone, in a majority

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opinion, characterized racial distinctions as "odious to a free people". In *Korematsu* v. *United States,* 323 U. S. 214, 216, the Court viewed racial restrictions as "immediately suspect". Mr. Justice Jackson, concurring in *Edwards* v. *California,* 314 U. S. 180, 185, referred to race and color as "constitutionally an irrelevance". Mr. Justice Douglas, dissenting in *South* v. *Peters,* 339 U. S. 276, 278, considered discriminations based upon race, creed, or color "beyond the pale". In an unanimous opinion in *Henderson* v. *United States,* 339 U. S. 816, 825, the Court, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility". Every member of the present Court has from time to time subscribed to this view of race as an irrational premise for government action.

The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi* v. *United States, supra,* and in *Korematsu* v. *United States, supra,* as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as within an implied war power, and the Court was unwilling to interfere with measures considered necessary to the safety of the nation by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmentally imposed racial and color distinctions ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or

color could no longer be countenanced. *Ex Parte Endo*, 323 U. S. 283.

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, and *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, while not deciding the constitutional question, left no doubt that the Fifth Amendment had stripped the national government of power to enforce the racial discrimination assailed.

These decisions serve to underscore the constitutional prohibition against Congressional action grounded upon color except in so far as it may have temporary justification to meet an overwhelming national emergency such as that which led to decisions in the *Hirabayashi* and *Korematsu* cases.

The power of states is even more rigidly circumscribed. For there is grave doubt that their acts can be sustained under the exception made in the *Hirabayashi* and *Korematsu* cases with respect to the national government. See *Oyama* v. *California*, 332 U. S. 633. The Fourteenth Amendment has been defined as a broad prohibition against state enforcement of differentiations and discrimination based upon race or color. State action restricting the right of Negroes to vote has been struck down as a violation of the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U. S. 73. Similarly, the Court has refused to sanction the systematic exclusion of Negroes from the petit or grand jury, *Hill* v. *Texas*, 316 U. S. 400; *Pierre* v. *Louisiana*, 306 U. S. 354; their representation on juries on a token or proportional basis, *Cassell* v. *Texas*, 339 U. S. 282; *Shepherd* v. *Florida*, 341 U. S. 50; or any method in the selection of juries susceptible of racial discrimination in practice. *Avery* v. *Georgia*, 345 U. S. 559.

Legislation depriving persons of particular races of an opportunity to pursue a gainful occupation has been held a denial of equal protection. *Truax* v. *Raich*, 239 U. S. 33; *Takahashi* v. *Fish and Games Commission*, 334 U. S. 410. It is now well settled that a state may not make racial dif-

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ferences among its employees the basis for salary differentiations. *Alston* v. *School Board,* 112 F. 2d 992 (CA 4th 1940), *cert. denied,* 311 U. S. 693.

Indeed, abhorence of race as a premise for governmental action pervades a wide realm of judicial opinion dealing with other constitutional provisions. Sweeping decisions have enforced the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U. S. 347; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461.

It should be added parenthetically that these decisions are not mere *pro forma* applications of the self-evident requirements of the Fifteenth Amendment. On the contrary, the concept of state action has been utilized in a dynamic and expanding fashion as the Court has sought to reach any method or subterfuge with which the state has attempted to avoid its obligation under that constitutional amendment. *Smith* v. *Allwright, supra; Terry* v. *Adams, supra.* See *Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875 and *Baskin* v. *Brown,* 174 F. 2d 391 (CA 4th 1949), cases holding state non-action violative of the Fifteenth Amendment the principle of which was expressly approved in *Terry* v. *Adams.*

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan* v. *Virginia,* 328 U. S. 373. But where a state sought to enforce against a carrier engaged in foreign commerce its local non-segregation policy, the state law was upheld. The Court considered it inconceivable that the Congress in the exercise of its plenary power over commerce would take any action in conflict with the local nondiscriminatory regulations imposed. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. These two cases considered together strikingly exemplify this Court's position that fundamental national policy is

offended by a requirement of segregation, but implemented by its prohibition.

The contention by a labor union that a state civil rights law which prohibited racial discrimination in union membership offended the Fourteenth Amendment was dismissed because such a position "would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color". *Railway Mail Association* v. *Corsi*, 326 U. S. 88, 94.

Thus, the Court has all but universally made short shrift of attempts to use governmental power to enforce racial distinctions. Yet, where such power has prohibited racial discrimination, it has been sustained even where it has been urged that the state is acting in derogation of other constitutional rights or protected interests.

At the graduate and professional school level, closest to the cases here, racial distinctions as applied have been struck down. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Sweatt* v. *Painter*, 339 U. S. 629. In those cases the educational process was viewed as a totality. The faculty of the school, the prestige of the institution, the fact that segregation deprived the Negro applicant of the benefits which he might secure in attending school with representatives of the state's dominant racial majority, the value judgment of the community with respect to the segregated school, and the impact of segregation on the individual were among the factors considered by the Court in determining that equal educational opportunities were not available. Those cases, we submit, control disposition of the cases here.

Since segregation was found to impair and inhibit an adult's ability to study in the *McLaurin* case, it seems clear that such segregation has even more far reaching adverse consequences on the mental development of the children involved here.

Sweatt's isolation from the dominant racial majority in a segregated law school was held to deprive him of an effec-

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tive opportunity to learn the law. The basic function of the public school is to instruct each succeeding generation in the fundamental traditions of our democracy. The child can best come to believe in and respect these traditions by learning them in a setting in which they are in practical operation. But to be taught that our society is founded upon a concept of equality in a public school from which those racial groups are excluded which hold pre-eminence in every field in his community makes it all but impossible for such teachings to take root. Segregation here is detrimental to the Negro child in his effort to develop into a useful and productive citizen in a democracy.

The *Sweatt* and *McLaurin* cases teach that the Court will consider the educational process in its entirety, including, apart from the measurable physical facilities, whatever factors have been shown to have educational significance. This rule cannot be peculiar to any level of public education. Public elementary and high school education is no less a governmental function than graduate and professional education in state institutions. Moreover, just as Sweatt and McLaurin were denied certain benefits characteristic of graduate and professional education, it is apparent from the records of these cases that Negroes are denied educational benefits which the state itself asserts are the fundamental objectives of public elementary and high school education.

South Carolina, like the other states in this country, has accepted the obligation of furnishing the extensive benefits of public education. Article XI, section 5, of the Constitution of South Carolina, declares: "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years". Some 410 pages of the Code of Laws of South Carolina deal with "education". Title 31, Chapters 122-23, S. C. Code, pp. 387-795 (1935). Provision is made for the entire state-supported system of public schools, its administration and

organization, from the kindergarten through the university. Pupils and teachers, school buildings, minimum standards of school construction, and specifications requiring certain general courses of instruction are dealt with in detail. In addition to requiring that the three "R's" must be taught, the law compels instruction in "morals and good behaviour" and in the "principles" and "essentials of the United States Constitution, including the study of and devotion to American institutions". Title 31, Chapter 122, sections 5321, 5323, 5325, S. C. Code (1935). The other states involved here are attempting to promote the same objectives.

These states thus recognize the accepted broad purposes of general public education in a democratic society. There is no question that furnishing public education is now an accepted governmental function. There are compelling reasons for a democratic government's assuming the burden of educating its children, of increasing its citizens' usefulness, efficiency and ability to govern.

In a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, even more than the family, the church, business institutions, political and social groups and other institutions, has become an effective agency for giving to all people that broad background of attitudes and skills required to enable them to function effectively as participants in a democracy. Thus, "education" comprehends the entire process of developing and training the mental, physical and moral powers and capabilities of human beings. See *Weyl* v. *Comm. of Int. Rev.*, 48 F. 2d 811, 812 (CA 2d 1931); *Jones* v. *Better Business Bureau*, 123 F. 2d 767, 769 (CA 10th 1941).

The records in instant cases emphasize the extent to which the state has deprived Negroes of these fundamental educational benefits by separating them from the rest of the school population. In the case of *Briggs* v. *Elliott* (No. 101), expert witnesses testified that compulsory racial

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segregation in elementary and high schools inflicts considerable personal injury on the Negro pupils which endures as long as these students remain in the segregated school. These witnesses testified that compulsory racial segregation in the public schools of South Carolina injures the Negro students by: (1) impairing their ability to learn (R. 140, 161); (2) deterring the development of their personalities (R. 86, 89); (3) depriving them of equal status in the school community (R. 89, 141, 145); (4) destroying their self-respect (R. 140, 148); (5) denying them full opportunity for democratic social development (R. 98, 99, 103); (6) subjecting them to the prejudices of others (R. 133) and stamping them with a badge of inferiority (R. 148).

Similar testimony was introduced in each of the other three cases here involved, and that testimony was undisputed in the case of *Briggs* v. *Elliott* (No. 101); *Brown* v. *Board of Education of Topeka, et al.* (No. 8); *Gebhart* v. *Belton* (No. 448). In *Davis* v. *County School Board* (No. 191), while witnesses for the appellees disputed portions of the testimony of appellants' expert witnesses, four of appellees' witnesses admitted that racial segregation has harmful effects and another recognized that such segregation could be injurious.

In the *Gebhart* case (No. 448) the Chancellor filed an opinion in which he set forth a finding of fact, based on the undisputed oral testimony of experts in education, sociology, psychology, psychiatry and anthropology (A. 340-341) that in "our Delaware society", segregation in education practiced by petitioners as agents of the state "itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated".

And the court below in the *Brown* case (No. 8) made the following Finding of Fact (R. 245-246):

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored chil-

> dren. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

The testimony of the expert witnesses in the cases now under consideration, the Opinion of the Chancellor in the Delaware case and the Finding of Fact by the lower court in the Kansas case are amply supported by scientific studies of recognized experts. A compilation of these materials was assembled and filed as an Appendix to the briefs in these cases on the first hearing. The observation of Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 636 that public school children, being educated for citizenship, must be scrupulously protected in their constitutional rights, "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", while made in somewhat different context, appropriately describes the high public interest which these cases involve.

In sum, the statutes and constitutional provisions assailed in these cases must fall because they are contrary to this Court's basic premise that, as a matter of law, race is not an allowable basis of differentiation in governmental action; they are inconsistent with the broad prohibition of the Fifth and Fourteenth Amendments as defined by this Court; they are clearly within that category of racism in state action specifically prohibited by the *McLaurin* and *Sweatt* decisions.

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II.

The statutory and constitutional provisions involved in these cases cannot be validated under any separate but equal concept.

The basic principles referred to in Point I above, we submit, control these cases, and except for the mistaken belief that the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, is a correct expression of the meaning of the Fourteenth Amendment, these cases would present no difficult problem.

This Court announced the separate but equal doctrine in a transportation case, and proponents of segregation have relied upon it repeatedly as a justification for racial segregation as if "separate but equal" had become *in haec verba* an amendment to the Fourteenth Amendment, itself. Under that anomalous doctrine, it is said that racial differentiations in the enjoyment of rights protected by the Fourteenth Amendment are permitted as long as the segregated facilities provided for Negroes are substantially equal to those provided for other racial groups. In each case in this Court where a state scheme of racism has been deemed susceptible of rationalization under the separate but equal formula, it has been urged as a defense.

A careful reading of the cases, however, reveals that this doctrine has received only very limited and restricted application in the actual decisions of this Court, and even that support has been eroded by more recent decisions. See particularly *McLaurin* v. *Oklahoma State Regents; Sweatt* v. *Painter*. Whatever appeal the separate but equal doctrine might have had, it stands mirrored today as the faulty conception of an era dominated by provincialism, by intense emotionalism in race relations caused by local and temporary conditions and by the preaching of a doctrine of racial superiority that contradicted the basic concept upon which our society was founded. Twentieth century America, fighting racism at home and abroad, has rejected the race

views of *Plessy* v. *Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weaknesses of our heritage.

A. Racial Segregation Cannot Be Squared With the Rationale of the Early Cases Interpreting the Reach of the Fourteenth Amendment.

In the *Slaughter House Cases*, 16 Wall. 36—the first case decided under the Fourteenth Amendment—the Court, drawing on its knowledge of an almost contemporaneous event, recognized that the Fourteenth Amendment secured to Negroes full citizenship rights and prohibited any state action discriminating against them as a class on account of their race. Thus, addressing itself to the intent of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court said at pages 71 and 72:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

The real purpose of the equal protection clause was discussed in these terms at page 81:

> "In the light of the history of these amendments, and the pervading purpose of them, which we have

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> already discussed, it is not difficult to give a meaning to this clause. *The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.*" (Emphasis supplied).

So convinced was the Court that the overriding purpose of the Fourteenth Amendment was to protect the Negro against discrimination that it declared further at page 81:

> "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

In *Strauder* v. *West Virginia*, 100 U. S. 303, the Court, on page 306, viewed the Fourteenth Amendment in the same light and stated that its enactment was aimed to secure for the Negro all the civil rights enjoyed by white persons:

> "It was in view of these considerations the 14th Amendment was framed and adopted. *It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons*, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but *it denied to any State the power to withhold from them the equal protection of the laws*, and authorized Congress to enforce its provisions by appropriate legislation." (Emphasis supplied).

Clearly recognizing the need to construe the Amendment liberally in order to protect the Negro, the Court noted at page 307:

> "If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside)."

It was explicitly stated at pages 307, 308 that the Amendment prevented laws from distinguishing between colored and white persons:

> "What is this but declaring *that the law in the States shall be the same for the black as for the white;* that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." **(Emphasis supplied).**

Any distinction based upon race was understood as constituting a badge of inferiority, at page 308:

> "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race preju-

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> dice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

There was no doubt that this new constitutional provision had changed the relationship between the federal government and the states so that the federal courts could and should now protect these new rights. At page 309 the Court said:

> "The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the National Government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the Amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

That law must not distinguish between colored and white persons was the thesis of all the early cases. *United States* v. *Cruikshank*, 92 U. S. 542, 554, 555; *Virginia* v. *Rives*, 100 U. S. 313; *Ex Parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110; *Civil Rights Cases*, 109 U. S. 3, 36, 43. As early as *Yick Wo* v. *Hopkins*, 118 U. S. 356, it became settled doctrine that the Fourteenth Amendment was a broad prohibition against state enforcement of racial differentiations or discrimination—a prohibition totally at war with any separate but equal notion. There can be no doubt, we submit, that, had the state regulation approved in *Plessy* v. *Fergu-*

son been before the Court that rendered the initial interpretations of the Fourteenth Amendment, the regulation would have been held a violation of the Federal Constitution.

B. The First Time the Question Came Before the Court, Racial Segregation In Transportation Was Specifically Disapproved.

In *Railroad Co.* v. *Brown*, 17 Wall. 445, the first case involving the validity of segregation to reach this Court after the adoption of the Fourteenth Amendment, segregation was struck down as an unlawful discrimination. While the Fourteenth Amendment was not before the Court, the decision in the *Brown* case was in line with the spirit of the new status that the Negro had gained under the Thirteenth, Fourteenth and Fifteenth Amendments.

The problem before the Court concerned the validity of the carrier's rules and regulations that sought to segregate its passengers because of race. The pertinent facts are described by the Court as follows at page 451:

> "In the enforcement of this regulation, the defendant in error, a person of color, having entered a car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons. This she refused to do, and this refusal resulted in her ejectment by force and with insult from the car she had first entered."

The Court characterized the railroad's defense that its practice of providing separate accommodations for Negroes was valid, as an ingenious attempt at evasion, at page 452:

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the

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> interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion, in legislating for a railroad corporation, to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—South as well as North—to transport, if paid for it, all persons whether white or black, who should desire transportation."

The Court stressed with particularity the fact that the discrimination prohibited was discrimination in the use of the cars, at pages 452-453:

> "It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road in the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The regulation that was struck down in the *Brown* case sought to accomplish exactly what was achieved under a state statute upheld subsequently in *Plessy* v. *Ferguson*—the segregation of Negro and white passengers. It is clear, therefore, that in this earlier decision the Court considered segregation *per se* discrimination and a denial of equality.

C. The Separate But Equal Doctrine Marked An Unwarranted Departure From the Main Stream of Constitutional Development and Permits the Frustration of the Very Purposes of The Fourteenth Amendment As Defined by This Court.

In *Plessy* v. *Ferguson*, this Court for the first time gave approval to state imposed racial distinctions as consistent with the purposes and meaning of the Fourteenth Amendment. The Court described the aims and purposes of the Fourteenth Amendment in the same manner as had the earlier cases, at page 543:

> ". . . its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states."

But these defined aims and purposes were now considered consistent with the imposition of legal distinctions based upon race. The Court said at 544, 551-552:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.
>
> • • •
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

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And reasonableness of the regulation was found in established social usage, custom and tradition, at page 550:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

In *Plessy*, through distortion of the concept of "social" rights as distinguished from "civil" rights, the right to civil equality as one of the purposes of the Fourteenth Amendment was given a restricted meaning wholly at variance with that of the earlier cases and the intent of the framers as defined by this Court. Indeed, civil rights, as defined by that Court, seem merely to encompass those rights attendant upon use of the legal process and protection against complete exclusion pursuant to state mandate. Race for the first time since the adoption of the Fourteenth Amendment was sanctioned as a constitutionally valid basis for state action, and reasonableness for the racial distinctions approved was found in the social customs, usages and traditions of a people only thirty-one years removed from a slave society.

Under this rationale the Court sought to square its approval of racial segregation with the *Slaughter House Cases, Strauder* v. *West Virginia* and the other precedents. It is clear, however, that the early cases interpreted the Fourteenth Amendment as encompassing that same category of rights which were involved in *Plessy* v. *Ferguson*—the right to be free of a racial differentiation imposed by the state in the exercise of any civil right. And the Court's attempt to distinguish *Railroad Co.* v. *Brown*, as a case of

exclusion, was the very argument that has been specifically rejected in the *Brown* case as a sophisticated effort to avoid the obvious implications of the Congressional requirement. Thus, the separate but equal doctrine is a rejection of the precedents and constitutes a break in the development of constitutional law under which the Fourteenth Amendment has been interpreted as a fundamental interdiction against state imposed differentiations and discriminations based upon color.

D. The Separate But Equal Doctrine Was Conceived in Error.

The separate but equal doctrine of *Plessy* v. *Ferguson*, we submit, has aided and supported efforts to nullify the Fourteenth Amendment's undoubted purpose—equal status for Negroes—as defined again and again by this Court. The fallacious and pernicious implications of the doctrine were evident to Justice Harlan and are set out in his dissenting opinion. It is clear today that the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order does not suffice to give constitutional validity to the state's action. What the doctrine has in fact accomplished is to deprive Negroes of the protection of the approved test of reasonable classifications which is available to everyone else who challenges legislative categories or distinctions of whatever kind.

1. The Dissenting Opinion of Justice Harlan in Plessy v. Ferguson.

Justice Harlan recognized and set down for history the purpose of segregation and the implications of the separate but equal doctrine and evidenced prophetic insight concerning the inevitable consequences of the Court's approval of racial segregation. He said at page 557: "The thing to accomplish was, under the guise of giving equal accommoda-

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tions for whites and blacks to compel the latter to keep to themselves while traveling in railroad passenger coaches."

He realized at page 560, moreover, that the approved regulations supported the inferior caste thesis of *Scott* v. *Sandford*, 19 How. 393, supposedly eradicated by the Civil War Amendments: "But it seems that we have yet, in some of the states, a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, on the basis of race." And at page 562: "We boast of the freedom enjoyed by our people above all other people. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law."

While the majority opinion sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for continuing racial animosities had been planted. He said at pages 560-561:

> "The sure guaranty of peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned."

"Our Constitution", said Justice Harlan at 559, "is color-blind, and neither knows nor tolerates classes among citizens." It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy* v. *Ferguson*, that is in keeping with the scope and meaning of the Fourteenth Amendment as consistently defined by this Court both before and after *Plessy* v. *Ferguson*.

2. Custom, Usage and Tradition Rooted in the Slave Tradition Cannot Be the Constitutional Yardstick for Measuring State Action Under the Fourteenth Amendment.

The analysis by Justice Harlan of the bases for the majority opinion in *Plessy* v. *Ferguson* was adopted by this Court in *Chiles* v. *Chesapeake & Ohio Railroad Company*, 218 U. S. 71, 77, 78. There this Court cited *Plessy* v. *Ferguson* as authority for sustaining the validity of legislative distinctions based upon race and color alone.

The importance of this case is its clear recognition and understanding that in *Plessy* v. *Ferguson* this Court approved the enforcement of racial distinctions as reasonable because they are in accordance with established social usage, custom and tradition. The Court said at pages 77, 78:

> "It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people,' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of reasonableness of the regulations of a carrier, made for like purposes and to secure like results."

But the very purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man. As we will demonstrate, post Civil War reestablishment of ante-bellum custom and usage, climaxed by the decision in *Plessy* v. *Ferguson*, reflected a constant effort to return the Negro to his pre-Thirteenth, Fourteenth Amendment inferior status.

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When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the Amendment, and made a travesty of the equal protection clause of the Fourteenth Amendment.

Here, again, the *Plessy* v. *Ferguson* decision is out of line with the modern holdings of this Court, for in a variety of cases involving the rights of Negroes it has constantly refused to regard custom and usage, however widespread, as determinative of reasonableness. This was true in *Smith* v. *Allwright,* of a deeply entrenched custom and usage of excluding Negroes from voting in the primaries. It was true in *Shelley* v. *Kraemer,* of a long standing custom excluding Negroes from the use and ownership of real property on the basis of race. In *Henderson* v. *United States,* a discriminatory practice of many years was held to violate the Interstate Commerce Act. In the *Sweatt* and *McLaurin* decisions, the Court broke a southern tradition of state-enforced racial distinctions in graduate and professional education—a custom almost as old as graduate and professional education, itself.

In each instance the custom and usage had persisted for generations and its durability was cited as grounds for its validity. If this were the only test, ours indeed would become a stagnant society. Even if there be some situations in which custom, usage and tradition may be considered in testing the reasonableness of governmental action, customs, traditions and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court.

3. Preservation of Public Peace Cannot Justify Deprivation of Constitutional Rights.

The fallacy underlying *Plessy* v. *Ferguson* of justifying racially-discriminatory statutes as essential to the public peace and good order has been completely exposed by

Frederick W. Lehmann, a former Solicitor General of the United States, and Wells H. Blodgett in their Brief as *amici curiae* in *Buchanan* v. *Warley*, 245 U. S. 60. Their statements warrant repetition here:

> "The implication of the title of the ordinance is, that unless the white and colored people live in separate blocks, ill feeling will be engendered between them and conflicts will result and so it is assumed that a segregation of the races is necessary for the preservation of the public peace and the promotion of the general welfare. There is evidence in the record that prior to the enactment of the ordinance there were instances of colored people moving into white blocks and efforts by the white people to drive them out by violence. So to preserve the peace, the ordinance was enacted not to repress the lawless violence, but to give the sanction of the law to the motives which inspired it and to make the purpose of it lawful.
>
> "The population of Louisville numbers two hundred and fifty thousand, of whom about one-fifth are colored. The ordinance, almost upon its face, and clearly by the evidence submitted and the arguments offered in support of it is a discriminating enactment by the dominant majority against a minority who are held to be an inferior people. It cannot be justified by the recitals of the title, even if they are true. Many things may rouse a man's prejudice or stir him to anger, but he is not always to be humored in his wrath. The question may arise, 'Dost thou well to be angry?'" (*Brief Amici Curiae*, pp. 2 and 3).

Accepting this view, the Court in *Buchanan* v. *Warley* rejected the argument that a state could deny constitutional rights with impunity in its efforts to maintain the public peace:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be

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> accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution" (245 U. S. 60, 81).

Accord, *Morgan* v. *Virginia, supra; Monk* v. *City of Birmingham,* 185 F. 2d 859 (CA 5th 1950), *cert. denied,* 341 U. S. 940.

Thus, the bases upon which the separate but equal doctrine was approved in the *Plessy* v. *Ferguson* case have all been uprooted by subsequent decisions of this Court. All that remains is the naked doctrine itself, unsupported by reason, contrary to the intent of the framers, and out of tune with present notions of constitutional rights. Repudiation of the doctrine itself, we submit, is long overdue.

4. The Separate but Equal Doctrine Deprives Negroes of That Protection Which the Fourteenth Amendment Accords Under the General Classification Test.

One of the ironies of the separate but equal doctrine of *Plessy* v. *Ferguson* is that under it, the Fourteenth Amendment, the primary purpose of which was the protection of Negroes, is construed as encompassing a narrower area of protection for Negroes than for other persons under the general classification test.

Early in its history, the Fourteenth Amendment was construed as reaching not only state action based upon race and color, but also as prohibiting all unreasonable classifications and distinctions even though not racial in character. *Barbier* v. *Connolly,* 113 U. S. 27, seems to be the earliest case to adopt this concept of the Amendment. There the Court said on page 31:

> "The Fourteenth Amendment . . . undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."

Accord: *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26, 28, 29; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *McPherson* v. *Blacker*, 146 U. S. 1, 39; *Yesler* v. *Board of Harbor Line Commissioners*, 146 U. S. 646, 655; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Marchant* v. *Pennsylvania R. Co.*, 153 U. S. 380, 390; *Moore* v. *Missouri*, 159 U. S. 673, 678.

In effectuating the protection afforded by this secondary purpose, the Court has required the classification or distinction used be based upon some real or substantial difference pertinent to a valid legislative objective. *E.g., Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Truax* v. *Raich*, 239 U. S. 33; *Smith* v. *Cahoon*, 283 U. S. 553; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *Skinner* v. *Oklahoma*, 316 U. S. 535. See also *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186.

Justice Holmes in *Nixon* v. *Herndon*, 273 U. S. 536, 541, recognized and restated a long established and well settled judicial proposition when he described the Fourteenth Amendment's prohibition against unreasonable legislative classification as less rigidly proscriptive of state action than the Amendment's prohibition of color differentiation. There he concluded:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

But the separate but equal doctrine substitutes race for reasonableness as the constitutional test of classification. We submit, it would be a distortion of the purposes and intendment of the Fourteenth Amendment to deny to those persons for whose benefit that provision was primarily intended the same measure of protection afforded by a rule of construction evolved to reach the Amendment's subsidiary and secondary objectives. We urge this Court to

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examine the segregation statutes in these cases to determine whether the statutes seek to serve a permissible legislative objective; and, if any permissible objective is found, whether color differentiation has pertinence to it. So examined, the constitutional provisions and statutes involved here disclose unmistakably their constitutional infirmity.

E. The Separate But Equal Doctrine Has Not Received Unqualified Approval in This Court.

Even while the separate but equal doctrine was evolving, this Court imposed limitations upon its applications. In *Buchanan* v. *Warley,* the Court, after reviewing the limited acceptance which the doctrine had received, concluded that its extension to approve state enforced segregation in housing was not permissible.

Ten years later in *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86, without any intervening development in the doctrine in this Court, sweeping language was used which gave the erroneous impression that this Court already had extended the application of the doctrine to the field of education. And in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, the doctrine is mentioned in passing as if its application to public education were well established. But, what Justice Day was careful to point out in *Buchanan* v. *Warley,* was true then and is true now—the separate but equal doctrine has never been extended by this Court beyond the field of transportation in any case where such extension was contested.

While the doctrine itself has not been specifically repudiated as a valid constitutional yardstick in the field of public education, in cases in which this Court has had to determine whether the state had performed its constitutional obligation to provide equal education opportunities—the question presented here—the separate but equal doctrine has never been used by this Court to sustain the validity of the state's separate school laws. *Missouri ex rel. Gaines* v. *Canada; Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter; McLaurin* v. *Oklahoma State Regents.*

Earlier educational cases, not concerned with equality, did not apply the doctrine. In *Cumming* v. *County Board of Education*, 175 U. S. 528, the question was explicitly beyond the scope of the decision rendered. In *Berea College* v. *Kentucky*, 211 U. S. 45, the question was reserved. In *Gong Lum* v. *Rice*, the separate but equal doctrine was not put in issue. Instead of challenging the validity of the Mississippi school segregation laws, the Chinese child merely objected to being classified as a Negro for public school purposes.

Even in the field of transportation, subsequent decisions have sapped the doctrine of vitality. *Henderson* v. *United States* in effect overruled *Chiles* v. *Chesapeake & Ohio Railway Co.*, 218 U. S. 71. See *Chance* v. *Lambeth*, 186 F. 2d 879 (CA 4th 1951), *cert. denied*, 341 U. S. 91. *Morgan* v. *Virginia* places persons traveling in interstate commerce beyond the thrust of state segregation statutes. Thus, the reach of the separate but equal doctrine approved in the *Plessy* case has now been so severely restricted and narrowed in scope that, it may be appropriately said of *Plessy* v. *Ferguson* as it was said of *Crowell* v. *Benson*, 285 U. S. 22, "one had supposed that the doctrine had earned a deserved repose." *Estep* v. *United States*, 327 U. S. 114, 142 (concurring opinion).

F. The Necessary Consequence of the Sweatt and McLaurin Decisions is Repudiation of the Separate But Equal Doctrine.

While *Sweatt* v. *Painter* and *McLaurin* v. *Oklahoma State Regents* were not in terms rejections of the separate but equal doctrine, their application in effect destroyed the practice of segregation with respect to state graduate and professional schools. *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986 (E. D. La. 1950), *aff'd*, 340 U. S. 909; *Gray* v. *Board of Trustees of University of Tennessee*, 342 U. S. 517; *McKissick* v. *Carmichael*, 187 F. 2d 949 (CA 4th 1951), *cert. denied*, 341 U. S. 951; *Swanson* v. *University of Virginia*, Civil Action #30 (W. D. Va. 1950) unreported;

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Payne v. *Board of Supervisors,* Civil Action #894 (E. D. La. 1952) unreported; *Foister* v. *Board of Supervisors,* Civil Action #937 (E. D. La. 1952) unreported; *Mitchell* v. *Board of Regents of University of Maryland,* Docket #16, Folio 126 (Baltimore City Court 1950) unreported.[1]

In the *Sweatt* case, the Court stated that, with members of the state's dominant racial groups excluded from the segregated law school which the state sought to require Sweatt to attend, "we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas." If this consideration is one of the controlling factors in determining substantial equality at the law school level, it is impossible for any segregated law school to be an equal law school. And pursuant to that decision one of the oldest and best state-supported segregated law schools in the country was found unequal and Negro applicants were ordered admitted to the University of North Carolina. *McKissick* v. *Carmichael.* Thus, substantial equality in professional education is "substantially equal" only if there is no racial segregation.

In the *McLaurin* case, the racial distinctions imposed in an effort to comply with the state's segregation laws were held to impair and inhibit ability to study, to exchange views with other students and, in general, to learn one's

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[1] Negroes are now attending state graduate and professional schools in West Virginia, Maryland, Arkansas, Delaware, Oklahoma, Kentucky, Texas, Missouri, North Carolina, Virginia, and Louisiana. See (Editorial Comment), THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952).

Negroes are also now attending private universities and colleges in Missouri, Georgia, Kentucky, Louisiana, Texas, Maryland, West Virginia, North Carolina, District of Columbia, and Virginia. See THE COURTS AND RACIAL INTEGRATION IN EDUCATION, 21 J. NEG. EDUC. 3 (1952): SOME PROGRESS IN ELIMINATION OF DISCRIMINATION IN HIGHER EDUCATION IN THE UNITED STATES, 19 J. NEG. EDUC. 4-5 (1950); LEE AND KRAMER, RACIAL INCLUSION IN CHURCH-RELATED COLLEGES IN THE SOUTH, 22 J. NEG. EDUC. 22 (1953); A NEW TREND IN PRIVATE COLLEGES, 6 NEW SOUTH 1 (1951).

profession. The state, therefore, was required to remove all restrictions and to treat McLaurin the same way as other students are treated. Consequently these decisions are a repudiation of the separate but equal doctrine.

III.

Viewed in the light of history the separate but equal doctrine has been an instrumentality of defiant nullification of the Fourteenth Amendment.

The history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and an inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery. Inevitably, segregation in its operation and effect has meant inequality consistent only with the belief that the people segregated are inferior and not worthy, or capable, of enjoying the facilities set apart for the dominant group.

Segregation originated as a part of an effort to build a social order in which the Negro would be placed in a status as close as possible to that he had held before the Civil War. The separate but equal doctrine furnished a base from which those who sought to nullify the Thirteenth, Fourteenth and Fifteenth Amendments were permitted to operate in relative security. While this must have been apparent at the end of the last century, the doctrine has become beclouded with so much fiction that it becomes important to consider the matter in historical context to restore a proper view of its meaning and import.

A. The Status of the Negro, Slave and Free, Prior to the Civil War.

One of the basic assumptions of the slave system was the Negro's inherent inferiority.[2] As the invention of the

[2] For an illuminating discussion of these assumptions, see JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, 1876-1910, IN ESSAYS IN SOUTHERN HISTORY PRESENTED TO JOSEPH GREGOIRE DEROULHAC HAMILTON, GREEN ED., 124-156 (1949).

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cotton gin rendered slavery essential to the maintenance of the plantation economy in the South, a body of pseudo-scientific thought developed in passionate defense of slavery, premised on the Negro's unfitness for freedom and equality.[3] Thus, the Negro's inferiority with respect to brain capacity, lung activity and countless other physiological attributes was purportedly established by some of the South's most respected scientists.[4] In all relationships between the two races the Negro's place was that of an inferior, for it was claimed that any other relationship status would automatically degrade the white man.[5]

This concept of the Negro as an inferior fit only for slavery was complicated by the presence of several hundred thousand Negroes, who although not slaves, could not be described as free men.[6] In order that they would not

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[3] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 243 (1935); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION 5-15 (1930).

[4] See VAN EVRIE, NEGROES AND NEGRO SLAVERY 120 ff, 122 ff, 214 ff (1861); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACE, 2 DEBOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND WESTERN STATES 315-329 (1852); NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES (1866); VAN EVRIE, NEGROES AND NEGRO "SLAVERY"; THE FIRST AN INFERIOR RACE—THE LATTER ITS NORMAL CONDITION (1853); VAN EVRIE, SUBGENATION: THE THEORY OF THE NORMAL RELATION OF THE RACES (1864); CARTWRIGHT, DISEASES AND PECULIARITIES OF THE NEGRO RACES, 9 DEBOW'S REVIEW 64-69 (1851); CARTWRIGHT, ESSAYS, BEING INDUCTIONS DRAWN FROM THE BACONIAN PHILOSOPHY PROVING THE TRUTH OF THE BIBLE AND THE JUSTICE AND BENEVOLENCE OF THE DECREE DOOMING CANAAN TO BE A SERVANT OF SERVANTS (1843).

[5] JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 242 ff (1935); THE PRO-SLAVERY ARGUMENT, especially HARPER'S MEMOIR ON SLAVERY, pp. 26-98; and SIMMS, THE MORALS OF SLAVERY, pp. 175-275 (1835); JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2 at 135.

[6] See FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 213-238 (1947).

constitute a threat to the slave regime, free Negroes were denied the full rights and privileges of citizens. They enjoyed no equality in the courts, their right to assemble was denied, their movements were proscribed, and education was withheld.[7] Their plight, in consequence of these proscriptions, invited the unfavorable comparison of them with slaves and confirmed the views of many that Negroes could not profit by freedom. They were regarded by the white society as the "very drones and pests of society," pariahs of the land, and an incubus on the body politic.[8] Even this Court, in *Scott* v. *Sanford*, recognized this substantial body of opinion to the effect that free Negroes had no rights that a white man was bound to respect.

The few privileges that free Negroes enjoyed were being constantly whittled away in the early nineteenth century. By 1836, free Negroes were denied the ballot in every southern state and in many states outside the South.[9] In some states, they were denied residence on penalty of enslavement; and in some, they were banned from the mechanical trades because of the economic pressure upon the white artisans.[10] Before the outbreak of the Civil War, the movement to reenslave free Negroes was under way in several states in the South.[11]

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[7] FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860 59-120 (1943).

[8] DEW, REVIEW OF THE DEBATES IN THE VIRGINIA LEGISLATURE OF 1831-1832, THE PRO-SLAVERY ARGUMENT, 422 ff (1853); JENKINS, *op. cit. supra*, n. 5, 246.

[9] WEEKS, HISTORY OF NEGRO SUFFRAGE IN THE SOUTH, 9 POL. SCI. Q. 671-703 (1894); PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 87 ff (1918); SHUGG, NEGRO VOTING IN THE ANTE-BELLUM SOUTH, 21 J. NEG. HIST. 357-364 (1936).

[10] VA. HOUSE J. 84 (1831-1832); VA. LAWS 1831, p. 107; CHANNING, HISTORY OF THE UNITED STATES 136-137 (1921); GREENE and WOODSON, THE NEGRO WAGE EARNER 15 ff (1930).

[11] FRANKLIN, THE ENSLAVEMENT OF FREE-NEGROES IN NORTH CAROLINA, 29 J. NEG. HIST. 401-428 (1944).

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This ante-bellum view of the inferiority of the Negro persisted after the Civil War among those who already regarded the newly freed slaves as simply augmenting the group of free Negroes who had been regarded as "the most ignorant . . . vicious, improverished, and degraded population of this country." [12]

B. The Post War Struggle.

The slave system had supported and sustained a plantation economy under which 1,000 families received approximately $50,000,000 a year with the remaining 600,000 families receiving about $60,000,000 per annum. The perfection of that economy meant the ruthless destruction of the small independent white farmer who was either bought out or driven back to the poorer lands—the slaveholders controlled the destiny of both the slave and the poor whites.[13] Slaves were not only farmers and unskilled laborers but were trained by their masters as skilled artisans. Thus, slave labor was in formidable competition with white labor at every level, and the latter was the more expendable for it did not represent property and investment. Only a few white supervisory persons were needed to insure the successful operation of the plantation system.

After the Civil War, the independent white farmer entered into cotton cultivation and took over the lands of the now impracticable large plantations. Within a few years the independent farmer was engaged in 40% of the cotton cultivation, and by 1910 this percentage had risen to 67%.[14] To the poor white Southerner the new Negro,

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[12] See JENKINS, *op. cit. supra*, n. 5, 246.

[13] WESTON, THE PROGRESS OF SLAVERY (1859); HELPER, THE IMPENDING CRISIS OF THE SOUTH (1863); JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION, *op. cit. supra*, n. 2; PHILLIPS, AMERICAN NEGRO SLAVERY, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY-PLANTATION AND FRONTIER DOCUMENTS (1910-11).

[14] VANCE, HUMAN FACTORS IN COTTON CULTIVATION (1926); SIMKINS, THE TILLMAN MOVEMENT IN SOUTH CAROLINA (1926).

as a skilled farmer and artisan in a free competitive economy, loomed as an even greater economic menace than he had been under the slave system. They became firm advocates of the Negro's subjugation to insure their own economic well being.[15]

The plantation aristocracy sought to regain their economic and political pre-eminence by rebuilding the pre-war social structure on the philosophy of the Negro's inferiority. This group found that they could build a new economic structure based upon a depressed labor market of poor whites and Negroes. Thus, to the aristocracy, too, the Negro's subjugation was an economic advantage.

The mutual concern of these two groups of white Southerners for the subjugation of the Negro gave them a common basis for unity in irreconcilable resistance to the revolutionary change in the Negro's status which the Civil War Amendments were designed to effect. Their attitude towards the Fourteenth Amendment is best described by a Mississippi editor who said that the southern states were not prepared "to become parties to their own degradation."[16] There were white southerners, however, as there always had been, who sought to build a society which would respect and dignify the rights of the Freedmen. But this group was in the minority and southern sentiment in bitter opposition to Negro equality prevailed. Accordingly, as a temporary expedient, even as an army of occupation has been necessary recently in Germany and Japan to prevent lawlessness by irreconcilables and the recrudescense of totalitarianism, so Union forces were needed during Reconstruction to maintain order and to make possible the development of a more democratic way of life in the states recently in rebellion.

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[15] For discussion of this whole development see JOHNSON, THE NEGRO IN AMERICAN CIVILIZATION (1930).

[16] COULTER, THE SOUTH DURING RECONSTRUCTION 434 (1947).

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The Thirteenth, Fourteenth and Fifteenth Amendments and the Reconstruction effort, implemented by those in the South who were coming to accept the new concept of the Negro as a free man on full terms of equality, could have led to a society free of racism. The possibility of the extensive establishment and expansion of mixed schools was real at this stage. It was discussed in every southern state, and in most states serious consideration was given to the proposal to establish them.[17]

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[17] KNIGHT, PUBLIC EDUCATION IN THE SOUTH 320 (1922). See also Part II *infra*, at pages 142-157.

There were interracial colleges, academies, and tributary grammar schools in the South established and maintained largely by philanthropic societies and individuals from the North. Although they were predominantly Negro institutions, in the Reconstruction period and later, institutions such as Fisk University in Nashville, Tennessee, and Talladega College in Alabama usually had some white students. In the last quarter of the nineteenth century most of the teachers in these institutions were white. For accounts of co-racial education at Joppa Institute and Nat School in Alabama, Piedmont College in Georgia, Saluda Institute in North Carolina and in other southern schools, see BROWNLEE, NEW DAY ASCENDING 98-110 (1946).

The effect of these institutions in keeping alive the possibility of Negroes and whites living and learning together on the basis of complete equality was pointed out by one of the South's most distinguished men of letters, George W. Cable. "In these institutions," he said:

> "... there is a complete ignoring of those race distinctions in the enjoyment of common public rights so religiously enforced on every side beyond their borders; and yet none of those unnamable disasters have come to or from them which the advocates of these onerous public distinctions and separations predict and dread. On scores of Southern hilltops these schools stand out almost totally without companions or competitors in their peculiar field, so many refutations, visible and complete, of the idea that any interest requires the colored American citizen to be limited in any of the civil rights that would be his without question if the same man were white."

CABLE, THE NEGRO QUESTION 19 (1890).

C. The Compromise of 1877 and the Abandonment of Reconstruction.

The return to power of the southern irreconcilables was finally made possible by rapproachement between northern and southern economic interests culminating in the compromise of 1877. In the North, control of the Republican Party passed to those who believed that the protection and expansion of their economic power could best be served by political conciliation of the southern irreconcilables, rather than by unswerving insistence upon human equality and the rights guaranteed by the post war Amendments. In the 1870's those forces that held fast to the notion of the Negro's preordained inferiority returned to power in state after state, and it is significant that one of the first measures adopted was to require segregated schools on a permanent basis in disregard of the Fourteenth Amendment.[18]

In 1877, out of the exigencies of a close and contested election, came a bargain between the Republican Party and the southern leaders of the Democratic Party which assured President Hayes' election, led to the withdrawal of federal troops from the non-redeemed states and left the South free to solve the Negro problem without apparent

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[18] Georgia, where the reconstruction government was especially short-lived, passed a law in 1870 making it mandatory for district school officials to "make all necessary arrangements for the instruction of the white and colored youth . . . in separate schools. They shall provide the same facilities for each . . . but the children of the white and colored races shall not be taught together in any sub-district of the state." Ga. Laws 1870, p. 56. As soon as they were redeemed, the other southern states enacted similar legislation providing for segregated schools and gradually the states incorporated the provision into their constitutions. See, for example, Ark. Laws 1873, p. 423; THE JOURNAL OF THE TEXAS CONSTITUTIONAL CONVENTION 1875, pp. 608-616; Miss. Laws 1878, p. 103; STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170-176 (1908). When South Carolina and Lousiana conservatives secured control of their governments in 1877, they immediately repealed the laws providing for mixed schools and established separate institutions for white and colored youth.

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fear of federal intervention. This agreement preserved the pragmatic and material ends of Reconstruction at the expense of the enforcement of not only the Fourteenth Amendment but the Fifteenth Amendment as well.[19] For it brought in its wake peonage and disfranchisement as well as segregation and other denials of equal protection. Although there is grave danger in oversimplification of the complexities of history, on reflection it seems clear that more profoundly than constitutional amendments and wordy statutes, the Compromise of 1877 shaped the future of four million freedmen and their progeny for generations to come. For the road to freedom and equality, which had seemed sure and open in 1868, was now to be securely blocked and barred by a maze of restrictions and limitations proclaimed as essential to a way of life.

D. Consequences of the 1877 Compromise.

Once the South was left to its own devices, the militant irreconcilables quickly seized or consolidated power. Laws and practices designed to achieve rigid segregation and the disfranchisement of the Negro came on in increasing numbers and harshness.

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[19] The explanation for this reversal of national policy in 1877 and the abandonment of an experiment that had enlisted national support and deeply aroused the emotions and hopes has been sought in many quarters. The most commonly accepted and often repeated story is that authorized spokesmen of Hayes met representatives of the Southern Democrats at the Wormley House in Washington in late February, 1877, and promised the withdrawal of troops and abandonment of the Negro in return for the support of southern Congressmen for Hayes against the Democratic candidate Samuel J. Tilden in the contested Presidential election. Recent investigation has demonstrated that the so-called "Wormley House Bargain", though offered by southern participants as the explanation, is not the full relevation of the complex and elaborate maneuvering which finally led to the agreement. See WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951) for an elaborate and detailed explanation of the compromise agreement.

The policy of the southern states was to destroy the political power of the Negro so that he could never seriously challenge the order that was being established. By the poll tax, the Grandfather Clause, the white primary, gerrymandering, the complicated election procedures, and by unabated intimidation and threats of violence, the Negro was stripped of effective political participation.[20]

The final blow to the political respectability of the Negro came with disfranchisement in the final decade of the Nineteenth Century and the early years of the present century when the discriminatory provisions were written into the state constitutions.[21] That problem the Court dealt with during the next forty years from *Guinn* v. *United States*, 238 U. S. 347 to *Terry* v. *Adams*, 345 U. S. 461.

A movement to repeal the Fourteenth and Fifteenth Amendments shows the extremity to which the irreconcilables were willing to go to make certain that the Negro remained in an inferior position. At the Mississippi Constitutional Convention of 1890, a special committee studied the matter and concluded that "the white people only are capable of conducting and maintaining the government" and that the Negro race, "even if its people were educated, being wholly unequal to such responsibility," should be excluded from the franchise. It, therefore, resolved that the "true and only efficient remedy for the great and important difficulties" that would ensue from Negro participation lay

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[20] In 1890, Judge J. Chrisman of Mississippi could say that there had not been a full vote and a fair count in his state since 1875, that they had preserved the ascendancy of the whites by revolutionary methods. In plain words, he continued, "We have been stuffing the ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for election was about to rot down." Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 58 (1951).

[21] KEY, SOUTHERN POLITICS IN STATE AND NATION 539-550 (1949); WOODWARD, ORIGINS OF THE NEW SOUTH 205, 263 (1951).

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in the "repeal of the Fifteenth Amendment . . . whereby such restrictions and limitations may be put upon Negro suffrage as may be necessary and proper for the maintenance of good and stable government . . ." [22]

A delegate to the Virginia Constitutional Convention of 1901-1902 submitted a resolution calling for a repeal of the Fifteenth Amendment because it is wrong, "in that it proceeds on the theory that the two races are equally competent of free government." [23] Senator Edward Carmack of Tennessee gave notice in 1903 that he would bring in a bill to repeal the Amendments.[24] The movement, though unsuccessful, clearly illustrates the temper of the white South.

Having consigned the Negro to a permanently inferior caste status, racist spokesmen, with unabashed boldness, set forth views regarding the Negro's unassimilability and uneducability even more pernicious than those held by the old South. Ben Tillman, the leader of South Carolina, declared that a Negro should not have the same treatment as a white man, "for the simple reason that God Almighty made him colored and did not make him white." He lamented the end of slavery which reversed the process of improving the Negro and "inoculated him with the virus of

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[22] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION, 1890, 303-304. Tillman, Vardaman, and other Southern leaders frequently called for the repeal of the Amendments. Tillman believed "that such a formal declaration of surrender in the struggle to give the Negro political and civil equality would confirm the black man in his inferior position and pave the way for greater harmony between the races." SIMKINS, PITCHFORK BEN TILLMAN 395 (1944). Vardaman called for repeal as a recognition that the Negro "was physically, mentally, morally, racially, and eternally inferior to the white man." See KIRWAN, REVOLT OF THE REDNECKS (1951).

[23] JOURNAL OF THE VIRGINIA CONSTITUTIONAL CONVENTION, 1901-1902, pp. 47-48.

[24] JOHNSON, THE IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, 136 ff.

equality."[25] These views were expressed many times in the disfranchising conventions toward the end of the century.[26] Nor were the politicians alone in uttering such views about the Negro. Drawing on the theory of evolution as expressed by Darwin and the theory of progress developed by Spencer, persons of scholarly pretension speeded the work of justifying an inferior status for the Negro.[27] Alfred H. Stone, having the reputation of a widely respected scholar in Mississippi, declared that the "Negro was an inferior type of man with predominantly African customs and character traits whom no amount of education or improvement of environmental conditions could ever elevate to as high a scale in the human species as the white man." As late as 1910, E. H. Randle in his

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[25] SIMKINS, PITCHFORK BEN TILLMAN 395, 399 (1944). Tillman's Mississippi counterpart, J. K. Vardaman, was equally vigorous in denouncing the Negro. He described the Negro as an "industrial stumbling block, a political ulcer, a social scab, 'a lazy, lying, lustful animal which no conceivable amount of training can transform into a tolerable citizen.'" Quoted in KIRWAN, *op. cit. supra*, n. 22, at 146.

[26] See, for example, Alabama Constitutional Convention, 1901, Official Proceedings, Vol. I, p. 12, Vol. II, pp. 2710-2711, 2713, 2719, 2782, 2785-2786, 2793; Journal of the South Carolina Convention, 1895, pp. 443-472; Journal of the Mississippi Constitutional Convention, 1890, pp. 10, 303, 701-702; Journal of the Louisiana Constitutional Convention, 1898, pp. 9-10.

[27] See ROWLAND, A MISSISSIPPI VIEW OF RELATIONS IN THE SOUTH, A Paper (1903); HERBERT, et al., WHY THE SOLID SOUTH? OR RECONSTRUCTION AND ITS RESULTS (1890); BRUCE, THE PLANTATION NEGRO AS A FREEMAN: OBSERVATIONS ON HIS CHARACTER, CONDITION AND PROSPECTS IN VIRGINIA (1889); STONE, STUDIES IN THE AMERICAN RACE PROBLEM (1908); CARROLL, THE NEGRO A BEAST (1908); CARROLL, THE TEMPTER OF EVE, OR THE CRIMINALITY OF MAN'S SOCIAL, POLITICAL, AND RELIGIOUS EQUALITY WITH THE NEGRO, AND THE AMALGAMATION TO WHICH THESE CRIMES INEVITABLY LEAD 286 ff (1902); PAGE, THE NEGRO: THE SOUTHERNER'S PROBLEM 126 ff (1904); RANDLE, CHARACTERISTICS OF THE SOUTHERN NEGRO 51 ff (1910).

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Characteristics of the Southern Negro declared that "the first important thing to remember in judging the Negro was that his mental capacity was inferior to that of the white man." [28]

Such was the real philosophy behind the late 19th Century segregation laws—an essential part of the whole racist complex. Controlling economic and political interests in the South were convinced that the Negro's subjugation was essential to their survival, and the Court in *Plessy* v. *Ferguson* had ruled that such subjugation through public authority was sanctioned by the Constitution. This is the overriding vice of *Plessy* v. *Ferguson.* For without the sanction of *Plessy* v. *Ferguson,* archaic and provincial notions of racial superiority could not have injured and disfigured an entire region for so long a time. The full force and effect of the protection afforded by the Fourteenth Amendment was effectively blunted by the vigorous efforts of the proponents of the concept that the Negro was inferior. This nullification was effectuated in all aspects of Negro life in the South, particularly in the field of education, by the exercise of state power.

As the invention of the cotton gin stilled the voices of Southern Abolitionists, *Plessy* v. *Ferguson* chilled the development in the South of opinion conducive to the acceptance of Negroes on the basis of equality because those of the white South desiring to afford Negroes the equalitarian status which the Civil War Amendments had hoped to achieve were barred by state law from acting in accordance with their beliefs. In this connection, it is significant that the Populist movement flourished for a

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[28] Quoted in JOHNSON, IDEOLOGY OF WHITE SUPREMACY, op. cit., *supra*, n. 2, p. 151. That the South was not alone in these views is clearly shown by Logan's study of the Northern press between 1877 and 1901. See LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR 1877-1901, cc. 9-10 (unpub. ms., to be pub. early in 1954 by the Dial Press).

short period during the 1890's and threatened to take over political control of the South through a coalition of the poor Negro and poor white farmers.[29] This movement was completely smashed and since *Plessy* v. *Ferguson* no similar phenomenon has taken hold.

Without the "constitutional" sanction which *Plessy* v. *Ferguson* affords, racial segregation could not have become entrenched in the South, and individuals and local communities would have been free to maintain public school systems in conformity with the underlying purposes of the Fourteenth Amendment by providing education without racial distinctions. The doctrine of *Plessy* v. *Ferguson* was essential to the successful maintenance of a racial caste system in the United States. Efforts toward the elimination of race discrimination are jeopardized as long as the separate but equal doctrine endures. But for this doctrine we could more confidently assert that ours is a democratic society based upon a belief in individual equality.

E. Nullification of the Rights Guaranteed by the Fourteenth Amendment and the Reestablishment of the Negro's Pre-Civil War Inferior Status Fully Realized.

Before the end of the century, even without repeal of the Fourteenth and Fifteenth Amendments, those forces committed to a perpetuation of the slave concept of the Negro had realized their goal. They had defied the federal government, threatened the white defenders of equal rights, had used intimidation and violence against the Negro and had effectively smashed a political movement designed to unite the Negro and the poor whites. Provisions requir-

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[29] See CARLETON, THE CONSERVATIVE SOUTH—A POLITICAL MYTH, 22 Va. Q. Rev. 179-192 (1946); LEWINSON, RACE, CLASS AND PARTY (1932); MOON, THE BALANCE OF POWER—THE NEGRO VOTE, c. 4 (1948).

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ing segregated schools were written into state constitutions and statutes. Negroes had been driven from participation in political affairs, and a veritable maze of Jim Crow laws had been erected to "keep the Negro in his place" (of inferiority), all with impunity. There was no longer any need to pretend either that Negroes were getting an education equal to the whites or were entitled to it.

In the Constitutional Convention of Virginia, 1901-1902, Senator Carter Glass, in explaining a resolution requiring that state funds be used to maintain primary schools for four months before being used for establishment of higher grades, explained that "white people of the black sections of Virginia should be permitted to tax themselves, and after a certain point had been passed which would safeguard the poorer classes of those communities, divert that fund to the exclusive use of white children. . . ." [30]

Senator Vardaman thought it was folly to make such pretenses. In Mississippi there were too many people to educate and not enough money to go around, he felt. The state, he insisted, should not spend as much on the education of Negroes as it was doing. "There is no use multiplying words about it," he said in 1899, "the negro will not be permitted to rise above the station he now fills." Money spent on his education was, therefore, a "positive unkindness" to him. "It simply renders him unfit for the work which the white man has prescribed and which he will be forced to perform." [31] Vardaman's scholarly compatriot, Dunbar Rowland, seconded these views in 1902, when he said that "thoughtful men in the South were beginning to lose faith in the power of education which had been heretofore given to uplift the negro," and to complain of the

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[30] REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, State of Virginia, Richmond, June 12, 1901-June 26, 1902, p. 1677 (1906).

[31] KIRWAN, *op. cit. supra*, n. 22, at 145-146.

burden thus placed upon the people of the South in their poverty.[32]

The views of Tillman, Vardaman, Stone, Rowland, Glass and others were largely a justification for what had been done by the time they uttered them. The South had succeeded in setting up the machinery by which it was hoped to retain the Negro in an inferior status. Through separate, inferior schools, through an elaborate system of humiliating Jim Crow, and through effective disfranchisement of the Negro, the exclusive enjoyment of first-class citizenship had now become the sole possession of white persons.

And, finally, the Negro was effectively restored to an inferior position through laws and through practices, now dignified as "custom and tradition." Moreover, this relationship—of an inferior Negro and superior white status—established through laws, practice, custom and tradition, was even more rigidly enforced than in the ante-bellum era. As one historian has aptly stated:

> "Whether by state law or local law, or by the more pervasive coercion of sovereign white opinion, 'the Negro's place' was gradually defined—in the courts, schools, and libraries, in parks, theaters, hotels, and residential districts, in hospitals, insane

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[32] JOHNSON, IDEOLOGY OF WHITE SUPREMACY, *op. cit. supra*, n. 2, at 153. That this pattern is not an antiquated doctrine but a modern view may be seen in the current expenditure per pupil in average daily attendance 1949-1950: In Alabama, $130.09 was spent for whites against $92.69 for Negroes; in Arkansas $123.60 for whites and $73.03 for Negroes; in Florida $196.42 for whites, $136.71 for Negroes; in Georgia, $145.15 for whites and $79.73 for Negroes; in Maryland, $217.41 for whites and $198.76 for Negroes; in Mississippi, $122.93 for whites and $32.55 for Negroes; in North Carolina, $148.21 for whites and $122.90 for Negroes; in South Carolina, $154.62 for whites and $79.82 for Negroes; in the District of Columbia, $289.68 for whites and $220.74 for Negroes. BLOSE AND JARACZ, BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES, 1948-50, TABLE 43, "STATISTICS OF STATE SCHOOL SYSTEMS, 1949-50" (1952).

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> asylums—everywhere including on sidewalks and in cemeteries. When complete, the new codes of White Supremacy were vastly more complex than the antebellum slave codes or the Black Codes of 1865-1866, and, if anything, they were stronger and more rigidly enforced." [33]

This is the historic background against which the validity of the separate but equal doctrine must be tested. History reveals it as a part of an overriding purpose to defeat the aims of the Thirteenth, Fourteenth and Fifteenth Amendments. Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.

That the Constitution is color blind is our dedicated belief. We submit that this Court cannot sustain these school segregation laws under any separate but equal concept unless it is willing to accept as truths the racist notions of the perpetuators of segregation and to repeat the tragic error of the Plessy court supporting those who would nullify the Fourteenth Amendment and the basic tenet of our way of life which it incorporates. We respectfully suggest that it is the obligation of this Court to correct that error by holding that these laws and constitutional provisions which seek to condition educational opportunities on the basis of race and color are historic aberrations and are inconsistent with the federal Constitution and cannot stand. The separate but equal doctrine of *Plessy* v. *Ferguson* should now be overruled.

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[33] WOODWARD, ORIGINS OF THE NEW SOUTH 212 (1951).

CONCLUSION TO PART ONE

In short, our answer to Question No. 3 proposed by the Court is that it is within the judicial power, whatever the evidence concerning Questions 2(a) and (b) may disclose, to hold that segregated schools violate the Fourteenth Amendment, and for the reasons hereinabove stated that such power should now be exercised.

WHEREFORE, it is respectfully submitted that constitutional provisions and statutes involved in these cases are invalid and should be struck down.

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PART TWO

This portion of the brief is directed to questions one and two propounded by the Court:

> *"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?*
>
> *"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment*
>
> *"(a) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or*
>
> *"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"*

I.

The Fourteenth Amendment was intended to destroy all caste and color legislation in the United States, including racial segregation.

Research by political scientists and historians, specialists on the period between 1820 and 1900, and other experts in the field, as well as independent research by attorneys in these cases, convinces us that: (1) there is ample evidence that the Congress which submitted and the states which ratified the Fourteenth Amendment contemplated and understood that the Amendment would deprive the states of the power to impose any racial distinctions in determining when,

where, and how its citizens would enjoy the various civil rights afforded by the states; (2) in so far as views of undeveloped public education in the 1860's can be applied to universal compulsory education in the 1950's, the right to public school education was one of the civil rights with respect to which the states were deprived of the power to impose racial distinctions; (3) while the framers of the Fourteenth Amendment clearly intended that Congress should have the power to enforce the provisions of the Amendment, they also clearly intended that the Amendment would be prohibitory on the states without Congressional action.

The historic background of the Fourteenth Amendment and the legislative history of its adoption show clearly that the framers intended that the Amendment would deprive the states of power to make any racial distinction in the enjoyment of civil rights. It is also clear that the statutes involved in these cases impose racial distinctions which the framers of the Amendment and others concerned with its adoption understood to be beyond the power of a state to enforce.

The framers of the Fourteenth Amendment were men who came to the 39th Congress with a well defined background of Abolitionist doctrine dedicated to the equalitarian principles of real and complete equality for all men. Congressional debates during this period must be read with an understanding of this background along with the actual legal and political status of the Negro at the end of the Civil War. This background gives an understanding of the determination of the framers of the Fourteenth Amendment to change the inferior legal and political status of Negroes and to give them the full protection of the Federal Government in the enjoyment of complete and real equality in all civil rights.[34]

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[34] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 185, 186 (1951).

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A. The Era Prior to the Civil War Was Marked By Determined Efforts to Secure Recognition of the Principle of Complete and Real Equality For All Men Within the Existing Constitutional Framework of Our Government.

The men who wrote the Fourteenth Amendment were themselves products of a gigantic antislavery crusade which, in turn, was an expression of the great humanitarian reform movement of the Age of Enlightenment. This philosophy upon which the Abolitionists had taken their stand had been adequately summed up in Jefferson's basic proposition "that all men are created equal" and "are endowed by their Creator with certain unalienable Rights." To this philosophy they adhered with an almost fanatic devotion and an unswerving determination to obliterate any obstructions which stood in the way of its fulfillment. In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion.

The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in the light of this revolutionary idealism that the questions propounded by this Court can best be answered.

In the beginning, the basic and immediate concern of the Abolitionists was necessarily slavery itself. The total question of removing all other discriminatory relationships after the abolition of slavery was at first a matter for the future. As a consequence, the philosophy of equality was in a state of continuous development from 1830 through the time of the passage of the Fourteenth Amendment. However, the ultimate objective was always clearly in mind—absolute and complete equality for all Americans.

During the pre-Civil War decades, the antislavery movement here and there began to develop special meaning and significance in the legal concept of "privileges and immunities," the concept of "due process" and the most important concept of all for these cases, "equal protection of the laws." In the immediately succeeding sections, we shall show how the development of these ideas culminated in a firm intention to obliterate all class distinction as a part of the destruction of a caste society in America.

The development of each of these conceptions was often ragged and uneven with much overlapping: what was "equal protection" to one was "due process" or "privilege and immunity" to another. However, regardless of the phrase used, the basic tenet of all was the uniform belief that Negroes were citizens and, as citizens, freedom from discrimination was their right. To them "discrimination" included all forms of racial distinctions.

Equality Under Law

One tool developed to secure full standing for Negroes was the concept of equal protection of the laws. It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the Abolitionists. When slavery was the evil to be attacked, no more was needed. But as some of the New England states became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, manufacturer, Abolitionist, and later United States Senator and Vice President, led

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the fight against discrimination, with "equality" as his rallying cry.[35] One Wilson measure adopted by the Massachusetts Legislature in 1845 gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[36]

Boston thereafter established a segregated school for Negro children, the legality of which was challenged in *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198 (1849). Charles Sumner, who later was to play such an important role in the Congress that formulated the Fourteenth Amendment, was counsel for Roberts. His oral argument, which the Abolitionists widely circulated, is one of the landmarks in the crystallization of the equalitarian concept.

This case was technically an action for damages under the Wilson Act. However, Sumner attacked segregation in public schools on the broader ground that segregation violated the Massachusetts Constitution which provided: "All men are created free and equal", and it was from this base that he launched his attack.

> "Of Equality I shall speak, not as a sentiment, but as a principle. . . . * * * Thus it is with all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenital effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life, as principles." [37]

"Equality before the law" [38] was the formula he employed. He traced the equalitarian theory from the eighteenth

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[35] For an account of Wilson's struggles against anti-miscegenation laws, against jim-crow transportation and jim-crow education, see NASON, LIFE OF HENRY WILSON 48 *et seq.* (1876).

[36] Massachusetts Act 1845, § 214.

[37] 2 WORKS OF CHARLES SUMNER 330, 335-336 (1875). The entire argument is reprinted at 327 *et seq.*

[38] *Id.* at 327, 330-331.

century French philosophers through the French Revolution into the language of the French Revolutionary Constitution of 1791,[39] the Constitution of February 1793,[40] the Constitution of June 1793 [41] and the Charter of Louis Phillipe.[42] Equality before the law, i.e., equality of rights, was the real meaning of the Massachusetts constitutional provision. Before it "all . . . distinctions disappear":

> "He may be poor, weak, humble, or black—he may be Caucasian, Jewish, Indian or Ethiopian race —he may be of French, German, English or Irish extraction; but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he French, German, English or Irish; he is a MAN, the equal of all his fellowmen." [43]

Hence, he urged, separate schools are illegal.

The Massachusetts court rejected Sumner's argument and refused to grant relief. Subsequent thereto, in 1853, the Legislature of Massachusetts, after careful consideration of the problem involving hearings and reports, amended the Wilson statute by providing, among other things, that in determining the qualifications of school children in public schools in Massachusetts "no distinction was to be made on account of the race, color or religious opinions of the appellant or scholar." [44]

The Committee on Education of the House of Representatives in its report recommending adoption of this bill carefully considered the arguments for and against the measure and concluded:

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[39] "Men are born and continue free and *equal in their rights.*" *Id.* at 337.

[40] "The law ought to be equal for all." *Id.* at 338.

[41] "All men are equal by nature *and before the law.*" *Id.* at 339.

[42] "Frenchmen are *equal before the law. . . .*" *Ibid.*

[43] *Id.* at 341-342.

[44] General Laws of Mass. c. 256, § 1 (1855).

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"Your committee believe, in the words of another, that 'The only security we can have for a healthy and efficient system of public instruction rests in the deep interest and vigilant care with which the more intelligent watch over the welfare of the schools. This only will secure competent teachers, indefatigable exertion, and a high standard of excellence; and where the colored children are mingled up with the mass of their more favored fellows, they will partake of the advantages of this watchful oversight. Shut out and separated, they are sure to be neglected and to experience all the evils of an isolated and despised class. One of the great merits of our system of public instruction is the fusion of all classes which it produces. From a childhood which shares the same bench and sports there can hardly arise a manhood of aristocratic prejudice or separate castes and classes. Our common-school system suits our institutions, promotes the feeling of brotherhood, and the habit of republican equality. To debar the colored race from these advantages, even if we still secured to them equal educational results, is a sore injustice and wrong, and is taking the surest means of perpetuating a prejudice that should be depreciated and discountenanced by all intelligent and Christian men." [45]

Thus, the argument and theories advanced by Sumner, although rejected by the Supreme Court of Massachusetts, finally became incorporated into the law of the State of Massachusetts. More important, however, is the fact that the argument of Sumner was widely distributed throughout the country during the period immediately preceding the consideration of the Fourteenth Amendment.[46] As a consequence it became a fundamental article of faith among

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[45] Report of Committee on Education to House of Representatives, Commonwealth of Massachusetts, March 17, 1855.

[46] Among those active in distributing the argument was SALMON P. Chase. DIARY AND CORRESPONDENCE OF SALMON P. CHASE. Chase to Sumner, Dec. 14,1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

the Radical Republicans that from a constitutional standpoint racial segregation was incompatible with constitutional guarantees of equal protection.[47]

The analysis of the available materials covering the period from 1830 to 1860, while important to this point, is too voluminous to be included in the argument at this point. We have, therefore, placed this analysis in a supplement at the end of the brief. The analysis of these materials compels the following historical conclusions:

1. To the Abolitionists, equality was an absolute—not a relative—concept which comprehended that no legal recognition be given to racial distinctions of any kind. The notion that any state could require racial segregation was totally incompatible with this doctrine.

2. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have a specific significance to opponents of slavery in the United States. Proponents of slavery knew and understood what that significance was, even as they disagreed with these theories. Members of the Congress that proposed the Amendment, shared this knowledge.

3. These radical Abolitionists, who had been in the minority prior to the Civil War, gained control of the Republican party in Congress during the course of the war and thus emerged in a dominant position in the Congress which was to write the Fourteenth Amendment. Ten of the members of the Joint Committee of Fifteen were men who had definite antislavery backgrounds and two others had likewise opposed slavery.

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[47] See, for example, Sumner resolution offered Congress on December 4, 1865 which called for "The organization of an educational system for the equal benefit of all without distinction of color or race." Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

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4. When the Joint Committee of Fifteen translated into constitutional provisions the equalitarian concepts held and widely bruited about in the struggle against slavery, it used the traditional phrases that had all become freighted with equalitarian meaning in its widest sense: "equal protection", "privileges and immunities" and "due process."

In these respects history buttresses and gives particular content to the recent admonition of this Court that "[w]hatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color." *Shelley* v. *Kraemer*, 334 U. S. 1, 23.

Despite the high principles and dedication of the leaders of the Abolitionist movement, their program ran into repeated roadblocks from both individual groups and state machinery. The movement was not only blocked in so far as the abolition of slavery itself was concerned, but was met by an ever increasing tendency on the part of all the southern states and some northern states to gradually cut down on the rights of free Negroes and to bring their status nearer and nearer to that of slaves. This countermovement culminated in the decision of the Supreme Court in the *Dred Scott* case (*Scott* v. *Sandford*, 19 How. 393) that no person of the "African race, whether free or not" could enjoy, under the Constitution of the United States, any right or protection whatsoever. All Negroes were thereby left, by the principles of that case, to the absolute, unrestrained power of the several states.

B. The Movement For Complete Equality Reached Its Successful Culmination in the Civil War and the Fourteenth Amendment.

The onset of the Civil War marked the turning point of the Abolitionists' drive to achieve absolute equality for all Americans. The first great success came on January 1,

1863, when President Lincoln's Emancipation Proclamation freed all slaves in those areas in insurrection against the United States. Obviously this was far from a complete victory. The doctrines enunciated by Chief Justice Taney in the *Dred Scott* case were still unqualified and remained as a part of the "constitutional law" of the time.

In February, 1865, the Abolitionist-dominated 38th Congress adopted and submitted to the states what was to become the Thirteenth Amendment to the Constitution. However, the Radical Republicans in Congress were intensely aware that the abolition of slavery constituted only a partial attainment of their goal of complete political and legal equality for Negroes. They had already determined as early as the spring and summer of 1862 to strike at the objective of federal statutory and constitutional guarantees for Negro equality. As yet, however, their thinking had not succeeded in distilling clearly a series of specifically defined legal and political objectives which they proposed to write into federal law and Constitution.

It should be observed in passing that their reason for this obviously was not necessarily pure Abolitionist idealism. They were in part motivated by hard practical considerations of Republican Party ascendency, and the fear that a restored South, in which Negroes were not given complete legal and political equality, would fall into the hands of a pre-war conservative white political leadership which would threaten the national political control of the Radical Republicans themselves. Thus their idealistic, social philosophy and their hard practical considerations of party interest dovetailed very nicely.[48]

It was to require the events of 1865-66, most notably the attempt to restore political rule in the South and the attempt to impose an inferior non-citizenship status upon the Negro in the restored southern states, to make clear to

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[48] tenBroek, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 117-119 (1951).

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the Radical Republicans their new constitutional objectives and the means they would seek to obtain it.

C. The Principle of Absolute and Complete Equality Began to Be Translated Into Federal Law as Early as 1862.

In 1862 Congress addressed itself to an immediate problem over which it had authority. In debating the bill which was to abolish slavery in the District of Columbia, Representative Bingham said: "The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law".[49] Representative Fessenden concluded: "If I do not mistake, it is quite apparent that when this bill shall be put on its final passage it will proclaim liberty to the slaves within this District. These men—for God created them men, though man has used them as goods and chattels—slaves—these men and women and children will, when the President of the United States signs this bill, be translated... [to a] condition in which they are invested with the rights of freemen, upon which none can trespass with impunity; since over the person of the free black as well as the free white man there is thrown the broad shield of the nation's majesty."[50] The bill was enacted into law.[51]

Simultaneously Congress discontinued the application of the Black Codes of Maryland and Virginia to the District of Columbia.[52]

Between the time of the Emancipation Proclamation in 1863 and the formulation of the Fourteenth Amendment, Congress took several forward steps to secure complete equality for the class so recently freed. These steps came in the form of particular solutions to particular problems.

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[49] Cong. Globe, 37th Cong., 2d Sess. 1639 (1862).

[50] *Id.* at 1642.

[51] 12 Stat. 376 (1862).

[52] 12 Stat. 407 (1862).

To this Congress (38th), the most immediate problem was one which fell under their glance daily, the problem of transportation in the District of Columbia. Congressional treatment of this problem is of significance because it reveals the early determination of the Radical Republicans to prohibit racial segregation.

In 1863, Congress amended the charter of the Alexandria and Washington Railroad to eliminate the practice of putting white and Negro passengers in separate parts of the street cars.[53] When, in 1864, the Washington and Georgetown street car company attempted to put colored passengers in cars separate from those of the white passengers, Senator Sumner denounced the practice in the Senate and set forth on his crusade to prohibit all racial distinctions by first eliminating street car segregation in the District.[54] In 1865, he carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[55]

The debate on the street car bill covered the entire issue of segregation in transportation. Those who supported prohibition of segregation did so on the ground that any such separation was a denial of equality itself. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[56] Senator Sumner persuaded his brethen to accept the Massachusetts view, saying that in Massachusetts, "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the Commonwealth."[57] Thus, when Congress in 1866 framed the Fourteenth Amendment, it did so against a background of Congressional determination that segregation in transportation was unequal, unjust, and was "in defiance of decency."

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[53] 12 Stat. 805 (1863).

[54] Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).

[55] 13 Stat. 536, 537 (1865).

[56] Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).

[57] *Id.* at 1158.

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D. From the Beginning the Thirty-Ninth Congress Was Determined to Eliminate Race Distinctions From American Law.

The 39th Congress which was to propose the Fourteenth Amendment convened in December 1865 with the realization that, although slavery had been abolished, the overall objective, the complete legal and political equality for all men had not been realized. This was dramatically emphasized by the infamous Black Codes being enacted throughout the southern states. These Black Codes had the single purpose of providing additional legislative sanction to maintain the inferior status for all Negroes which had been judicially decreed in the opinion in the case of *Scott* v. *Sandford*, 19 How. 393.

The Black Codes, while they grudgingly admitted that Negroes were no longer slaves, nonetheless used the states' power to impose and maintain essentially the same inferior, servile position which Negroes had occupied prior to the abolition of slavery. These codes thus followed the legal pattern of the ante-bellum slave codes. Like their slavery forerunners, these codes compelled Negroes to work for arbitrarily limited pay; restricted their mobility; forbade them, among other things, to carry firearms; forbade their testimony in a court against any white man; and highly significant here, contained innumerable provisions for segregation on carriers and in public places. In at least three states these codes prohibited Negroes from attending the public schools provided for white children.[58]

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[58] See the summary in Senator Wilson's speech before Congress, Cong. Globe, 39th Cong., 1st Sess. 39-40, 589 (1866); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906); MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1880).

It was this inferior caste position which the Radical Republicans in Congress were determined to destroy. They were equally determined that by federal statutory or constitutional means, or both, Congress would not only invalidate the existing Black Codes but would proscribe any and all future attempts to enforce governmentally-imposed caste distinctions.

Congress was well aware of the fact that to take this step involved a veritable revolution in federal-state relations. A number of Senators and Representatives in the 39th Congress, by speech and resolution, made it eminently clear that they aimed at nothing less than the total destruction of all hierarchy, oligarchy and class rule in the southern states. One of the more notable resolutions of this kind was that of Senator Charles Sumner, introduced on December 4, 1865, at the opening of the session. This resolution asserted that no state formerly declared to be in rebellion was to be allowed to resume its relation to the Union until "the complete reestablishment of loyalty . . ." and:

> "The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens, so that there shall be no denial of rights on account of color or race; but justice shall be impartial, and all shall be equal before the law."

Another requirement of Sumner's resolution called for:

> "The organization of an educational system for the equal benefit of all without distinction of color or race."[59]

Sumner thus recognized the close relationship between the destruction of the southern ruling class and the elimination of segregation in the educational system.

Representative Jehu Baker of Illinois introduced a similar resolution in the House of Representatives, which read in part as follows:

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[59] Cong. Globe, 39th Cong., 1st Sess. 2 (1865-1866).

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"Whereas class rule and aristocratic principles of government have burdened well nigh all Europe with enormous public debts and standing armies, which press as a grievous incubus on the people, absorbing their substance, impeding their culture, and impairing their happiness; and whereas the class rule and aristocratic element of slaveholding which found a place in our Republic has proved itself, in like manne, hurtful to our people . . . Therefore,

"*Resolved*, (as the sense of this House,) That once for all we should have done with class rule and aristocracy as a privileged power before the law in this nation, no matter where or in what form they may appear; and that, in restoring the normal relations of the States lately in rebellion, it is the high and sacred duty of the Representatives of the people to proceed upon the true, as distinguished from the false, democratic principle, and to realize and secure the largest attainable liberty to the whole people of the Republic, irrespective of class or race."[60]

There were numerous other resolutions and speeches expressing similar sentiments. All of the resolutions were referred to the Joint Committee on Reconstruction and are a part of the background of that committee's work in the framing of the Fourteenth Amendment.

These expressions of principle were started toward statutory fruition by Senator Trumbull's Bill to enlarge the powers of the Freedmen's Bureau. The debates which followed the introduction of his Senate Bill No. 60 are of particular interest because they make it clear that a large number of the Radical Republicans regarded the destruction of segregation in the school districts of the southern states as a highly desirable legislative objective. What followed amounted to a forthright assault on the idea that there could be racial segregation in the public schools.

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[60] Cong. Globe, 39th Cong. 1st Sess. 69 (1865-1866).

Representative Hubbard of Connecticut expressed the broad pattern of thinking of which this bill was a part:

> "The words, caste, race, color, ever unknown to the Constitution, . . . are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill.
>
> "The era is dawning when it will be a reproach to talk in scorn about the distinctions of race or color. Our country is, and must be, cosmopolitan. . . .
>
> "It is in vain that we talk about race, caste, or color. . . ." [61]

Likewise, Representative Rousseau of Kentucky stated:

> ". . . Here are four school-houses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates." [62]

Representative Dawson of Pennsylvania recognized that the supporters of the bill:

> ". . . hold that the white and black race are equal. . . . Their children are to attend the same schools with white children, and to sit side by side with them. . . ." [63]

Of more importance was S.61 "A Bill to Protect All Persons in the United States in Their Civil Rights and Furnish the Means of Vindication." This bill, though introduced through Senator Trumbull in his capacity as Chairman of the Judiciary Committee, was in fact a measure sponsored by the entire Radical Republican majority.

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[61] *Id.* at 630.

[62] *Id.* at App. 71.

[63] *Id.* at 541.

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The bill forbade any "discrimination in civil rights or immunities" among "the people of the United States on account of race, color, or previous condition of slavery". It provided that all persons should have "full and equal benefits of all laws" for the security of their persons and their property.

In a lengthy speech, Senator Trumbull defended the wisdom and constitutionality of this bill in detail. The Thirteenth Amendment, he argued, made the bill both constitutional and necessary.

> "Then, sir, I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited."[64]

Senator Trumbull's argument precipitated a lengthy debate on the constitutional issues. Opponents of the measure, conceding that Congress had the power under the Thirteenth Amendment to assure freedom of Negroes, denied that Congress had the power to endow Negroes with citizenship and civil rights. To sustain their position they pointed to the fact that Negroes who were freed prior to the Emancipation Proclamation were not treated as citizens and under the authority of the *Dred Scott* case could not be citizens.[65]

In reply, Trumbull advanced the additional constitutional argument that, once slavery was abolished, the naturalization clause of the Constitution provided Congress with the power to endow Negroes with the citizenship the *Dred Scott* case had held they could not otherwise enjoy. Trumbull thus adopted the position of Chief Justice Taney in

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[64] *Id.* at 474.

[65] See statements of Senators Van Winkle of West Virginia and Saulsbury of Delaware. *Id.* at 475 ff.

the *Dred Scott* case that the power to confer citizenship was vested in the federal, not the state government.

Another major area of controversy with respect to the bill was as to its scope. Time and again the Democrats and the more conservative Republicans in the Senate asserted that the bill would invalidate every state law which provided for racial segregation, or provided a different rule for persons of different races.[66] For example, there was the charge of Senator Cowan, a Republican of Pennsylvania, who said:

> "Now, as I understand the meaning . . . of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous."[67]

Senator Howard in reply gave the Conservatives no comfort:

> "I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter

[66] *Id.* at 500 ff.

[67] *Id.* at 500.

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> no distinction between the white race and the black race. It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else. . . . There is no invasion of the legitimate rights of the States." [68]

But, perhaps the best answer of all to these assertions of the sweeping character of the bill was given by Senator Morrill of Vermont, a member of the Joint Committee of Fifteen:

> "The Senator from Kentucky tells us that the proposition [federal guarantee of civil rights] is revolutionary, . . . I admit that this species of legislation is absolutely revoluntionary. But are we not in the midst of revolution? Is the Senator from Kentucky utterly oblivious to the grant results of four years of war?" [69]

It is highly significant that Senator Morrill was not only a member of the Joint Committee of Fifteen, even then engaged in drafting the Fourteenth Amendment, but that he later was to insist that the Fourteenth Amendment prohibited separate but equal provisions in state school legislation.

After two full days of debate, the Senate passed the Trumbull bill by a vote of 33 to 12.

The only rational inference to be drawn from the legislative history of the Trumbull bill in the Senate is that the great majority of that body was determined to bar the states from using their power to impose or maintain racial distinctions. The same majority was of the opinion that the federal government had constitutional authority so to delimit such action by the state.

In the House, the Conservatives pointed out forcefully that the text of the bill presented would destroy all

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[68] *Id.* at 504.

[69] *Id.* at 570.

limitations on federal power over state legislation and would likewise destroy all state legislative and judicial provisions making distinctions against Negroes. Representative Rogers observed:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the soveriegn domain of a State . . . then, by parity of reasoning, it has a right to enter the domain of that State and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise. . . ."[70]

In a somewhat disingenous attempt to deal with the argument of the Conservatives, Representative Wilson of Iowa, chairman of the House Judiciary Committee, argued vaguely that the bill would not have the effect of destroying all legislation discriminating on the basis of race.[71] Nevertheless Wilson broadly defined the term civil rights as used in the bill as being "the natural rights of man." Moreover, he observed that "immunities" secured "to citizens of the United States equality in the exemptions of the law."[72]

At this point, Representative Bingham of Ohio, who had become converted to the Conservatives' constitutional power argument, made a notable address to the House. While admitting that perhaps Congress was at that time without constitutional authority to enact so sweeping a bill, he said it was nevertheless true that the bill as it stood was as sweeping as was charged by the Conservatives.

Representative Bingham then made it preeminently clear that he entirely approved of the sweeping objectives of the

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[70] *Id.* at 1121.

[71] *Id.* at 1117.

[72] *Ibid.*

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bill as it came from the Senate. His willingness to accept any modification of the bill was *solely* on the grounds of an overwhelming present constitutional objection which he himself was even then in the process of curing with a proposal for a constitutional amendment. He said:

> "If civil rights has this extent, what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. I might say here, without the least fear of contradiction, that there is scarcely a State in this Union which does not, by its Constitution or by its statute laws, make some discrimination on account of race or color between citizens of the United States in respect of civil rights."[73]

Bingham then insisted that he believed that all discriminatory legislation should be wiped out by amending the Constitution.

> "The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."[74]

Bingham's prestige as a leader of the Radical Republican majority obliged Wilson to accept the Ohioan's interpretation. Consequently, the bill was returned to the Judiciary Committee and amended to eliminate the sweeping phrase "there shall be no discrimination in civil rights and immunities." Wilson no doubt comforted himself with the fact that even as amended the language of the bill was

[73] *Id.* at 1291.

[74] *Id.* at 1294.

still revolutionary. At any rate, the Conservatives were still convinced that the bill invalidated state racial segregation laws. With considerable force, they argued that the phrase "the inhabitants of every state" . . . shall have the rights to full and equal benefits of all laws and proceedings for the "security of persons and property . . ." was properly to be broadly interpreted. In fact, Senator Davis of Kentucky had this to say:

> ". . . [T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' . . .
>
> But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment. . . ." [75]

Significantly, there was no attempt to reply to this interpretation of the amended bill.

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[75] *Id.* at App. 183.

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The bill in its amended form was adopted by Congress and vetoed by President Johnson.

Representative Lawrence, who spoke in favor of overriding President Johnson's veto said:

> "This section does not limit the enjoyment of privileges to such as may be accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion, for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequalities in which is rank injustice."[76]

He also said:

> ". . . distinctions created by nature of sex, age, insanity, etc., are recognized as modifying conditions and privileges, but mere race or color, as among citizens never can [be]."[77]

Numerous newspapers also thought the bill destroyed all segregation in schools, theatres, churches, public vehicles and the like.[78] Flack said of the bill:

> "Many [Congressmen] believed that the negro would be entitled to sit on juries, to attend the same schools, etc., since, if the States undertook to legislate on those matters, it might be claimed that he was denied the equal rights and privileges accorded to white men. It does not appear that all of these contentions were specifically contradicted.
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[76] *Id.* at 1836.

[77] *Id.* at 1835.

[78] New York Herald, March 29 and April 10, 1866; Commercial March 30, 1866; National Intelligencer, April 16, 1866 and May 16, 1866. There were a number of suits against local segregation laws banning Negroes from theatres, omnibuses, etc., McPherson's Scrap Book, The Civil Rights Bill, pp. 110 ff. None of these suits appear to have involved school segregation laws.

It would seem reasonable to suppose that if the bill should prove to be constitutional that these rights could not be legally denied them." [79]

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". . . many of the leading papers of the country, including some of the principal Republican papers, regarded the Civil Rights Bill as a limitation of the powers of the States, and as a step towards centralization, in that it interfered with the regulation of local affairs which had hitherto been regulated by state and local authorities or by custom. This opinion was held in the North as well as in the South. There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc." [80]

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"What the papers gave as their opinion must necessarily have been the opinion of large numbers of people. There is much evidence to substantiate this conclusion, for almost immediately after the passage of the bill over the President's veto, efforts were made by the negroes to secure these rights." [81]

The following generalizations are pertinent to the relationship of the Civil Rights Act (S. 61 as amended) to the problem of segregation in schools and the Fourteenth Amendment:

1. As originally drafted, the Act contained a phrase "there shall be no discrimination in civil rights and immunities among the inhabitants of any state . . ." This was so broad in scope that most Senators and Representatives believed that it would have the effect of destroying entirely all state legis-

[79] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 40 (1908).

[80] *Id.* at 45.

[81] *Ibid.*

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tion which distinguished or classified in any manner on the basis of race. School segregation laws, statutes establishing unequal penalties in criminal codes, laws banning Negroes from juries, all alike would have become invalid as against the federal statute.

2. A great majority of the Republicans—the men who formulated the Fourteenth Amendment—had no objection to a bill which went this far. Men like Rogers, Kerr and Cowan objected to the bill on the ground that it would end all caste legislation, including segregated schools, and this was the view of the Senate. None of the bill's supporters in the House, except Wilson, denied that the bill had that effect.

3. The Bingham amendment was finally adopted in the House which struck out the "no discrimination" clause, simply because a majority of the members of the House believed that so sweeping a measure could not be justified under the Constitution as it stood. They accepted Bingham's argument that the proper remedy for removing racial distinctions and classifications in the states was a new amendment to the Constitution.

4. The logic of the Bingham constitutional objections aside, the persuasiveness of his technical objection to the Trumbull bill was immeasurably enhanced by the fact that several days before his motion to amend the Civil Rights Bill, Bingham had in fact proposed to the House, on behalf of the Joint Committee, a constitutional amendment by the terms of which his constitutional objections to the Trumbull bill were obviated. That measure, H. R. 63, with some significant changes intended to underscore the prohibition on state governmental action with the

addition of the citizenship clause became the Fourteenth Amendment.[82]

5. The law as finally enacted enumerated certain rights which Trumbull and other Radicals had felt were inseparably connected with the status of freedom. However, there is no evidence that even after the modification of the bill, the enumeration in the bill was considered to exclude rights not mentioned. Kerr, Rogers, Cowan, Grimes and other conservatives still insisted that the bill, even in its final form, banned segregation laws. The phrase "the inhabitants of every race . . . shall have the right . . . to full and equal benefit of all laws and proceedings for the security of persons and property" still stood in the bill and was susceptible of broad interpretation.

6. Finally, it may be observed that a majority of both Houses of Congress were ready to go beyond the provisions of the Civil Rights Act. Congressmen as diverse in their views as John A. Bingham and Henry J. Raymond, a moderate Republican and editor of the New York Times, united in proposing a constitutional amendment which would remove doubts as to the ability of Congress to destroy all state legislation discriminating and segregating on the basis of race. The forthcoming amendment, at all odds, was to set at rest all doubts as to the power of Congress to abolish all state laws making any racial distinctions or classifications.

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[82] "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 61 (Kendrick ed. 1914).

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The Framers of the Fourteenth Amendment

While Congress was engaged in the passage of the Civil Rights Act, a powerful congressional committee was even then wrestling with the problem of drafting a constitutional amendment which they hoped would definitely destroy all class and caste legislation in the United States. This committee was the now famous Joint Committee of Fifteen, which the two houses of Congress had established by Joint Resolution in December, 1865, to "inquire into the conditions of the states which formed the so-called Confederate States of America and report whether any or all of them were entitled to representation in Congress." It is extremely important for the purpose of this brief to observe that the Joint Committee of Fifteen was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition, the equalitarianism which has been set forth earlier in this brief.

Section 1 of the Fourteenth Amendment, and particularly the equal protection clause, is pecularily the product of this group, plus Senators Sumner, Wilson and Trumbull.[83]

Co-chairmen of the Commitee were Representative Thaddeus Stevens of Pennsylvania and Senator William P. Fessenden of Maine.

Stevens was virtually dictator of the House. It was his dedicated belief that the Negro must be immediately elevated to a position of unconditional, legal, economic, political and social equality; and to this end he was determined to destroy every legal and political barrier that stood in

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[83] Kelly and Harbison, The American Constitution, Its Origin and Development 460-463 (1948); Boudin, Truth and Fiction About the Fourteenth Amendment, 16 N. Y. U. L. Q. Rev. 19 (1938); Frank and Munro, The Original Understanding of "Equal Protection of the Laws", 50 Col. L. Rev. 131, 141 (1950).

the way of his goal.[84] Obviously, any constitutional amendment affecting the Negro would very heavily reflect his point of view.

Stevens believed that the law could not permit any distinctions between men because of their race. It was his understanding of the first section of the Fourteenth Amendment that: "... where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality ..." [85] He believed that it was up to Congress to repudiate "... the whole doctrine of the legal superiority of families or races," [85a] and that under the Amendment, "... no distinction would be tolerated in this purified Republic but what arose from merit and conduct." [86]

Senator Fessenden undoubtedly held moderate views on the Reconstruction and, these views probably accounted for his selection as Co-chairman of the Joint Committee. Although Fessenden hoped that the Republican Party would work successfully with President Johnson, he broke with Johnson on the Civil Rights Act, which he supported with conviction. He was a staunch champion of the Fourteenth Amendment. Fessenden believed that all distinctions in civil rights based upon race must be swept away, and he

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[84] See for example, Stevens' speech attacking the "doctrine of the legal superiority of families or races" and denouncing the idea that "this is a white man's government." Cong. Globe, 39th Cong., 1st Sess. 75 (1865). "Sir," he said on this occasion, "this doctrine of a white man's Government is as atrocious as the infamous sentiment that damned the late Chief Justice to everlasting fame; and, I fear, to everlasting fire." See also similar observations on Stevens in Bowers, The Tragic Era (1929) and Woodburn, The Life of Thaddeus Stevens (1913).

[85] Cong. Globe, 39th Cong., 1st Sess. 1063 (1866).

[85a] *Id.* at 74.

[86] *Id.* at 3148.

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was in favor of excluding the southern states from any representation in Congress until this end was assured.[87]

His son reports that the essence of his views was "all civil and political distinctions on account of race or color [would] be inoperative and void. . . ." [88]

Senator James W. Grimes, Republican of Iowa, was a Moderate and a close friend of Fessenden.[89] While he was governor of Iowa, prior to his election to the Senate the state constitution was revised to provide schools free and open to all children.[90] He insisted upon free schools open to all,[91] and Lewellen, who analyzed Grimes' political ideas, concluded that—

> "Special legislation, whether for individual or class, was opposed by Grimes as contrary 'to the true theory of a Republican government' and as the 'source of great corruption.' Although he sympathized with the newly freed Negroes after the Civil War, he opposed any attempt to make them wards of the Federal government. They had been made citizens and had been given the right to vote; there was no reason in the world why a law should be passed 'applicable to colored people' and not to white people. While his ideas on the Negro question were colored by his radical opinions on the slavery question his opposition to race legislation would probably have been practically as firm upon any other subject." [92]

Senator Ira Harris of New York, one of the least vocal members of the Committee of Fifteen, was a close friend

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[87] KENDRICK, *op. cit. supra* n. 82, at 172-177; 6 DICTIONARY OF AMERICAN BIOGRAPHY 349-350 (1931).

[88] 2 FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 36 (1931).

[89] KENDRICK, *op. cit. supra* n. 82, at 190-191.

[90] 7 DICTIONARY OF AMERICAN BIOGRAPHY 632 (1931).

[91] *Ibid.*; SALTER, LIFE OF JAMES W. GRIMES, c. 3 (1876).

[92] LEWELLEN, POLITICAL IDEAS OF JAMES W. GRIMES 42 IOWA HIST. & POL. 339, 347 (1944).

of Charles Sumner,[93] and "acted with the radicals in all matters pertaining to reconstruction."[94] His explicit views on segregation are unascertained.[95] He was, however, so closely allied to the insiders on the Committee who considered race and color an indefensible basis for making legal distinctions,[96] that it is safe to conclude that he espoused, or at least acquiesced in, this viewpoint.

Senator George H. Williams, an Oregon Republican and former Douglas Democrat, claimed authorship of the First Reconstruction Act of 1867, originally called the Military Reconstruction Bill, which he introduced in the Senate on February 4, 1867.[97] In commenting upon this bill he said:

> "I will say that in preparing this bill, I had no desire to oppress or injure the people of the South, but my sole purpose was to provide a system by which all classes would be protected in life, liberty, and property . . ."[98]

His views on segregation are also unascertained.[99] It should be noted, however, that there is no record of his ever lending his voice or his votes to any law providing segregation based upon race or color.

Senator Jacob H. Howard of Michigan was clearly in the vanguard of that group which worked to secure full

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[93] 8 DICTIONARY OF AMERICAN BIOGRAPHY 310 (1932).

[94] KENDRICK, *op. cit. supra* n. 82, at 195.

[95] FRANK AND MUNRO, THE ORIGINAL UNDERSTANDING OF EQUAL PROTECTION OF THE LAWS, 50 COL. L. REV. 131, 142 (1950).

[96] *Ibid.*

[97] KENDRICK, *op. cit. supra* n. 82, at 191; Williams, *Six Years in the United States Senate*, Daily Oregonian, Dec. 3, 10, 1905.

[98] CHRISTENSEN, THE GRAND OLD MAN OF OREGON: THE LIFE OF GEORGE H. WILLIAMS 26 (1939).

[99] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

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equality for Negroes.[100] He was clear and definite in his interpretation of the Civil Rights Act of 1866 and the Fourteenth Amendment. He said after the passage of the former that "in respect of all civil rights, there is to be hereafter no distinction between the white race and the black race."[101] In explaining the intention of the Joint Committee during discussion of the joint resolution to propose what was to become the Fourteenth Amendment, he said:

> "He desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power of such gentlemen as [Senator Doolittle of Wisconsin] who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters."[102]

In another speech, while acting for Senator Fessenden as floor leader for the Amendment, Howard interpreted Section 1 as follows:

> "The last two clauses of first section . . . disable a state from depriving . . . any person . . . of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States . . .[103]

The evidence conclusively establishes that Howard's interpretation of the equal protection clause precluded any

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[100] KENDRICK, *op. cit. supra* n. 82, at 192.

[101] FRANK AND MUNRO, *op. cit. supra* n. 83, at 140.

[102] Cong. Globe, 39th Cong., 1st Sess. 2896 (1866).

[103] *Id.* at 2766.

use whatever of color as a basis for legal distinctions.[104]

Senator Reverdy Johnson, Democrat of Maryland, was attorney for the defense in *Dred Scott* v. *Sandford*.[105] George I. Curtis, one of Scott's attorneys, credited Johnson with being the major influence in shaping the decision.[106] Where segregation was concerned, Johnson was not entirely consistent or predictable.

In 1864 he supported the motion of Senator Charles Sumner that the Washington Railroad end the exclusion of persons of color.[107] During the debate upon Sumner's motion, Johnson said:

> "It may be convenient, because it meets with the public wish or with the public taste of both classes, the white and the black, that there should be cars in which the white men and ladies are to travel, designated for that purpose, and cars in which the black men and black women are to travel, designated for that purpose. But that is a matter to be decided as between these two classes. There is no more right to exclude a black man from a car designated for the transportation of white persons than there is a right to refuse to transport in a car designated for black persons white men; and I do not suppose that anybody will contend . . . that there exists any power in the company to exclude white men from a car because the company have appropriated that car for the general transportation of black passengers.[108]

Two years later, Johnson said:

> ". . . as slavery has been abolished in the several States, those who were before slaves are now citizens of the United States, standing . . . upon the same condi-

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[104] Frank and Munro, *op. cit. supra* n. 83, at 142.

[105] 19 How. 393.

[106] 10 Dictionary of American Biography 113 (1933).

[107] Wilson, History of the Rise and Fall of the Slave Power in America 507 (1877).

[108] Cong. Globe, 38th Cong., 1st Sess. 1156 (1864).

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> tion, therefore, with the white citizens. If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason [is] equally applicable to the white man as to the black man. . . ." [109]

Thus it appears that he understood that the granting of citizenship rights to Negroes meant that racial distinctions could no longer be imposed by law.

Representative John A. Bingham of Ohio, a member of the committee who has been described as the "Madison of the first section of the Fourteenth Amendment" [110] and undoubtedly its author, was a strong and fervent Abolitionist, classified with those whose views of equal protection "precluded any use whatsoever of color as a basis of legal distinctions." [111]

While the Fourteenth Amendment was pending, Representative Bingham took the view that state constitutions which barred segregated schools were "in accordance with the spirit and letter of the Constitution of the United States . . . [if] the utterance of Jefferson ever meant anything . . . it meant precisely that when he declared for equal and exact justice. . . ." [112]

Representative George Boutwell of Massachusetts, was a hard, practical politician rather than an idealist. He was how-

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[109] Cong. Globe, 39th Cong., 1st Sess. *372-374* (1865-1866).

[110] Dissent of Mr. Justice Black in Adamson v. California, 332 U. S. 46, 74.

[111] Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Col. L. Rev. at 151. See Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371, 400-401 (1938); Graham, The Early Antislavery Backgrounds of the Fourteenth Amendment, 1950 Wis. L. Rev. 479 at 492; Cong. Globe, 39th Cong., 1st Sess. 1291, 1293, 2461-2462 (1866). For other sketches of Bingham see 2 Dictionary of American Biography 278 (1929) and Kendrick, *op. cit. supra* n. 82 at 183.

[112] Cong. Globe, 40th Cong., 1st Sess. *2462* (1868).

ever, no less extreme in his demands for Negro civil rights and Negro suffrage than men like Stevens and Sumner. Indicative of his views is his vote on May 22, 1874 against the Sargent amendment to the Civil Rights Act of 1875, which would have permitted separate but equal schools.[113] During Reconstruction Alabama was "flooded with the radical speeches of Morton and Boutwell in favor of mixed schools." [114] He was among those whose interpretation of "equal protection" would not admit color as a basis for legal distinctions.[115]

Representative Roscoe Conkling, a New York Republican, was thought to have taken his views on Reconstruction from Stevens.[116] He was called by some a protege of Stevens; at any rate, they worked as partners on much reconstruction legislation.[117] In 1868, when the readmission of Arkansas was being discussed, he voted against the Henderson Amendment to the bill which would have permitted the state to establish segregated schools.[118] In 1872 he favored the supplementary civil rights bill and voted against the Thurman amendment which would have struck out a clause permitting colored persons to enter "any place of public amusement or entertainment." [119] He was in the Senate majority which on May 22, 1874, voted down the Sargent amendment to the Civil Rights Bill, an amendment which would have permitted separate but equal schools.[120] Conkling must be classified as one of those who agreed to no legal classifications or distinctions based upon color.[121]

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[113] 2 Cong. Rec. 4167 (1874).

[114] BOWERS, THE TRAGIC ERA 427 (1929).

[115] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[116] KENDRICK, *op. cit. supra n.* 82, at 186.

[117] CHIDSEY, THE GENTLEMAN FROM NEW YORK 34-35 (1935).

[118] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).

[119] CONKLING, LIFE AND LETTERS OF ROSCOE CONKLING 432 (1869).

[120] 2 Cong. Rec. 4167 (1874).

[121] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

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Representative Henry T. Blow, a Missouri Republican, first supported the views of Thaddeus Stevens in the Joint Committee and then in the second session gave his support to Bingham.[122] In either case, he acted with those who favored a broad and sweeping denial of the right of the states to make legal classifications on the basis of race or color. Blow came to Congress with a strong antislavery background and took the position that color discrimination could not be defended, as a matter of course.[123]

Representative Justin S. Morrill of Vermont is characterized as "an extreme radical", one "regularly on the side of radicalism". It is said of him that "the only part taken by him in Reconstruction was to attend the meetings of the Committee and cast his vote."[124] However, he was among those voting against the "white" clause in the Nebraska constitution when the bill to admit that state to the union was under consideration.[125] He voted against the Henderson amendment to permit segregated schools in the bill to readmit Arkansas.[126] He voted against the Sargent Amendment to allow separate but equal schools, during the debates on the bill that became the Civil Rights Act of 1875.[127] Morrill thus belongs in the group of those who did not consider color a reasonable ground for legal distinctions.[128]

Representative Elihu Washburne of Illinois was a staunch member of the House Radical bloc, and a pronounced enemy of the more moderate Reconstruction policies of President Johnson. He supported both the Civil

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[122] KENDRICK, *op. cit. supra* n. 82, at 194.

[123] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

[124] KENDRICK, *op. cit. supra* n. 82, at 140, 193.

[125] Cong. Globe, 39th Cong., 1st Sess. 4275-4276 (1866).

[126] Cong. Globe, 40th Cong., 2nd Sess. 2748 (1868).

[127] 2 Cong. Rec. 4167 (1874).

[128] FRANK AND MUNRO, *op. cit. supra* n. 83, at 142.

Rights Act and the Fourteenth Amendment and his remarks make it clear that he favored a revolution in the southern social order.[129]

The two Democratic members of the Joint Committee from the House were both enemies of the Civil Rights Act and the Fourteenth Amendment. Representative Henry Grider of Kentucky was without influence in the drafting of the Fourteenth Amendment by the Joint Committee.[130] However, remarks of Representative Andrew Jackson Rogers of New Jersey, in opposition to these measures, are significant indication of contemporary understanding of their reach and thrust. Thus, in speaking of the Civil Rights Bill, Rogers said:

> "In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes . . . , then . . . it has a right to . . .., inflict upon the people . . . the right of the negro to [vote]. . . ." [131]

Similarly, in speaking of the proposed Section 1 of the Fourteenth Amendment on February 26, 1866, he said:

> ". . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have

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[129] 19 DICTIONARY OF AMERICAN BIOGRAPHY 504 (1936); see also KENDRICK, *op. cit. supra* n. 82, at 194.

[130] KENDRICK, *op. cit. supra* n. 82, at 196. Grider is not even listed in the DICTIONARY OF AMERICAN BIOGRAPHY. He died before the second session of the 39th Congress. KENDRICK, *op. cit. supra* n. 82, at 197.

[131] Cong. Globe., 39th Cong., 1st Sess. 1121 (1866).

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> equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens. . . ." [132]

Again, in denouncing the Amendment, he declared:

> "This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill. . . ."
>
> ". . . I hold [the amendment] will prevent any State from refusing to allow anything to anybody." [133]

E. The Fourteenth Amendment Was Intended to Write into the Organic Law of the United States the Principle of Absolute and Complete Equality in Broad Constitutional Language.

While the Civil Rights Act of 1866 was moving through the two Houses of Congress, the Joint Committee of Fifteen was engaged in the task of drafting a constitutional amendment as a part of a program for the "readmission" of the southern states to the Union. When the Committee began its meetings in January 1866, several of its members introduced proposals for constitutional amendments guaranteeing civil rights to the freedmen. After a series of drafting experiments, Representative Bingham on February 3 proposed the following:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." [134]

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[132] *Id.* at App. 134 (1866).

[133] *Id.* at 2538.

[134] This proposal with some changes was destined to become eventually the second portion of Section 1 of the Fourteenth Amendment. KENDRICK, *op. cit. supra* n. 82, at 61.

The Joint Committee found this proposal satisfactory and accordingly on February 13th introduced it in the House as H. R. 63.[135]

By now the dedicated purpose of the Radical Republicans based in part upon the ante-war equalitarian principles as opposed to caste and class legislation had to be crystallized in a Fourteenth Amendment. Necessarily, the drafters of this amendment and those who participated in the debates on the amendment recognized that constitutional amendments are properly worded in the broadest and most comprehensive language possible.

It must be borne in mind that Representative Bingham, and those who supported his position on the amendment to the Civil Rights Bill of 1866, had already demonstrated that the constitutional amendment under consideration would be at least as comprehensive in its scope and effect as the original sweeping language of the Trumbull Civil Rights Bill *before* it was amended in the House, and that it would be far broader than the scope of the bill as finally enacted into law. On this point, Bingham repeatedly made his intentions clear, both in his discussion on the power limitations on the Civil Rights Bill itself and in his defense of his early drafts of the proposed constitutional amendment.

Representative Rogers immediately attacked the proposed constitutional amendment (H. R. 63) as "more dangerous to the liberties of the people and the foundations of the government" than any proposal for amending the Constitution heretofore advanced. This amendment, he said, would destroy all state legislation distinguishing Negroes on the basis of race. Laws against racial intermarriage, laws applying special punishments to Negroes for certain crimes, and laws imposing segregation, including school segregation laws, alike would become unconstitutional. He said:

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[135] Cong. Globe, 39th Cong., 1st Sess. 813 (1865-1866).

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"Who gave the Senate the constitutional power to pass that bill guarantying equal rights to all, if it is necessary to amend the organic law in the manner proposed by this joint resolution? . . . It provides that all persons in the several States shall have equal protection in the right of life, liberty, and property. Now, it is claimed by gentlemen upon the other side of the House that Negroes are citizens of the United States. Suppose that in the State of New Jersey Negroes are citizens, as they are claimed to be by the other side of the House, and they change their residence to the State of South Carolina, if this amendment be passed Congress can pass under it a law compelling South Carolina to grant to Negroes every right accorded to white people there; and as white men there have the right to marry white women, Negroes, under this amendment, would be entitled to the same right; and thus miscegenation and mixture of the races could be authorized in any State, as all citizens under this amendment are entitled to the same privileges and immunities, and the same protection in life, liberty, and property.

* * *

"In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." [136]

Representative Bingham, who was contemporaneously amending the original Trumbull Civil Rights Bill because its broad anti-discrimination provisions lacked constitu-

[136] Cong. Globe, 39th Cong., 1st Sess., App. 134 (1865-1866).

tional foundation, naturally did not dispute Representative Rogers' appraisal of the wide scope of H. R. 63. On the contrary, Representative Bingham two days later indicated his concurrence in that appraisal in the course of a colloquy with Representative Hale.

Representative Hale inquired of Representative Bingham whether his proposed constitutional amendment did not "confer upon Congress a general power of legislation for the purpose of securing to all persons in the several states protection of life, liberty and property, subject only to the qualification that the protection shall be equal." And Representative Bingham replied, "I believe it does . . ."

In order to nail down the precise source of the proposed grant of power, Representative Hale then asked Representative Bingham to "point me to that clause or part . . . which contains the doctrine he here announces?" To which the answer was, "The words 'equal protection', contain it, and nothing else." [137]

The House at the end of February was preoccupied with debating Reconstruction generally as well as the Civil Rights Bill, and it showed itself in no hurry to take up Bingham's proposal, especially since it was obvious that a more comprehensive measure would soon be forthcoming from the Joint Committee. Following the debate on February 28, the House postponed further consideration of the proposed amendment until mid-April.[138] In fact, "H. R. 63" was not to be heard from in that form again. Yet its protective scope presently passed into the more extensive proposal which the Joint Committee brought forward at the end of April and which became, after some changes, the amendment which Congress finally submitted to the states.

During most of March and April, the Joint Committee paid little attention to the question of civil rights.

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[137] *Id.* at 1094.

[138] *Id.* at 1095

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It was concerned, for a time, with the question of the admission of Tennessee; then, for a time, it appears to have been inactive. Not until late April did it resume sessions looking forward to the drafting of a comprehensive constitutional amendment on Reconstruction. On April 21, Stevens offered to the committee a draft of a proposed constitutional amendment, covering civil rights, representation, Negro suffrage and the repudiation of the "rebel" debt.

This proposal became the frame upon which the Fourteenth Amendment was constructed. Most significant from our point of view was section 1:

> "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." [139]

Section 2 provided that on and after July 4, 1876, no discrimination should be made between persons in the rights of suffrage on account of race, color, or previous condition of servitude. Section 3 provided that until that time, no class of persons against whom a state imposed suffrage discrimination because of race, color or previous condition of servitude should be included in the state's basis of representation. Section 4 invalidated the "rebel" debt. Section 5, which passed substantially intact into the Fourteenth Amendment, provided that Congress was to have the power to enforce the provisions of the amendment by appropriate legislation.[140]

Section 1 was to pass through several critical changes in the next few days. Almost at once, Senator Bingham moved to have the following provision added to section 1:

> "... nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation." [141]

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[139] KENDRICK, *op. cit. supra* n. 82, at 83.

[140] *Ibid.*

[141] *Id.* at 85.

It will be noticed that Bingham's suggestion had within it the substance of the equal protection clause of the Fourteenth Amendment. After some discussion, the committee voted this suggestion down, seven to five.

Other changes followed. After some further discussion, Bingham moved that the following be added as a new section of the amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [142]

This was substantially Bingham's earlier amendment, submitted to Congress in February as H. R. 63 with the addition of the equal protection clause. One significant difference lay in the fact that Bingham's new section did not confer power upon Congress to legislate; instead, it made privileges and immunities, due process and equal protection constitutional guarantees against state interference.

F. The Republican Majority in the 39th Congress Was Determined to Prevent Future Congresses from Diminishing Federal Protection of These Rights.

There were two rather obvious reasons for Senator Bingham's last two amendments. First, a number of committee members had earlier expressed some concern over the phraseology of H. R. 63 because it allowed Congress to refuse to enforce the guarantees if it saw fit. The Radical Republicans were openly fearful lest later and more conservative Congresses destroy their work.[143] But direct

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[142] *Id.* at 87.

[143] See speeches of Representatives Garfield, Broomall, Eldridge, and Stevens and Senator Howard, Cong. Globe, 39th Cong., 1st Sess. 2459, 2462, 2498, 2506, 2896 (1865-1866).

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constitutional guarantees would be beyond the power of Congress to impair or destroy. Second, Bingham was acting with the knowledge that section 5 of the proposed amendment already granted Congress full power to legislate to enforce the guarantees of the amendment. In other words, the Radical Republicans had no thought of stripping Congress of the power to enforce the amendment by adequate legislation. They put the guarantees themselves beyond the reach of a hostile Congress.[144]

The Committee at once adopted Representative Bingham's suggested addition by a vote of ten to two.[145] Four days later, however, on April 25, the Committee on Williams' motion, struck out Bingham's latest suggested revision, only Stevens, Bingham, Morrill, Rogers and Blow voting to retain it.[146] On April 28, in the final stages of committee discussion, Bingham moved to strike out section 1, reading "no discrimination shall be made . . ." and insert his proposal of April 21 in its place. Although the Committee had voted only three days earlier to kill Bingham's proposal entirely, it now passed his new motion.[147] Thus, Bingham's proposal ultimately became section 1 of the amendment which the Committee now submitted to Congress. As such, and with the addition of the citizenship clause adopted from the Civil Rights Act of 1866, it was to pass into the Fourteenth Amendment as finally accepted by Congress.

On April 30, Representative Stevens introduced the text of the Committee's proposed amendment in the House of Representatives. As presented, the amendment differed in two particulars from the Fourteenth Amendment as finally adopted: the first section as yet did not contain the citizen-

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[144] See for example Stevens's explanations on the reasons for reenforcing the Civil Rights Act by constitutional guarantees. *Id.* at 2459.

[145] KENDRICK, *op. cit. supra* n. 82, at 87.

[146] *Id.* at 98.

[147] *Id.* at 106.

ship clause; and the third section carried a clause for the complete disfranchisement of Confederate supporters until 1870. An accompanying resolution proposed to make successful ratification of the amendment, together with ratification by the several southern states, a condition precedent to the readmission of the southern states to representation in Congress.[148]

On May 8, Stevens opened debate in the House on the proposed amendment. In a sharp speech he emphasized the legislative power of Congress under the proposed amendment:

> "I can hardly believe that any person can be found who will not admit that every one of these provisions [in the first section] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime, shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."[149]

The amendment, he added, was made necessary by the "oppressive codes" which had become law in the southern states. "Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."[150]

Finally, he stated that the purpose of section 1 was to place the Civil Rights Act beyond the reach of a hostile Congress:

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[148] Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

[149] *Ibid.* (italics in original).

[150] *Ibid.*

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> "Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed . . . This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get." [151]

There was general agreement among subsequent speakers that one of the purpose of section 1 of the amendment was to reinforce the Civil Rights Act. Enemies of the proposed amendment charged that Radical Republicans, having forced through what was an unconstitutional statute, were now attempting to clear up the constitutional issue by writing the statute into the supreme law.[152]

The Radical Republicans refused to admit that they were attempting to cover up the passage of an unconstitutional statute. Instead, they insisted that one of the purposes of the present proposed amendment was to place the guarantees of the Civil Rights Act beyond attack by future Congresses unfriendly to the rights of the freedman "The Civil Rights Bill is now part of the law of this land," said Representative James A. Garfield of Ohio in defending the amendment. "But every gentleman knows it will cease to

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[151] *Ibid.*

[152] Representative William Finck of Ohio asserted, for example, that "all I have to say about this section is, that if it is necessary to adopt it . . . then the civil rights bill, which the President vetoed, was passed without authority and was clearly unconstitutional." *Id.* at 2461. Representative Benjamin Boyer of Pennsylvania, another enemy of the amendment, after observing that "the first section embodies the principles of the civil rights bill," twitted the Republicans for seeking to rectify their own constitutional error and attacked the present amendment as "objectionable, also, in its phraseology, being open to ambiguity and admitting the conflicting constructions." *Id.* at 2467. Representative Charles Eldridge of Wisconsin asked ironically, "What necessity is there, then, for this amendment if that bill was constitutional at the time of its passage?" *Id.* at 2506.

be a part of the law whenever the sad moment arrives when that gentleman's party comes into power . . . For this reason, and not because I believe the civil rights bill to be unconstitutional, I am glad to see that first section here."[153] Representative John Broomall of Ohio, making the same point, said, "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Broomall pointed out, also, that no less a friend of the Negro than Representative John A. Bingham, had entertained grave doubts as to the constitutionality of the measure, and thought a constitutional amendment necessary. He disagreed, Broomall said, with Bingham's doubts, but he was not so sure of himself that he felt justified "in refusing to place the power to enact the law unmistakably in the Constitution."[154]

Probably other moderate Republicans agreed with Representative Henry J. Raymond of New York who had voted against the Civil Rights bill because he "regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution had any power to enact such a law. . . ." But he nonetheless had heartily favored the principles and objectives of the bill, and because he still favored "securing an equality of rights to all citizens" he would vote "very cheerfully" for the present amendment.[155]

There was little discussion during the debate in the House of the scope of the civil rights which would be protected by the proposed amendment, apparently because both sides realized that debate on the original Civil Rights Bill had exhausted the issue. The indefatigable Rogers, fighting to the last against any attempt to guarantee rights for the Negro, repeatedly reminded Congress that the amendment would sweep the entire range of civil rights

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[153] *Id.* at 2462.

[154] *Id.* at 2498.

[155] *Id.* at 2502.

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under the protection of the Federal Government and so work a revolution in the constitutional system.[156]

Although it was not necessary to answer Rogers, Bingham reminded Congress:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." [157]

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[156] *Id.* at 2537.

[157] *Id.* at 2542.

G. Congress Understood That While the Fourteenth Amendment Would Give Authority to Congress to Enforce Its Provisions, the Amendment in and of Itself Would Invalidate All Class Legislation by the States.

On May 10, the House passed the amendment without modification by a vote of 128 to 37. The measure then went to the Senate.[158]

On the same day, Senator Howard opened the debate in the Senate. Speaking for the Joint Committee because of Senator Fessenden's illness, Howard gave a broad interpretation of the first section of the proposed amendment. He emphasized the scope of legislative power which Congress would possess in the enforcement of the Amendment.

> "How will it be done under the present amendment? As I have remarked, they are not [at present] powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power be given to Congress to that end. This is done by the fifth section of this amendment which declares that 'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." [159]

Senator Howard's interpretation of the legislative power of Congress under the proposed amendment makes it obvious that the Joint Committee, in separating the guarantees of civil rights from the congressional power to legislate thereon, had not at all intended to weaken the legislative capacity of Congress to enforce the rights conferred by the amendment. The guarantees, however, no longer depended upon congressional fiat alone for their effectiveness as they

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[158] *Id.* at 2545.

[159] *Id.* at 2766.

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had in Bingham's proposed civil rights amendment of January (H. R. 63). But in Howard's view and that of the Committee, this meant merely that future Congresses could not destroy the rights conferred.

Senator Howard then passed to an equally expansive interpretation of the due process and equal protection clauses of the amendment:

> "The last two clauses of the first section of the amendment disabled a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law or from denying to him the equal protection of the laws of the State. *This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.* It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." [160] (Italics added.)

The only class of rights, Howard added, which were not conferred by the first section of the amendment was "the right of suffrage." Howard concluded this analysis by asserting that the entire first section, taken in conjunction with the legislative power of Congress conferred in section five, was of epoch-making importance:

> "I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable everyone of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it

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[160] *Id.* at 2766.

> gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government." [161]

Thus, Senator Howard understood that due process and equal protection would sweep away entirely "all class legislation" in the states. By implication, he subscribed to a "substantive interpretation" of due process of law, thus making due process a limitation upon state governments to subvert civil liberties.

No Senator thereafter challenged these sweeping claims for the efficacy of the civil rights portion of Section 1. Howard's allies subscribed enthusiastically to his interpretation. Senator Luke Poland of Vermont, a staunch Radical Republican, regarded the amendment as necessary to set to rest all questions of congressional competence in enacting the civil rights bill:

> "Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States. . . ." [162]

Certainly the Conservatives in the Senate agreed altogether with Senator Howard and the other Senate Republicans about the sweeping impact which the prospective amendment would have upon state caste legislation. Senator Thomas Hendricks of Indiana, in condemning the legislative power to enforce the amendment which Congress would

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[161] *Id.* at 2766.

[162] *Id.* at 2961.

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acquire from the operation of section 5, said that these words had

> "... such force and scope of meaning as that Congress might invade the jurisdiction of the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power. As construed this provision is most dangerous." [163]

The prospective amendment moved forward rapidly in the Senate, with comparatively little debate. The Radical Republicans were confident of their objectives. The conservative Republicans and Democrats despaired of arresting the tide of events. One significant change occurred on May 30 when Howard brought forward the citizenship clause of the Civil Rights Act and successfully moved it as an amendment to section 1. Few Republicans doubted that Congress already had the power to legislate upon the question of citizenship. However, the new provision cleared up a serious hiatus in the original Constitution by settling in unequivocal fashion the definition of national and state citizenship. Needless to say, the new provision, like its predecessor in the Civil Rights Act, specifically endowed Negroes with citizenship and reversed the dictum of the *Dred Scott* case that no Negro could be a citizen of the United States.

The Radical Republicans were well aware that by endowing the Negro with citizenship, they strengthened his claim to the entire scope of civil rights. Bingham had mentioned as much in debate in the House, while Representative Raymond of New York had added that once the Negro became a citizen, it would not be possible in a republican government to deny him any right or to impose upon him any restriction, even including that of suffrage. The force of this stratagem did not escape the Conservatives in the Senate.

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[163] *Id.* at 2940.

Senator Garrett Davis of Kentucky had this to say of the citizenship provision of the amendment:

> "The real and only object of the first provision of this section, which the Senate has added to it, is to make Negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle." [164]

The Senate passed the amendment in June, 33 to 11. Congress formally proposed the amendment on June 13 and it was submitted to the states.

Congress Intended to Destroy All Class Distinctions In Law

What, then, may one conclude concerning the intent of Congress with regard to segregation in the framing of the amendment?

Both Senator Howard and Representative Stevens made it definitely clear that the scope of the rights guaranteed by the amendment was much greater than that embraced in the Civil Rights Act.

It is evident that the members of the Joint Committee intended to place all civil rights within the protection of the Federal Government and to deny the states any power to interfere with those rights on the basis of color. The scope of the concept of liberties entertained by the Committee was very broad. The breadth of this concept was recognized by this Court in all of its decisions up to *Plessy* v. *Ferguson*.

In adopting the Civil Rights Act of 1866, Congress had enumerated the rights protected. This was done because Bingham and others doubted that Congress had the power to take all civil liberties under federal protection. Un-

[164] *Id.* at App. 240.

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restricted by this consideration in drafting a constitutional provision, Congress used broad comprehensive language to define the standards necessary to guarantee complete federal protection. This was promptly recognized by this Court in one of the earliest decisions construing the Amendment when it was held: "The 14th Amendment makes no effort to enumerate the rights it designs to protect. It speaks in general terms, and those are as comprehensive as possible." *Strauder* v. *West Virginia,* 100 U. S. 303, 310.

Did Congress specifically intend to ban state laws imposing segregation by race? And more specifically, did it intend to prohibit segregation in school systems, even where a state provided a separate but equal system for Negroes? To begin with it must be recognized that the "separate but equal" doctrine was yet to be born. The whole tenor of the dominant argument in Congress was at odds with any governmentally enforced racial segregation as a constitutionally permissible state practice.

Senator Howard, among others, asserted categorically that the effect of the due process and equal protection clauses of the Fourteenth Amendment would be to sweep away entirely all caste legislation in the United States. Certainly a number of Conservatives, notably Representative Rogers of New Jersey, a member of the Joint Committee and Senator Davis of Kentucky, were convinced that the effect of the amendment would be to prohibit entirely all laws classifying or segregating on the basis of race. They believed, and stated, that school laws providing separate systems for whites and Negroes of the kind which existed in Pennsylvania, Ohio and in several of the Johnson-Reconstructed southern states would be made illegal by the amendment.

It is notable that while there were some assurances extended by Radical Republicans to the Moderates and Conservatives as to the scope of the Civil Rights Act of 1866 in this regard, there were no such assurances in the debates on the Fourteenth Amendment.

The Republican majority realized full well that it could not envisage all possible future applications of the amendment to protect civil rights. By separating section 1 of the amendment, which provides an absolute federal constitutional guarantee for those rights, from section 5, which endows Congress with legislative capacity to protect such rights, the framers of the amendment assured continued protection of these rights, by making it possible to win enforcement of them in the courts and eliminated the power of Congress alone to diminish them.

H. The Treatment of Public Education or Segregation in Public Schools During the 39th Congress Must Be Considered in the Light of the Status of Public Education at That Time.

Although today, compulsory free public education is universally regarded as a basic, appropriate governmental function, there was no such unanimity existing at the time the Fourteenth Amendment was adopted. Arrayed against those who then visualized education as vital to effective government, there were many who still regarded education as a purely private function.

While it has already been shown that the conception of equal protection of the laws and due process of law, developed by the Abolitionists before the Civil War, was so broad that it would necessarily cover such educational segregation as is now before this Court, compulsory public education at that time was the exception rather than the rule. The conception of universal compulsory free education was not established throughout the states in 1866. The struggle for such education went on through most of the 19th century and, even where accepted in principle in some of the states, it sometimes was not fully put into practice.

Prior to the first quarter of the nineteenth century childhood education was considered an individual private responsibility.[165] The period 1830-1860 was one of marked

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[165] CUBBERLY, A BRIEF HISTORY OF EDUCATION, cc. XXV-XXVI (1920).

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educational advancement. It has commonly been termed as the era of the Common School Revival, a movement to extend and improve facilities for general education. This movement flourished in New England under the leadership of Horace Mann, Henry Barnard and others. There was a definite tendency throughout the country to shift from private to public support of education and this trend extended to normal schools and facilities for secondary and higher education. Many states, urged on by educational leaders, publicists and statesmen, began making legislative provisions for public education.

On the other hand, these gains have been commonly exaggerated and in some respects misinterpreted. The laws were by no means always carried into effect and the recommendations of the reformers were, in most instances, accepted with great hesitancy.[166] Another authority after appraising public education during the period just prior to the Civil War made the following generalizations:

> "Practically all the states were making substantial progress in the development of systems of public education. (2) At the close of the period no single state can be said to have been providing any large percentage of its children and youth with schools well-supported and well-taught. (3) The facilities for secondary education were by no means as extensive as has commonly been reported. (4) Regional differences in educational development have been exaggerated; and (5) where sectional differences in school support and attendance did exist they appear to have been due more to differentials in urban and rural development than to differences in social attitudes and philosophies." [167]

In general, it should be noted that in New England and in New York the main problem during this period was to

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[166] EDWARDS AND RICHEY, THE SCHOOL IN THE SOCIAL ORDER 421 (1947).

[167] *Id.* at 423.

improve the educational systems which had already been established and to secure additional support for them. In the Middle Atlantic states the major problem was to establish systems of public schools and to provide effective public education. In the West, the prevailing political and social philosophy required that at least some degree of education be provided to as large an element of the population as possible.

Public education was much slower in getting under way in the South. In most of the southern states, despite some promising beginnings, an educational system was not created until after the close of the Civil War. One historian concluded:

> ". . . although the 'common school awakening' which took place in the Northern States after Horace Mann began his work in Massachusetts (1837) was felt in some of the Southern States as well, and although some very commendable beginnings had been made in a few of these States before 1860, the establishment of state educational systems in the South was in reality the work of the period following the close of the Civil War. The coming of this conflict, evident for a decade before the storm broke, tended to postpone further educational development." [168]

Public education in the South made progress only after it became acceptable as being compatible with its ideal of a white aristocracy.[169]

Among the factors responsible for this condition were the aristocratic attitude which held that it was not neces-

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[168] CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 251 (1919).

[169] EDWARDS AND RICHEY, *op. cit. supra* n. 166, at 434.

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sary to educate the masses, the reluctance of the people to tax themselves for educational purposes, the marked individualism of the people, born of isolation, and the imperfect state of social and political institutions. Most southerners saw little or no relation between education and life. Consequently, the view prevailed that those who could afford education could indulge themselves in securing it and those who could not afford it lost little, if anything. This southern attitude was aptly summed up fifteen years after the close of the war by the statement of Virginia's Governor F. W. M. Holliday that public schools were "a luxury . . . to be paid for like any other luxury, by the people who wish their benefits." [170] Education in the South was not so much a process of individual and community improvement as it was an experience that carried with it a presumption of social equality for those who shared it, a view hardly compatible with any notion of universal education which included persons of diverse social and ethnic backgrounds.

Between 1840 and 1860, public education began to advance in the South but its benefits were denied Negroes. It is significant that racist and other types of intolerant legislation increased markedly during this period. While education could be extended to all whites who, for political purposes, belonged to one big happy family, there was nothing in such a conception that suggested that Negroes should be included.[171] The editor of the authoritative antebellum organ of southern opinion, *DeBow's Review*, summed up the matter of education for Negroes during slavery as follows: "Under the institution of slavery we used to teach them everything nearly except to read." [172]

The framers of the Fourteenth Amendment were familiar with public education, therefore, only as a developing con-

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[170] Quoted in WOODWARD, ORIGINS OF THE NEW SOUTH 61 (1951).

[171] DEBOW, THE INTEREST IN SLAVERY OF THE SOUTHERN NON-SLAVEHOLDER 3-12 (1860).

[172] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., Pt. IV, 135 (1866).

cept. We have already demonstrated that they were determined to eliminate all governmentally imposed racial distinctions—sophisticated as well as simple minded—and expressed their views in the broadest and most conclusive terms. The intentions they expressed were definitely broad enough to proscribe state imposed racial distinctions in public education as they knew it, and the language which they used in the Fourteenth Amendment was broad enough to forever bar racial distinctions in whatever public educational system the states might later develop.

Furthermore, the framers intended that Congress would have the power under section 5 to provide additional sanctions, civil and criminal, against persons who attempted to enforce states statutes made invalid by section 1 of the Amendment. As stated above, Representative Bingham purposely revised an earlier draft of the Amendment so that the prohibitions of section 1 would be self-executing against state statutes repugnant thereto and would be beyond the threat of hostile Congressional action seeking to repeal civil rights legislation. In other words, the judicial power to enforce the prohibitory effect of section 1 was not made dependent upon Congressional action.

Thus, the exercise of this Court's judicial power does not await precise Congressional legislation. This Court has repeatedly declared invalid state statutes which conflicted with section 1 of the Fourteenth Amendment, even though Congress had not acted.[173] For example, there

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[173] Of course, Title 8 provides a remedy in law or equity against any person acting under color of State law who deprives anyone within the jurisdiction of the United States of rights secured by the Federal Constitution or laws. It provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 8 U. S. C. § 43.

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is no federal statute to the effect that a state which permits released time for religious instructions is acting in a way prohibited by the Fourteenth Amendment. This Court, nevertheless, held that such state action conflicted with section 1 of the Fourteenth Amendment and directed the trial court to enjoin the continuance of the proscribed state action. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203.

Similarly, this Court has acted to redress violations of constitutional rights, even in the absence of specific Congressional statute, in a long series of cases involving the rights of freedom of expression and freedom of worship under the Fourteenth Amendment. See *e.g., De Jonge* v. *Oregon*, 299 U. S. 353. And this Court has often vindicated the constitutional rights of members of minority groups in the area of public education in the absence of any Congressional statute. *Sweatt* v. *Painter, supra.*

Indeed, this rule has been applied in all areas in which the prohibitory effect of section 1 has been employed by the Court. *E.g., Miller* v. *Schoene*, 276 U. S. 272; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400. To now hold Congressional action a condition precedent to judicial action would be to stultify the provisions in the Federal Constitution protecting the rights of minorities. In effect, this Court would be holding that action by a state against an unpopular minority which the Constitution prohibits cannot be judicially restrained unless the unpopular minority convinces a large majority (the whole country as represented in Congress) that a forum in which to ask relief should be provided for the precise protection they seek.

I. During the Congressional Debates on Proposed Legislation Which Culminated in the Civil Rights Act of 1875 Veterans of the Thirty-Ninth Congress Adhered to Their Conviction That the Fourteenth Amendment Had Proscribed Segregation in Public Schools.

At various times during the 1870's, Congress considered bills for implementing the Fourteenth Amendment as well as the Civil Rights Act of 1866. Debate on these measures was on occasion extremely significant, since it gave members of Congress an opportunity to express themselves as to the meaning and scope of the Amendment. These observations were the more significant in that perhaps two-fifths of the members of both Houses in the early seventies were veterans of the Thirty-ninth Congress which had formulated the Amendment. Moreover, the impact of the Amendment upon segregated schools had by this time moved into the public consciousness so that Congressmen now had an opportunity to say specifically what they thought about the validity under the Amendment of state statutes imposing segregation upon public school systems.

The second session of the Forty-second Congress, which convened in December, 1871, soon found itself involved in a fairly extended discussion of the effect of the Fourteenth Amendment upon racial segregation, particularly in school systems. Early in the session the Senate took under consideration an amnesty bill to restore the political rights of ex-Confederate officials in accordance with the provisions of section 3 of the Amendment. On December 20, Senator Sumner of Massachusetts, now a veteran champion of the rights of the Negro, moved the following as an amendment to the measure under consideration:

> "Section—That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn-keepers;

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> by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law. . . and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude." [174]

Here was a provision, which if adopted would commit Congress to the proposition that under the Fourteenth Amendment it could do away entirely with state school statutes providing for segregated school systems. Sumner attacked school segregation at length. The public school, he asserted, "must be open to all or its designation is a misnomer and a mockery. It is not a school for whites or a school for blacks, but a school for all; in other words a common school for all." Segregation he called an "odius discrimination" and an "ill-disguised violation of the principle of Equality." [175]

In the debate that followed, it was apparent that a large majority of the Republicans in the Senate were convinced that Congress quite appropriately might enact such legislation in accordance with section 5 of the Fourteenth Amendment.

Senator Carpenter of Wisconsin, one of the best constitutional lawyers in the Upper House, was doubtful of the constitutionality of Sumner's measure insofar as it applied to churches. But he had no doubt on the authority of Congress to guarantee the right of all persons, regardless of race or color, to attend public schools, to use transportation facilities, and the like, and he offered a resolution of his own to this end.[176] Even the conservative Kentuckian Garrett Davis admitted that there was no question of congressional competence under the Amendment to guarantee these

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[174] Cong. Globe, 42nd Cong., 2nd Sess. 244 (1871).

[175] *Id.* at 383-384.

[176] *Id.* at 760.

rights as against state action, though he challenged the validity of any statute protecting rights against private discrimination.[177] And Senator Stevenson of Kentucky, another strong enemy of mixed schools, confined his attack to discussion of the evil involved in an attempt to "coerce social equality between the races in public schools, in hotels, in theatres. . . ."; he spoke not at all of constitutional objections.[178]

The real objection to Sumner's measure, however, was not the constitutionality of the measure itself, but the incongruity of its attachment as a rider to an amnesty bill, which required a two-thirds majority of both Houses of Congress. Nonetheless, the Senate, after extended debate, adopted Sumner's amendment, including the provision banning segregated schools, by a vote of 28-28, the ballot of the Vice President breaking the tie.[179] The amnesty measure itself later failed to obtain the necessary two-thirds majority of the Senate.

The impressive Senate support in favor of a bill which would have banned segregation in state school systems alarmed Conservatives in both Houses, who now began to advance, very deliberately, the idea that "separate but equal" facilities would be constitutional under the limitations of the equal protection clause of the Fourteenth Amendment. In the House, a few days after the defeat of the amnesty bill, Representative Frank Hereford of West Virginia offered the following resolution as an expression of conservative sentiment:

> "*Be it resolved*, That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the States, and equally unconstitutional and tyrannical for Con-

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[177] *Id.* at 764.

[178] *Id.* at 913.

[179] *Id.* at 919. The Senate vote on the amnesty bill was 33 to 19 in favor of the measure. *Id.* at 929.

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> gress to pass any law interfering with churches, public carriers, or inn-keepers, such subjects of legislation belonging of right to the States respectively."

There was no debate on the Hereford resolution, which was put to an immediate vote and defeated, 85 to 61, 94 not voting.[180]

Later in the session, there was still further debate in the Senate concerning segregated schools. With a second amnesty bill up for consideration, Sumner on May 8 again moved an amendment providing:

> "That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers; by common carriers . . . or . . . by trustees, commissioners, superintendents, teachers, and other officers of common schools and other public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law. . . ." [181]

This proposal led to sharp debate and decided differences of opinion among the Republican majority. Senator Trumbull of Illinois, who was the author of the Civil Rights Act of 1866 and who had become decidedly more conservative in his political outlook since the early Reconstruction era, now insisted that the right to attend public schools was in any event not a civil right, so that Congress could not legislate on the subject under the Fourteenth Amendment. But Senator George Edmunds of Vermont, already known as a distinguished constitutional lawyer and who had entered the Senate in 1866 in time to participate in the debates on the Fourteenth Amendment, dissented sharply, insisting that the right to attend tax-supported public schools was a civil right and therefore subject to regulation by Con-

[180] *Id.* at 1582.

[181] *Id.* at 3181.

gress.[182] Senator Morton taking the same view, insisted that "if the right to participate in these schools is to be governed by color, I say that it is a fraud upon those who pay the taxes." And he added that where there are public schools supported by common taxation upon everybody, white and black, then there is a civil rights that there shall be equal participation in those schools.

Observing that the Ohio Supreme Court had but lately held constitutional a state statute providing for segregation in public schools, he argued that Congress was entirely competent under the Fourteenth Amendment to prohibit segregated schools.

Senator Arthur Boreman of West Virginia also took it as a matter of course that Congress had the power under the amendment to prohibit separate but equal facilities in school systems; he thought that Congress ought not to force the issue at present:

> "The time will come when . . . these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes." [183]

At the close of the debate, the proponents of segregated school systems tried unsuccessfully to modify the Sumner measure to eliminate the requirement for mixed school systems. Senator Orris Ferry of Connecticut first moved to strike out entirely the provisions of the Sumner amendment which related to public school systems. This motion the Senate defeated 26 to 25.[184] Senator Francis P. Blair of Missouri then offered another amendment to allow "local

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[182] *Id.* at 3190.

[183] *Id.* at 3195.

[184] *Id.* at 3256, 3258.

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option" elections within the states on the question of mixed versus segregated schools. Sumner, Edmunds and Howe all strongly condemned this proposal, which the border and southern Senators as strongly commended. The Blair amendment in turn met defeat, 23 to 30.[185] Finally, an amendment to strike out the first five sections of the Sumner measure, thereby completely destroying its effect, was defeated 29 to 29, with the Vice President casting a deciding negative vote.[186] The Senate then formally adopted the Sumner amendment to the amnesty bill, 28 to 28, with the Vice President voting in the affirmative.[187]

The conclusion seems inescapable that as of 1872 a substantial majority of the Republican Senators and perhaps half of the Senate at large believed that the prohibitions of the Fourteenth Amendment extended to segregated schools.

The authority of the judiciary to act in this field was specifically recognized and not disputed.[188] A significant number of the Senators in question, among them Edmunds, Howe, Sumner, Conkling, and Morrill, had been in Congress during the debates on the adoption of the Amendment, while Conkling and Morrill had been members of the Joint Committee. And Vice President Henry Wilson, who several times cast a deciding vote in favor of prohibiting segregated schools not only had been in Congress during the debates on the Amendment but had also authored one of the early civil rights bills of the Thirty-ninth Congress.

The first session of the Forty-third Congress, which opened in December, 1873, saw extended discussion of the issue of segregated schools in both Houses. On December

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[185] *Id.* at 3262.

[186] *Id.* at 3264-3265.

[187] *Id.* at 3268. The amnesty bill itself subsequently received a favorable vote of 32 to 22, thereby failing to receive the necessary two-thirds majority. *Id.* at 3270.

[188] *Id.* at 3192.

18, Representative Benjamin F. Butler of Massachusetts, chairman of the House Judiciary Committee and long one of the most outspoken leaders of the Radical faction of the Republican party, introduced the following measure from his committee:

> ". . . whoever, being a corporation or natural person and owner, or in charge of any public inn, or of any place of public amusement or entertainment for which a license from any legal authority is required, or of any line of stage-coaches, railroad, or other means of public carriage of passengers or freight, or of any cemetery or other benevolent institution, or any public school supported in whole or in part at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein of any citizen of the United States because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than $100 nor more than $5000 for each offense. . . ." [189]

This measure inspired a somewhat bitter two-day debate early in January, 1874, during which the power of Congress to prohibit segregated schools received more attention than any other single issue involved. The most extended defense of the constitutionality of Butler's measure was made by Representative William Lawrence of Ohio, who began with the flat assertion that "Congress has the constitutional power to pass this bill." Denying that civil rights were any longer in the exclusive care of the states, he asserted that since the passage of the Fourteenth Amendment, "if a state permits any inequality in rights to be created or meted out by citizens or corporations enjoying its protection, it denied the equal protection of laws." He then launched into an extended historical analysis of the debates in the Thirty-ninth Congress before and during the passage of the Amendment. He recalled Bingham's

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[189] 2 CONG. REC. 318 (1873-1874).

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statement in opposition to the original extreme language of the Civil Rights bill, in which the Ohioan had said that the proper remedy for state violation of civil rights was to be achieved not by an "arbitrary assumption of power," but "by amending the Constitution of the United States expressly prohibiting the States from any such abuse of power in the future." He quoted Stevens' and Howard's speeches introducing the Amendment in Congress to show the broad purpose which they had represented to be the objectives of the Joint Committee. In some irony, he quoted various conservatives in the House, among them Finck, Boyer and Shanklin, who had asserted again and again that the Amendment would place all civil rights within the protective custody of the federal government.[190] Lawrence's speech was the more impressive in that he was a veteran of the Thirty-ninth Congress who had actively supported both the Civil Rights Act and the passage of the Fourteenth Amendment. Moreover, he was held in great respect in Congress as an able jurist and constitutional lawyer.[191]

The most extended argument in opposition to Lawrence was advanced by Representative Roger Q. Mills of Texas, who presented the contention that civil rights, in spite of the Fourteenth Amendment, were still entrusted entirely to the care of the states. Congress, he thought, had no right to touch the public school system of the several states. "The States," he said, "have . . . [an] unquestioned right . . . to establish universities, colleges, academies, and common schools, and govern them according to their own pleasure." He relied upon the narrow interpretation of the "privileges or immunities" clause of the Fourteenth Amendment recently advanced by the Supreme Court in the *Slaughter House Cases* as a new argument in support of

[190] *Id.* at 412 ff.

[191] 11 DICTIONARY, *op. cit. supra* n. 129, at 52. He was later the author of the statute creating the Department of Justice.

his contention. And he finished with the warning, not entirely unheard in the twentieth century, that if Congress passed any such measure as the Butler bill, "the Legislatures of every State where the white people have control will repeal the common-school laws." [192] At the end of debate, Butler's bill was recommitted on the motion of its sponsor, and was not heard of again during the session.

More significant events were occurring in the Senate. On December 2, Sumner had once more presented his now well-known civil rights measure, this time as an independent Senate bill instead of a proposed amendment to an amnesty resolution.[193] This bill finally came up for debate in late April and May, although Sumner himself had died in March. Conkling of New York, Boutwell of Massachusetts, Howe of Wisconsin, Edmunds of Vermont, and Frelinghuysen of New Jersey all gave it very effective support in debate.[194]

In a strong speech, Senator Frelinghuysen pointed out that a variety of conflicting state decisions had introduced some confusion into the question of whether or not state statutes setting up segregated school systems were constitutional under the Amendment. The present measure, he thought, would destroy "injurious agitation" on that subject. There could be no question of the constitutional power of Congress to enact the bill; the "privileges or immunities" and "the equal protection" clauses, in particular, were especially germane to congressional power. And he pointed out that if the present bill became law, it would still be possible to pursue an informal voluntary segregation by the consent of both parents and school boards, where for a time that seemed advisable. But he added that segregated school systems established by law

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[192] 2 Cong. Rec. 383 ff. (1873-1874).

[193] *Id.* at 2.

[194] Boutwell and Conkling, it will be recalled, had both served as members of the Joint Committee.

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were in complete violation of the whole spirit of the Amendment; separate schools for colored people were inevitably inferior to those for whites. "Sir", he said in conclusion, "if we did not intend to make the colored race full citizens . . . we should have left them slaves." [195]

Senator Edmunds used both constitutional and pragmatic arguments in support of the bill. "What the Constitution authorizes us to do is to enforce equality," he said, "and . . . not half-equality, for there is no such thing as half-equality. It is entire equality or none at all." And segregated schools imposed inequality on Negroes. He quoted figures from Georgia school statistics, to demonstrate that although forty-three percent of the children in that state were colored, there were nonetheless only 356 schools for colored children as against 1379 for whites. In the light of this kind of evidence, he thought, the duty of Congress was clear.[196]

Senator Boutwell declared that "opening the public schools of this country to every class and condition of people without distinction of race and color, is security . . . that . . . the rising . . . generations will advance to manhood with the fixed purpose of maintaining these principles [of the Republic]." Like Edmunds, he argued that segregation made either adequate or equal facilities impossible; there was not enough money in the South to support two school systems.[197]

Senator Howe asserted that ". . . I am of the opinion that the authority of Congress to issue these commands, to enact this bill into law, is as clear, as indisputable as its authority to lay taxes or do any other one thing referred to in the Constitution." Like Frelinghuysen he thought that voluntary segregation might exist in some places for a time without violating the amendment. "Open two school houses

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[195] *Id.* at 3451-3455.

[196] *Id.* at 4173.

[197] *Id.* at 4116.

wherever you please;" he said, and "furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves for the same reason, because each will feel more at home by themselves than at present either can feel with the other. . . ." But legally segregated schools, he thought would not in fact be equal, and it was the duty of Congress to prohibit them.[198]

Senator Pease of Mississippi shortly before the bill was passed speaking in favor of the bill said in unequivocal terms:

> "The main objection that has been brought forward by the opponents of this bill is the objection growing out of mixed schools. . . . There has been a great revolution in public sentiment in the South during the last three or four years, and I believe that to-day a majority of the southern people are in favor of supporting, maintaining, and fostering a system of common education . . . I believe that the people of the South so fully recognize this, that if this measure shall become a law, there is not a State south of Mason and Dixon's line that will abolish its school system. . . .
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> * * * I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that 'because you are a black man you shall have a separate school,' he looks upon that, and justly, as tending to degrade him. There is no equality in that.
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> ". . . because when this question is settled I want every college and every institution of learning in this broad land to be open to every citizen, that there shall be no discrimination." [199]

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[198] *Id.* at 4151.

[199] *Id.* at 4153-4154.

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The opponents of the Sumner bill meantime had become aware of the epoch-making significance of the Supreme Court's decision in the *Slaughter House Cases*, and they leaned very heavily upon Justice Miller's opinion during the debate. Thurman of Ohio analysed the *Slaughter House Cases* at length to prove his former contention that the main body of civil rights was still in the custody of the states and that the present bill was unconstitutional."[200] Senator Henry Cooper of Tennessee, after citing Justice Miller's opinion to make the same constitutional point, asked the Republican majority, ". . . what good are you to accomplish thus by forcing the mixture of the races in schools?"[201] And Senator Saulsbury of Delaware, who, in 1866 had insisted that if Congress enacted the Fourteenth Amendment it would work an entire revolution in state-federal relations, now argued flatly that the Sumner bill was unconstitutional under Justice Miller's interpretation of the limited scope of the "privileges or immunities" clause of the Amendment.[202]

However, the Senate majority remained firm in its intention to pass the bill with the ban on segregated schools. At the close of debate, Senator Aaron Sargent of California presented an amendment that "nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds." This amendment the Senate promptly defeated, 21 to 26.[203] Senator McCreery then moved an amendment providing that "nothing herein contained shall be so construed as to apply to schools already

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[200] *Id.* at 4089.

[201] *Id.* at 4154.

[202] *Id.* at 4159.

[203] *Id.* at 4167.

established." This, too, met defeat, mustering but eleven "ayes" in its support.[204] Immediately after this, the Senate, on May 22, passed the Sumner bill, by a vote of 29 to 16, and sent it to the House.[205]

Again the conclusion with respect to congressional intent as regards segregated schools seems fairly clear: a majority of the Senate in the Forty-third Congress, under control of leaders, a number of whom had supported the passage of the Fourteenth Amendment eight years earlier, thought Congress had the constitutional power to ban segregated schools and that it would be good national policy to do so.[206]

Congress adjourned before the House could take action on the Sumner bill, so that the measure carried over to the second session of the Congress, beginning in December, 1874. And now occurred a curious anticlimax with respect to the prohibition of segregated schools; Congress speedily enacted what virtually amounted to the Sumner bill of 1874 into law, but with the provision banning segregated schools eliminated from the bill.

The critical action occurred in the House of Representatives, where Butler on December 16 introduced what amounted to a somewhat modified draft of the measure passed by the Senate the previous spring. The constitutional debates produced little that was new. It was apparent that Congress by virtue of Section 5 had the constitutional power to take all civil liberties under its protection. Representative Robert Hale of New York, a veteran of the Thirty-ninth Congress, twitted Finck of Ohio for his fallible memory in forgetting so conveniently that in 1866,

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[204] *Id.* at 4171.

[205] *Id.* at 4176.

[206] Flack long ago reached a similar conclusion, that the great majority in Congress who voted for Sumner's bill "fully believed they had the power to pass it." "Of all the evidence," he said, "only a very minor part of it against this conclusion." FLACK, *op. cit. supra* n. 79, at 271.

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he had solemnly warned that the impending amendment would place all civil rights under federal protection.[207]

Whatever may be said about the quantum or quality of Congressional debates on one side or the other no one can deny that the 39th Congress opened with a determination on the part of the Radical Republican majority to deprive the states of all power to maintain racial distinctions in governmental functions. No one can gainsay that this determination permeated the 39th Congress and continued through the passage adoption of the Fourteenth Amendment. The debates and all of the related materials show conclusively that the Fourteenth Amendment effectively gave constitutional sanction to the principle that states are thereby deprived of all power to enforce racial distinctions in governmental functions including public schools.

II

There is convincing evidence that the State Legislatures and conventions which ratified the Fourteenth Amendment contemplated and understood that it prohibited State legislation which would require racial segregation in public schools.

The Fourteenth Amendment was submitted to the states for consideration on June 16, 1866. 14 Stat. 358. It was deliberated by thirty-seven states and ratified by thirty-three.[208] We urge that the evidence with respect to the

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[207] 3 Cong. Rec. 979, 980 (1875).

[208] The ratifying states included twenty free or non-slaveholding states (Connecticut, New Hampshire, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, Kansas, Maine, Nevada, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska and Iowa), two former slave-holding but loyal states (West Virginia and Missouri), and the eleven former slaveholding states which had seceded (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia). Delaware, Kentucky and Maryland, three former slave-holding but non-seceding states, expressly rejected the Amendment. California, probably because the control of its legislature differed in each house, was unable to take any definitive action.

states' understanding indicates that three-fourths of the states understood and contemplated the Amendment to forbid legislation compelling the assignment of white and Negro youth to separate schools.

The evidence which compels this conclusion is adduced from governors' messages, reports of the legislative committees on federal relations and entries in the journals of the legislatures. At that time, the legislatures, almost without exception, kept no verbatim record of debates and speeches; and the journals merely noted motions and votes. There are, however, newspaper summaries of some speeches and proceedings. But much of the evidence from these sources is inadequate.

More significant is the modifications which the states made in their schools laws. For if it was understood in the legislatures, which considered the proposed Amendment, that ratification would perforce forbid compulsory segregated schools, it seems certain that the legislatures would have apprehended its effect upon the state's constitutional or statutory provisions for public schools. If, for example, a state required or authorized segregated schools under existing law, presumably the legislature would not knowingly adopt the Amendment without giving some thought to its implications. After adoption, it would be expected that measures would be taken to conform the school laws to the new constitutional mandate. If, however, a state's school laws and practices already conformed to the understanding that the Fourteenth Amendment forbade segregated schools, it is probable that its legislature would not have objected to the Amendment on this question and would afterwards either retain or reinforce its school laws. On the other hand, if there was an authorization or requirement of segregation in a state's school laws, and, after ratification, the legislature took no action to end this disparity, undoubtedly it would appear that this state did not understand the Amendment to have the effect which Appellants urge. Yet, if a state under these same conditions had

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rejected the Amendment, it would suggest that the Amendment's impact upon the school segregation law was a controlling factor. We submit, the new constitutional and statutory provisions enacted with respect to public schools during the critical period, i.e., from 1866, the year the Amendment was submitted, until several years following adoption, constitute strong evidence on the question of the understanding of the Amendment in the state legislatures.

Then, too, we note that the Fourteenth Amendment was designed particularly as a limitation upon the late Confederate States. *Slaughter House Cases,* 16 Wall. 36. Each of them, except Tennessee, was required to endorse the Amendment and the price of readmission also required each to demonstrate that it "modified its constitution and laws in conformity therewith." 14 Stat. 428 (Act of March 2, 1867). In this connection, Representative Boutwell significantly declared: [209]

> "We are engaged in the great work of reconstructing this Government, and I suppose if we are committed to anything, it is this: that in the ten States not now represented there shall hereafter be no distinction on account of race or color."

These new constitutions, and the proposals and debates of the conventions which framed them, then are of utmost significance. Certainly, they had to measure up to the requirements of the Fourteenth Amendment and, therefore, their educational provisions apparently reflect the understanding of the draftsmen as to the Amendment's effect upon compulsory public school segregation. Similarly, since the constitutions of these states, were subject to the scrutiny of Congress, an additional insight into the understanding of Congress is provided. For it would hardly be possible to maintain that Congress contemplated

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[209] Cong. Globe, 39th Cong., 2nd Sess. 472 (1867).

the Fourteenth Amendment as a prohibition on compulsory segregated schools if it had approved a constitution having a provision inconsistent with this proposition.

We now turn to the legislative history of the Fourteenth Amendment in the states. The proceedings in the several states shall be taken up in turn. Because of the geographic origin of certain of the instant cases and the significance of the contemporary understanding and contemplation of the effect of the Amendment upon Southern institutions, we will first treat the evidence from the states whose readmission to the Union was conditioned upon their conformity with the Amendment.

A. The Eleven States Seeking Readmission Understood that the Fourteenth Amendment Stripped Them of Power to Maintain Segregated Schools.

Subsequent to the proclamation of the Thirteenth Amendment the South sought to define the relations between the new freedmen and white men in a manner which retained most of the taint of the former master-slave relationship. The ante-bellum constitutions remained inviolate although prohibitions against slavery were added. Laws were passed which restricted Negroes in their freedom of movement, employment, and opportunities for learning. *Slaughter House Cases*, 16 Wall. 36, 71-72; *Strauder* v. *West Virginia*, 100 U. S. 303, 306-307. In Arkansas [210] and Florida,[211] the so-called Black Codes required separate schools for the children of the two races.

After March 2, 1867, the date of the First Reconstruction Act, 14 Stat. 428, the South was obliged to redefine the status of the freedmen in conformity with their understanding of the Fourteenth Amendment. New constitutions were adopted which without exception were free of

[210] Ark. Acts 1866-67 p. 100.

[211] Cong. Globe, 39th Cong., 1st Sess. 217 (1866).

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any requirement or specific authorization of segregated schools. It is also significant that in almost all of these constitutional conventions and legislatures, the issue of segregated schools was specifically raised and rejected. And no law compelling segregated schools was enacted in any state until after it had been readmitted.

Arkansas

The first of these states to be readmitted was Arkansas. 15 Stat. 72 (Act of June 22, 1868). The constitution which it submitted to Congress had not one reference to race; the education article merely obligated the general assembly to "establish and maintain a system of free schools for all persons" of school age.[212] It is reported that this article was adopted to nullify the segregated school law passed by the legislature earlier in 1867.[213] Its adoption had been generally opposed in the Convention on the ground that it would "establish schools in which there would be 'indiscriminate social intercourse between whites and blacks.'"[214] The electorate was warned that this constitution would "force children into mixed schools."[215] But the new constitution was adopted and proclaimed law on April 1, 1868.[216]

The general assembly convened on April 3, and ratified the Fourteenth Amendment on April 6, 1868.[217] It then proceeded to repeal the former school statute and a new school law was proposed whereby taxes were to be assessed to support a system of common schools for the education of all children. This law was interpreted as establishing "a system of schools where the two races are blended together."[218] And it was attacked because it granted white

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[212] Ark. Const. 1868, Art. IX, § 1.

[213] Staples, Reconstruction in Arkansas 28 (1923).

[214] *Id.* at 247.

[215] Daily Arkansas Gazette, March 19, 1868; *Id.*, March 15, 1868.

[216] *Id.*, April 2, 1868.

[217] Ark. Sen. J., 17th Sess. 19-21 (1869).

[218] *Ibid.*

parents "no option to their children . . . but to send them to the negro schools . ... unless, as is now rarely the case, they are able to give their children education in other schools." [219]

These provisions for public schools were included in the legislative record which Arkansas submitted to the scrutiny of Congress. Whereupon, Arkansas was re-admitted on June 22, 1868. 15 Stat. 72. One month later, but after readmission, the legislature amended the public school statute and directed the Board of Education to "make the necessary provisions for establishing separate schools for white and colored children and youths. . . ." [220]

North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida.

The North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida modifications in their constitutions and laws were approved by Congress in the Omnibus Act of June 25, 1868 and Congress authorized readmittance effective on the date each ratified the Amendment. 15 Stat. 73. The constitution which Florida offered for congressional review imposed a specific duty on the state to provide "for the education of all children residing within its borders without distinction or preference." [221] The legislature ratified the Amendment on June 9, 1868 and when it next convened passed a law to maintain "a uniform system of instruction, free to all youth of six to twenty-one years." [222] It is agreed that this law was not designed to foster segregated schools and by its operation "mixed schools were authorized or required." [223]

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[219] Daily Arkansas Gazette, April 10, 1868.

[220] Act of July 23, 1868 as amended by Ark. Acts 1873, p. 423. See Ark. Dig. Stats., c. 120 § 5513 (1874).

[221] Fla. Const. 1868, Art. VIII § 1.

[222] Fla. Laws 1869, Act of Jan. 30, 1869.

[223] Knight, Public Education in the South 306 (1922); Eaton, "Special Report to the United States Commissioner of Education", Rep. U. S. Commr. Educ. to Secy. Int. 127 (1871).

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Several years later the Florida Legislature passed a sweeping law which forbade any racial distinction in the full and equal enjoyment of public schools, conveyances, accommodations and amusements.[224] The first compulsory school segregation provision did not appear until over twenty years after readmission.[225]

In the North Carolina Constitution of 1868, the education article called for the general assembly to maintain "a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and sixteen."[226] Furthermore, the general assembly was "empowered to enact that every child of sufficient mental and physical ability, shall attend the public schools" unless otherwise educated.[227] It is reported that the Constitutional Convention refused by a vote of 86 to 11 to adopt a section which provided that "The General Assembly shall provide separate and distinct schools for the black children of the state, from those provided for white children."[228] The adopted article also survived amendments which would have permitted separate schools "for any class of the population" providing each class shared equally in the school fund.[229] Some proponents of the education article said that it did not force racial commingling but they frankly admitted that it did not prevent it and contended that separate schools, if established, should only develop out of the mutual agreement of parents rather than through legislation.[230] Avail-

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[224] Fla. Laws 1873, c. 1947.

[225] FLA. CONST. 1885, Art. XII § 2.

[226] N. C. CONST. 1868, Art. IX § 2.

[227] *Id.*, § 17.

[228] Motion of Mr. Durham reported in KNIGHT, INFLUENCE OF RECONSTRUCTION ON EDUCATION 22 (1913).

[229] Motions of Messrs. Graham and Tourgee reported in *Id.* at 22.

[230] NOBLE, A HISTORY OF PUBLIC SCHOOLS IN NORTH CAROLINA 340-41 (1930).

able contemporary comment upon the education article of the 1868 constitution uniformly agreed that it either authorized or required mixed schools.[231]

The 1868 Constitution, with this education article, was submitted to Congress and treated as being in conformity with the Amendment. North Carolina's readmission was thus assured contingent upon its ratification of the Fourteenth Amendment.

The state legislature convened on July 1, 1868 and ratified the Amendment on July 4th.[232] Three days later the lower house adopted a resolution providing for the establishment of separate schools, but it failed to win support in the upper house which successfully carried a resolution instructing the Board of Education to prepare a code for the maintenance of the system of free public schools contemplated in the constitution.[233] Significantly, this measure made no reference to race. It was enrolled on July 28, 1868.[234]

At the next regular session after readmission, the legislature passed a school law which required separate schools.[235] However doubtful the validity of this law was to some as late as 1870,[236] the state constitution as amended in 1872, settled the issue by specifically requiring racial separation in education.[237]

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[231] Wilmington Morning Star, March 27, 1868; *id.*, March 28, 1868, p. 2; Charlotte Western Democrat, March 24, 1868; *id.*, April 17, 1868, p. 2; Greensboro Times, April 2, 1868, p. 3; *id.*, April 16, 1868, p. 1; Fayetteville News, April 14, 1868, p. 2; *id.*, June 2, 1868, p. 1.

[232] N. C. Laws 1867, ch. CLXXXIV, Sec. 50.

[233] NOBLE, *op. cit. supra* n. 230, at 297, 299.

[234] See List of Public Acts and Resolutions Passed by the General Assembly of North Carolina, Spec. Sess. of July, 1868.

[235] N. C. Laws 1868-69, c. CLXXXIV, § 50.

[236] NOBLE, *op. cit. supra* n. 230, at 325.

[237] Art. IX, § 2.

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South Carolina and Louisiana both ratified the Amendment on July 9, 1868 and were readmitted as of that date pursuant to the Omnibus Act. 15 Stat. 73. The educational articles in their 1868 constitutions were of the same cloth. The Louisiana article flatly said: "There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana."[238] South Carolina's constitution provided that: "All the public schools, colleges and universities of this State, supported in whole or in part by the public school fund, shall be free and open to all the children and youths of the State, without regard to race or color."[239] In addition to this, the South Carolina Constitution required the legislature to pass a compulsory school law after it organized facilities for the education of all children.[240] The 1868 constitutions of both states also declared that all citizens, without regard to race or color, were entitled to equal civil and political rights.[241]

The proponents of the education articles in the Louisiana and South Carolina conventions defended the provisions prohibiting segregation by force of law in public schools as an incident of equal justice or equal benefits in return for equal burdens; and they overwhelmingly considered compulsory segregation to be a hostile distinction based on race and previous condition.[242] The chairman of the Education Committee of the South Carolina Convention, defending the proposed education article, explained:[243]

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[238] La. Const. 1868, Title VII, Art. 135.

[239] S. C. Const. 1868, Art. XX § 10.

[240] *Id.*, § 4.

[241] *Id.*, Art. I, § 7; La. Const. 1868, Title I, Art 2.

[242] Proceedings of the South Carolina Constitutional Convention of 1868, Held at Charleston, S. C., Beginning January 14th and Ending March 17th, 1868, pp. 654-900 (1868); Official Journal of the Proceedings for Framing a Constitution for Louisiana, 1867-1868, *passim* (1868).

[243] Proceedings, *op. cit. supra* n. 242, at 899.

> "The whole measure of Reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section."

Continuing, he explained:[244]

> "*We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so.*" (Emphasis supplied.)

After the Louisiana and South Carolina constitutions were approved by Congress, the South Carolina Legislature, in a special session, ratified the Amendment and temporarily organized the school system in conformity with the education article, despite Governor Scott's plea for a law which would require racial separation in schools as a preventive against "educational miscegenation."[245] At the next regular session, the school system was permanently organized, and a law was passed forbidding officials of the state university to "make any distinction in the admission of students or management of the university on account of race, color or creed."[246]

The Louisiana legislature acted with similar celerity and consistency. It assembled on June 29, 1868, ratified the Amendment on July 9, 1868 and enacted laws conforming to the constitutional mandate against segregated schools.[247] At its next session, it supplemented the school

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[244] *Id.* at 690.

[245] S. C. House J., Spec. Sess., p. 51 *et seq.* (1868). See Charleston Daily News, July 10, 1868.

[246] S. C. Acts 1868-69, pp. 203-204.

[247] DABNEY, UNIVERSAL EDUCATION IN THE SOUTH 370 (1936).

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laws by imposing penal and civil sanctions against any teacher refusing to accept a pupil of either race.[248] Subsequent laws forbade racial distinctions at a state institution for the instruction of the blind, prohibited racial separation on common carriers, and provided that there should be no racial discrimination in admission, management and discipline at an agricultural and mechanical college.[249]

More than a quarter-century elapsed before South Carolina and Louisiana in 1895 and 1898, respectively, changed these laws to require racial segregation in public education.[250]

The Alabama Constitutional Convention assembled on November 4, 1867, but the education article was not adopted until December 5th, the final day of the session. What emerged was borrowed directly from the Iowa Constitution of 1857, in most particulars, plus the language of a statute passed by the 1865-66 Iowa legislature to specifically bar segregation in schools.[251] This anti-segregation article survived two attempts to introduce provisos specifically requiring the establishment of separate schools.[252]

Congress found that Alabama had conformed its constitution with the Amendment and considered the state qualified for readmission as soon as it ratified the Fourteenth Amendment. On July 13th, 1868, the General Assembly fulfilled the final requirement. Thereafter, on August 11th, the State Board of Education, acting under the legislative powers conferred upon it in the constitution,

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[248] FAY, "THE HISTORY OF EDUCATION IN LOUISIANA", 1 U. S. Bu. Educ. Cir. No. 1, p. 101 (1898).

[249] La. Acts 1869, p. 37; La. Laws 1871, pp. 208-10; La. Laws 1875, pp. 50-52.

[250] S. C. CONST. 1895, Art. XI § 7; LA. CONST. 1898, Art. 248.

[251] Compare ALA. CONST. 1867, Art. XI with IOWA CONST. 1857, Art. IX and Iowa Laws 1865-66, p. 158.

[252] Official Journal of the Constitutional Convention of the State of Alabama 1867-68, pp. 237, 242 (1869).

passed a regulation which made it unlawful "to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children . . ."[253] But the significant point again is that this was done only after readmission.

Georgia, like most of the South, had no public school system prior to Reconstruction. In fact, no reference to public schools appears in either the ante-bellum Georgia Constitution or the Constitution of 1865 which was substantially a reenactment of the former.[254]

The Constitutional Convention of 1867-68, however, rewrote the basic state document and the committee on education reported a proposal to establish a thorough system of public education "without partiality or distinction."[255] During the drafting and consideration of the proposed education article, several efforts to include provisions requiring segregated schools were defeated.[256] The Convention adopted an article which directed the General Assembly to "provide a thorough system of general education to be forever free to all children of the State . . .".[257]

After this constitution was approved by Congress, the legislature ratified the Fourteenth Amendment on July 21, 1868 and Georgia apparently qualified for readmission. But the General Assembly forcibly expelled its Negro complement at this session on the ground that their color

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[253] Ala. Laws 1868, App., Acts Ala. Bd. of Educ. It would appear that had this law been tested, application of the rule applicable to borrowed statutes would have invalidated it inasmuch as a similar statute in Iowa had been struck down on the basis of a less stringent constitutional provision. Clark v. Board of School Directors, 24 Iowa 266 (1868).

[254] 2 Thorpe, Federal and State Constitutions 765 *et seq.* (1909).

[255] Journal of the Constitutional Convention of Georgia, 1867-68, p. 151 (1868).

[256] *Id.*, at 69, 151, 479, 558. See Orr, History of Education in Georgia 187 (1950).

[257] Ga. Const. 1868, Art. VI.

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made them ineligible to hold office. This action prompted Congress to refuse to seat the Georgia congressional delegation.[258] The General Assembly then reconvened on January 10, 1870, re-seated its Negro members, ratified the Fourteenth Amendment again, and expunged the word "white" from all state laws.[259] The conduct of this legislature satisfied Congress and Georgia was readmitted to the Union on July 15, 1870. 16 Stat. 363.

Three months later, on October 13, 1870, the state legislature passed a public school act which in section 32 established a system of segregated schools.[260] The state constitution was amended in 1877 and validated this legislation by an express requirement for racial separation in public schools.[261]

Texas.

In Texas a Constitutional Convention met in June 1868 to frame the constitution under which it was subsequently readmitted. Drafted to secure the approval of Congress,[262] it required the legislature to maintain "a system of public free schools, for the gratuitous instruction of all the inhabitants of this State of school age."[263] This constitution was accepted at the elections in 1869, and the legislature, without discussion, ratified the three Civil War Amendments on February 18, 1870.[264] Texas was readmitted on March 30, 1870, 16 Stat. 80, and the legislature drafted a public school law which provided that local boards of

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[258] Orr, *op. cit. supra* n. 256, at 195-196.

[259] Ga. Sen. J. Pt. II, p. 289 (1870); Ga. House J. pp. 307, 1065 (1870).

[260] Ga. Laws 1870, p. 57.

[261] Ga. Const. 1877, Art. VIII § 1.

[262] Tex. Const. 1871, Art. I § 1.

[263] *Id.* Art. IX §§ 1-4.

[264] Daily State Journal, February 20, 1870.

education, "when in their opinion the harmony and success of the schools require it, . . . *may* make any separation of the students or schools necessary to secure success in operation . . . ".[265] Contemporary opinion was that this grant of discretion to school boards was a restrained effort to achieve racial separation without offending Congress and that the Fourteenth Amendment forbade the requirement of separate schools although it did not compel mixed schools.[266] It was not until 1876, when Texas adopted a new constitution, that racial separation in schools was expressly required by law.[267]

Virginia.

Virginia submitted to Congress a constitution which contained no reference to race or racial separation in public schools.[268] In the Constitutional Convention, the issue of segregation was introduced when the report of the committee on education was being considered. First, an amendment was proposed to provide "that in no case shall white and colored children be taught in the same school."[269] This amendment was defeated.[270] Subsequently, a proposal to add an independent section providing for the establishment of segregated schools met a like fate.[271] A provision was also submitted to require that public schools be open to all classes without distinction and that the legislature be denied the power to make any law which would admit of any

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[265] 6 Tex. Laws 1866-71, p. 288. (Emphasis added.)

[266] Flake's Daily Bulletin, March 3, 1870; *Id.* March 13, 1870.

[267] Tex. Const. 1876, Art. VII § 7; 8 Tex. Laws 1873-79 CXX § 54.

[268] Va. Const. 1868, Art. VIII § 3.

[269] Journal of the Virginia Constitutional Convention, 1867-68, p. 299 (1868).

[270] *Id.* at 300; Richmond Enquirer, March 31, 1868.

[271] Journal, *op cit. supra* n. 269, at 301.

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invidious distinctions.[272] This proposal and a substitute to the same effect were also defeated.[273] Opponents of the proposals to prohibit segregated schools explained the failure of passage, not on the grounds of fundamental objection, but because it was feared that the adoption of such an article in the constitution would doom its chance of ratification.[274] Thus, an article merely directing the general assembly to provide for a uniform system of public free schools was adopted "rather than risk having the Congress or Union Leagues force an obnoxious law on them." [275]

After the election of 1869, at which the constitution was adopted, the General Assembly convened and ratified the Fourteenth Amendment on October 8, 1869. This session passed no school laws and the establishment of the public school system was deferred until after readmission. Full statehood status was regained on January 26, 1870. 16 Stat. 62. Six months later, on June 11th, the General Assembly established a "uniform system of schools" in which separate schools were required.[276] A specific constitutional mandate for segregated[277] schools, however, did not appear until 1902.

Mississippi.

Mississippi followed the general pattern of the former seceded states. The Constitutional Convention of 1868, adopted an education article which made no mention of race or racial separation.[278] At least two unsuccessful

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[272] *Id.*, at 333.

[273] *Id.*, at 335-40.

[274] Address of the Conservative Members of the Late State Convention to the Voters of Virginia (1868).

[275] Dabney, Universal Education in the South 143-44 (1936).

[276] Va. Acts 1869-70, c. 259 § 47, p. 402.

[277] Va. Const. 1902, Art. IX § 140.

[278] Miss. Const. 1868, Art. VIII.

attempts were also made in the Convention to require segregated schools.[279]

While the convention journal does not specifically indicate that the Fourteenth Amendment was raised as an objection to segregated schools, the convention had passed a resolution which declared that:

> ". . . the paramount political object . . . is the restoration or reconstruction of our government upon a truly loyal and national basis, or a basis which will secure liberty and equality before the law, to all men, regardless of race, color or previous conditions." [280]

The convention also framed a Bill of Rights which required all public conveyances to accord all persons the same rights,[281] and it refused to adopt an article forbidding intermarriage.[282]

The next legislature convened in January, 1870, ratified the Fourteenth and Fifteenth Amendments, repealed all laws relative to Negroes in the Code of 1857, as amended by the Black Code of 1865, and indicated that it intended to remove all laws "which in any manner recognize any natural difference or distinction between citizens and inhabitants of the state." [283]

The Constitution and actions of the legislature proved acceptable to Congress, and Mississippi was restored to the Union on February 23, 1870. 16 Stat. 77. It was not until 1878 that Mississippi passed a law requiring segregated

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[279] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 316-18, 479-80 (1868).

[280] *Id.* at 123.

[281] *Id.* at 47; MISS. CONST. 1868, Art 1, § 24.

[282] JOURNAL OF THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1868, pp. 199, 212 (1868).

[283] GARNER, RECONSTRUCTION IN MISSISSIPPI 285 (1901).

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schools;[284] and it was still later when the Constitution was altered to reiterate this requirement.[285]

Tennessee.

Tennessee, although a member state in the late Confederacy, was not subjected to the requirements of the First Reconstruction Act, inasmuch as it had promptly ratified the Fourteenth Amendment and had been readmitted prior to the passage of that Act. Nevertheless, this state likewise reentered the Union with compulsory racial segregation absent from its constitution and statutory provisions on public schools. Readmission was under the Constitution of 1834, inasmuch as the Constitutional Convention of 1865 merely amended it to abrogate slavery and authorize the general assembly to determine the qualifications of the exercise of the elective franchise.[286] The education article in this constitution merely required the legislature to encourage and support common schools "for the benefit of all the people" in the state.[287] The first law providing for tax supported schools, on its face, also made no racial distinction.[288] The next law, however, prohibited compulsory integrated schools.[289] Contemporary federal

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[284] Miss. Laws 1878, p. 103.

[285] Miss. Const. 1890, Art. IX, § 2.

[286] Tenn. Const. 1834 as amended by §§ 1 and 9 of "Schedule" ratified February 22, 1865. In conformity with the Schedule's directive the legislature enacted that Negroes could exercise and pursue all types of employment and business under the laws applicable to white persons, Tenn. Acts. 1865-66, c. 15; that Negroes were competent witnesses, *Id.*, c. 18; and that persons of color henceforth had the same rights in courts, contracts and property as white persons except that Negroes could not serve on juries and that this act "shall not be construed as to require the education of white and colored children in the same school." *Id.*, c. 40, § 4.

[287] Tenn. Const. 1834, Art. XI § 10.

[288] Tenn. Acts. 1853-54, c. 81.

[289] Tenn. Acts 1865-66, c. 40, § 4.

authorities noted that ante-bellum practice apparently had restricted the benefits of the school system to white children; but approved these provisions because, in sum, they provided a sufficient guarantee for the support and enjoyment of common schools for the equal benefit of all the people without distinction on the basis of race or color.[290]

The Governor convened the legislature in special session on July 4, 1866 to consider the Fourteenth Amendment. In urging its adoption, he summarized Section 1, and said that its practical effect was to protect the civil rights of Negroes and to "prevent unjust and oppressive discrimination" in the exercise of these citizenship rights.[291] A joint resolution to ratify was introduced in the upper house; and a resolution to amend it with a proviso that the proposed Amendment should not be construed to confer upon a person of color rights to vote, to hold office, to sit on juries or to intermarry with whites or to "prevent any state from enacting and enforcing such laws" was voted down.[292] Then the Senate approved the joint resolution and the House concurred.[293]

After ratification, a group in the lower house formally protested its confirmation of the Amendment on the ground that it invaded state rights "and obliterates all distinctions in regard to races, except Indians not taxed."[294] A similar protest was filed in the upper house.[295] Such of the debates as were reported in the press indicate that the legislators understood the Amendment to force absolute equality[296] and that under the inhibitions of Section 1 "distinctions in

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[290] Rep. U. S. Commr. Educ. 1867-68, 101 (18).

[291] Tenn. House J., Called Sess. 3, 26-27 (1866); Tenn. Sen. J., Called Sess. 8 (1866).

[292] Tenn. Sen. J., Called Sess. 26 (1866).

[293] *Id.* at p. 24; Tenn. House J., Called Sess. 24 (1866).

[294] Tenn. House J., Called Sess. 38 (1866).

[295] Tenn. Sen. J., Called Sess. 41-42 (1866).

[296] Nashville Dispatch, July 12, 1866.

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schools cannot be made, and the same privileges the one has cannot be denied the other. . . ." [297]

Tennessee was readmitted July 24, 1866. 15 Stat. 708-711. After readmission, a school law was passed on March 5, 1867 whereby boards of education were "authorized and required to establish . . . special schools for colored children, when the whole number by enumeration exceeds twenty-five." [298] It also provided for the discontinuance of these separate schools when the enrollment fell below fifteen. The law, however, did not forbid non-segregated schools. But it was repealed in 1869 and replaced with a requirement that racial separation in schools be observed without exception.[299] Finally, the constitution was amended in 1870 to secure the same result.[300]

In summary, therefore, as to these eleven states the evidence clearly reveals that the Fourteenth Amendment was understood as prohibiting color distinctions in public schools.

B. The Majority of the Twenty-two Union States Ratifying the 14th Amendment Understood that it Forbade Compulsory Segregation in Public Schools.

Other than the states already treated, twenty-six Union States considered the Amendment. Twenty-two of them ratified it. The evidence adduced here is of a somewhat less uniform character than that from the states which formed the late Confederacy for the simple reason that the legislatures in the North were unfettered by any congressional surveillance, and they did not experience the imperative necessity of re-examining their constitutions and laws at the time the proposed Fourteenth Amendment was con-

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[297] *Id.*, July 25, 1866.

[298] Tenn. Laws 1867, c. 27, § 17.

[299] Tenn. Laws 1870, c. 33, § 4.

[300] TENN. CONST. 1870, Art. XI, § 12.

sidered by them. Thus, it is to be expected that some of these legislatures deferred attuning their school laws with the keynote of the Amendment until several years after it had become the law of the land. In other states, the legislatures adjusted their school laws almost simultaneously with their ratification of the Amendment. Still others, because existing laws and practices conformed with their basic understanding with respect to the impact of the Amendment, were not required to act. In the end, nevertheless, we submit that the overwhelming majority of the Union States ratified or did not ratify the Fourteenth Amendment with an understanding or contemplation that it commanded them to refrain from compelling segregated schools and obliged them to conform their school laws to assure consistency with such an understanding.

West Virginia and Missouri.

West Virginia, a state created during the Civil War when forty western counties refused to follow Virginia down the road to secession, and Missouri, a former slaveholding state comprised the small minority of states which ratified the Fourteenth Amendment and perpetuated laws requiring segregated schools without any subsequent enactment consistent with a discernment that such laws and the Amendment were incompatible.

Both states required separate schools for the two races prior to the submission of the Amendment.[301] These laws were continued after the Amendment was proclaimed as ratified;[302] and both states subsequently strengthened the requirement of separate schools in the 1870's by amending their constitutions to specifically proscribe racial integration in public schools.[303]

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[301] W. Va. Laws 1865, p. 54; Mo. Laws 1864, p. 126.

[302] W. Va. Laws 1867, c. 98; W. Va. Laws 1871, p. 206; Mo. Laws 1868, p. 170; Mo. Laws 1869, p. 86.

[303] W. Va. Const. 1872, Art. XII, § 8; Mo. Const. 1875, Art. IX.

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The New England States.

Segregated schools also existed in some of the strongly abolitionist New England states prior to their consideration and ratification of the Amendment. But their reaction to the prohibitions of Section 1 was directly contrary to the course taken in West Virginia and Missouri.

In Connecticut, prior to the adoption of the Amendment, racial segregation was not required by state law but segregated schools were required in some cities and communities, e.g., in Hartford pursuant to an ordinance enacted in 1867 and in New Haven by administrative regulation.[304] On August 1, 1868, four days after the Amendment was proclaimed, however, the legislature expressly forbade separate schools.[305] Interestingly, during the course of debate on this bill, amendments which would have required segregation or permitted separate "equal" schools were introduced and rejected.[306]

Similarly, racial separation in schools was never required by the constitution or laws of Rhode Island, but segregated schools existed at least in Providence, Newport and Bristol.[307] Here, too, the same legislature which

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[304] Morse, The Development of Free Schools in the United States as Illustrated by Connecticut and Michigan 127, 144, 192 (1918); Warner, New Haven Negroes 34, 71-72 (1940).

[305] Conn. Acts 1866-68, p. 206. See Conn. House J. 410 (1866); Conn. Sen. J. 374 (1866).

[306] Conn. Sen. J. 247-48 (1868); Conn. House J. 595 (1868). See New Haven Evening Register, June 17, 1868.

[307] Bartlett, From Slave to Citizen, c. 6 *passim*. (unpub. ms., pub. expected in Dec. 1953). See Ammons v. School Dist. No. 5, 7 R. I. 596 (1864).

ratified the Amendment enacted a law prohibiting racial segregation in public schools.[308]

In Maine, there was no racial separation in public schools prior to the adoption of the Amendment.[309] However, the leading supporter of ratification extolled in the broadest terms its equality provisions and indicated that the proponents expected it to compel in the other states the same equality in civil and political rights as existed in Maine, itself.[310]

Massachusetts too, had already made unlawful any racial segregation in schools prior to the submission of the Amendment.[311] Thus, since Massachusetts had already considered state required racial segregation completely inconsistent with a system of laws and government which treats all persons alike irrespective of color,[312] there was

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[308] R. I. Laws 1866, c. 609.

The Committee on Education recommended passage of this act, saying: "The great events of the time are, also, all in favor of the elevation of the colored man. They are all tending to merge the distinctions of race and of class in the common brotherhood of humanity. They have already declared the Negro and the white man to be equal before the law; and the privileges here asked for by these petitioners, are simply a necessary result of this recognized equality." It went on to say, "We have no right to withhold it from him in any case", and asked, "With what consistency can we demand that these colored people shall be equal before the law in other states or the territories, while we, ourselves, deprive them of one of their most important civil rights?" Report of Committee on Education, Pub. Doc. No. 4 (1896).

[309] See CHADBOURNE, A HISTORY OF EDUCATION IN MAINE (1936).

[310] Speech of Senator Crosby in the Maine Senate, January 16, 1867, reported in Kennebec Journal, January 22, 1867, p. 1.

[311] Mass. Acts & Res. 1854-1855, p. 650; Mass. Acts & Res. 1864-1865, pp. 674-75.

[312] This was precisely the fundamental proposition underlying the enactment of the Act of 1855 prohibiting racial segregation in public schools. Report of the Committee on Education, Mass. House Doc. No. 167, March 17, 1855.

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no subsequent legislative action interpretative of the impact of the Amendment on segregation.

The deliberations of the legislature on the proposed Amendment opened with its reference to the body by the governor. He recommended ratification and his speech indicates that he understood Section 1 of the Amendment to be a reinforcement of the Civil Rights Act of 1866 and observed: "Whatever reasons existed at the time for the enactment of that bill, apply to the incorporation of its provisions into the state law." [313] Surprisingly, strong opposition to ratification developed. A majority of the joint committee recommended rejection on the ground that the proposed Amendment neither specifically guaranteed Negro suffrage nor added anything to what was already in the constitution "possibly excepting the last clause" of Section 1. Of this, is concluded: [314]

> "The denial by any state to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights. . . . [But] such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments."

The minority reported that: [315]

> "Without entering into any argument upon the merits of the amendment, they would express the opinion that its ratification is extremely important in the present condition of national affairs."

When these reports were presented in the lower house of the legislature, a motion was passed to substitute the

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[313] Mass. Acts and Res. 1867, pp. 789, 820; Boston Daily Advertiser, January 5, 1867, Sat. Supp.

[314] Mass. House Doc. 149, pp. 23-24 (1867).

[315] *Id.*, at 25.

minority report.[316] Suffrage had claimed much of the strident debate on the motion. But a speech of one of the last members to speak for the motion was reported as follows:[317]

> "To the first article of this amendment, there had been no objection brought by those who favored rejection. . . . The speaker felt that this was a most important article; by it the question of equal rights was taken from the supreme courts of the States and given to the Supreme Court of the United States for decision; the adoption of the article was the greatest movement that the country had made toward centralization, and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks."

The upper house considered the motion several days later, re-echoed the theme of the speeches previously made in the lower house, and voted for ratification.[318]

The New Hampshire legislature took up the proposed Amendment in June of 1866. The governor's message urged ratification but its brief comment was not revealing.[319] The majority report of the house committee with respect to the Amendment merely offered a resolution to modify.[320] But the minority reported a number of reasons

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[316] Boston Daily Advertiser, March 13, 1867, p. 2; *Ibid.*, March 14, 1867, p. 1.

[317] *Id.*, March 14, 1867, p. 1 (Speech of Richard Henry Dana, Jr.).

[318] Mass. Acts and Res. 1867, p. 787; Mass. Leg. Doc. Sen. Doc. No. 25 (1867); Boston Daily Advertiser, March 21, 1867, p. 1.

[319] N. H. House J. 137 (1866).

[320] *Ibid.*, p. 174.

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for rejection which, *inter alia*, criticized section 1 on the grounds of ambiguity and furthermore:[321]

> "Because said amendment is a dangerous infringement upon the rights and independence of all the states, north as well as south, assuming as it does, control their legislation in matters purely local in their character, and impose disabilities upon them for regulating, in their own way [such matters]."

The same set of objections was presented by a minority of the special committee of the upper house.[322] Both chambers voted for ratification, however, within a month after the Amendment was offered to the state.[323]

Laws governing public schools in New Hampshire appear to have never been qualified on the basis of race or color at any time after its organic law obligated the legislature to stimulate public education.[324] Similarly, Vermont seems to have no history of segregated schools. Neither did its laws sanction such a policy.[325] When the legislature convened in 1866, the Governor's opening message discussed the proposed Fourteenth Amendment at some length. He urged that it be ratified to secure "equal rights and impartial liberty", otherwise a small number of whites in the South and the entire colored race would be left unprotected. In concluding, he said Vermont welcomed "such a reorganization of the rebellious communities, as would have given the people, white and black, the equal civil and political rights secured to the people of the State, by our Bill of Rights and Constitution, and under which peace,

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[321] *Id.* at 176.

[322] N. H. Sen. J. 70 (1866).

[323] *Id.* at 94, N. H. House J. 231-33 (1866).

[324] N. H. Const. 1792, § LXXXIII.

[325] Vt. Const. 1777, c. II, § XXXIX; Vt. Const. 1786, c. II, § XXXVIII; Vt. Const. 1793, c. II, § 41. See Report of the Indiana Department of Public Instruction 23-28 (1867-68).

order, civilization, *education,* contentment, Christianity and liberty have shed their benign and blessed influence alike upon every home and household in our beloved Commonwealth." [326] Thereupon, both houses routinely voted for ratification.[327]

The Middle Atlantic States.

Three Mid-Atlantic States, New York, New Jersey and Pennsylvania ratified the Amendment. The Pennsylvania evidence is in some detail because it was one of the few states to preserve the full discussions and debates of its legislature. Furthermore, its statutes, previous to the adoption of the Amendment, authorized segregation in schools; [328] and public carriers had regulations which excluded or segregated Negroes. See *West Chester & Phila. R. Co.* v. *Miles,* 5 Smith (55 Pa.) 209 (1867).

On January 2, 1867, the Governor transmitted the Fourteenth Amendment to the Legislature. He called for its adoption primarily upon political grounds but strenuously urged that every citizen of the United States had certain rights that no state had a right to abridge and the proposed Amendment asserted "these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments [sic]." [329]

The resolution recommending ratification was introduced in the Pennsylvania Senate by its floor leader. He urged that one of the reasons why it had to be adopted was because Mississippi had enacted a law requiring segregation on railroads and the Amendment was necessary to

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[326] Vt. Sen. J. 28 (1866); Vt. House J. 33 (1866). (Emphasis added.)

[327] Vt. House J. 139 (1866); Vt. Sen. J. 75 (1866).

[328] Act of May 8, 1854, Pa. L. 617 § 24.

[329] Pa. Sen. J. 16 (1867).

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overcome all state legislation of this character.[330] In summary of his concept of the purpose of section 1, he said:

> "The South must be fenced in by a system of positive, strong, just legislation. The lack of this has wrought her present ruin; her future renovation can come only through pure and equitable law; law restraining the vicious and protecting the innocent, making all castes and colors equal before its solemn bar, that, sir, is the *sine qua non*. . . ."

The pith of the speeches of both the proponents and opponents of ratification are as follows:

Senator Bingham, a leading supporter of the resolution, noted that "it has been only a question of time how soon all legal distinctions will be wiped out."[331]

Another announced, "I shall vote for it with satisfaction for my own conscience and gratitude to Congress for squarely meeting the universal demand of the loyal states to destroy all legal caste within our borders."[332]

The leading opponent of ratification interpreted the Amendment as follows:[333]

> "By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons . . . which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal rights to all. *In all matters of civil legislation and administration there shall be perfect equality in the advantages and securities guaranteed by each state to everyone here declared a citizen, without distinction of race or color,* every one being equally entitled to demand from the

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[330] 2 Pa. Leg. Rec., app., p. III (1867).

[331] *Id.* at XVI.

[332] *Id.* at XXII (speech of Senator Taylor).

[333] *Id.* at XLI (speech of Mr. Jenks).

state and state authorities full security in the enjoyment of such advantages and securities." (Emphasis supplied).

The legislature ratified the Amendment on January 17, 1867.[334]

About two weeks later, on February 5th, a bill was introduced making it unlawful for public conveyances to exclude or segregate Negroes.[335] In introducing this bill, its sponsor announced that the doctrine of equality before the law required the passage of this bill. Both he and another supporter of the bill pointed out that these practices were pursuant to carrier regulations and policies and had to be eradicated by legislative action. It was also pointed out that the bill did not effect social equality because that is regulated solely by the personal tastes of each individual.[336] The bill was overwhelmingly enacted into law the following month.[337]

The school law authorizing separate schools was not specifically repealed until 1881 when the legislature made it unlawful for any school official to make any distinction on account of race or color in students attending or seeking to attend any public school.[338]

It appears, however, that when the state constitution was amended in 1873, the 1854 school law was viewed as having been brought into conformity with the adoption of a provision for a school system "wherein all children of this Commonwealth above the age of six years shall be educated. . . ."[339] The Secretary of State, official reporter

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[334] Pa. Laws 1867, 1334.

[335] 2 Pa. Leg. Rec., app. p. LXXXIV (1867).

[336] Id. at pp. LXXXIV *et seq.* (Remarks of Senators Lowery and Brown.)

[337] Act of March 22, 1867, Pa. Laws 1867, pp. 38-39.

[338] Act of June 8, 1881, Pa. L. 76, § 1, Pa. Laws 1881, p. 76.

[339] PA. CONST. 1873, Art. X, § 1.

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of the Convention, states particular attention was paid to "that part which confers authority on the subject of education." And he noted that the new article was formulated to conform with the policy of protest against all racial discrimination and, specifically, to remove the "equivocal and indivious provision."[340] These purposes are further borne out when the sponsor of the 1881 bill stated:[341]

> "In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time."

New Jersey, as early as 1844, enacted general legislation for the establishment and support of a public school system "for the equal benefit of all persons. . . ."[342] In 1850, special legislation was enacted which enabled Morris Township to establish a separate colored school district if the local town meeting voted to do so.[343] The state superintendent of schools construed this act and concluded that it in combination with the earlier law of 1844 permitted any local school system to maintain separate schools provided both schools offered the same advantages and no child was excluded.[344]

The New Jersey Legislature convened in a special session and hastily ratified the Amendment on September 11, 1866.[345] The dispatch with which this was done was made

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[340] JORDAN, OFFICIAL CONVENTION MANUAL 44 (1874).

[341] Pa. Sen. J. (entry dated May 26, 1881).

[342] N. J. CONST. 1844, Art. IV § 7(6); N. J. REV. STATS., c. 3 (1847).

[343] N. J. Laws 1850, pp. 63-64.

[344] ANNUAL REPORT OF THE STATE SUPERINTENDENT OF SCHOOLS 41-42, (1868).

[345] N. J. Sen. J., Extra Sess., 1866, p. 14; MINUTES OF THE ASSEMBLY, Extra Sess., 1866, p. 8.

a focal issue in the following elections. The Republicans broadly defended the Amendment as "forbidding class legislation, or the subjecting of one class of people to burdens that are not equally laid upon all."[346] The Democrats more specifically contended that their candidates opposed the Amendment because they were "against Negro suffrage and the attempt to mix negroes with workingmen's children in public schools."[347] When the Republicans captured the governorship and elected a radical congressional delegation, the Democrats captured the state legislature and immediately proceeded to rescind New Jersey's ratification.[348]

When the Republicans recaptured control of the legislature in 1870 the school law was amended to require "a thorough and effective system of public schools for the instruction of all children. . . ."[349] And this was later reinforced by an enactment which made it unlawful to exclude any child from any public school on account of color.[350] As a result of this law, separate schools soon disappeared except in a few counties where Negro citizens generally accepted them. When Negroes chose not to accept these segregated schools the school authorities were required to admit them to the white schools pursuant to the prohibition of the 1881 school law.[351]

New York, like the other Middle-Atlantic states, had ante-bellum constitutions which merely authorized the legis-

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[346] Newark Daily Advertiser, October 25, 1866; Trenton State Gazette, November 3, 1866.

[347] Trenton Daily True American, November 3, 1866.

[348] N. J. Sen. J. 198, 249, 356 (1868); Minutes of the Assembly; 309, 743 (1868). See KNAPP, NEW JERSEY POLITICS DURING THE PERIOD OF CIVIL WAR AND RECONSTRUCTION 167 (1924).

[349] N. J. Laws 1874, p. 135.

[350] N. J. Laws 1881, p. 186.

[351] See Pierce v. Union Dist. School Trustees, 17 Vroom (46 N. J. L.) 76 (1884).

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lature to establish a common school fund.[352] There was never any general legislation on the subject of racial separation in schools sharing in the common school fund. The legislature, however, granted charters to Brooklyn, Canandaigua, Buffalo and Albany which permitted these cities to maintain segregated schools as early as 1850.[353] The Common School Act of 1864 was in the same vein. It only permitted school boards in certain political subdivisions to establish and maintain segregated schools "when the inhabitants of any school district shall so determine, by resolution at any annual meeting called for that purpose, establish a separate school or separate schools for the instruction of such colored children. . . ."[354] Communities exercising the option under this law comprised the exception rather than the rule.[355]

Shortly after New York ratified the Amendment,[356] a constitutional convention was held and it adopted a new constitution which provided for free instruction of all persons of school age.[357] The convention approved a committee report which contained a ringing declaration that Negroes

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[352] N. Y. Const. 1821, Art. VII; N. Y. Const. 1846, Art. IX.

[353] N. Y. Laws 1850, c. 143; N. Y. Laws 1852, c. 291. See Dallas v. Fosdick, 50 How. Prac. 249 (1869); People v. Easton, 13 Abb. Prac. N. S. 159 (1872).

[354] N. Y. Laws 1864, c. 555.

[355] Annual Report of the State Superintendent of Public Instruction 131, 159, 163, 166, 170, 233, 323 (1866).

[356] N. Y. Sen. J. 33 (1867); N. Y. Ass. J. 77 (1867). The Governor's message upon transmission of the Amendment leaves little doubt that he considered it as a "moderate proposition" containing "just the conditions for safety and justice indispensible to a permanent settlement." N. Y. Sen. J. 6 (1867); N. Y. Ass. J. 13 (1867).

[357] N. Y. Const. 1868, Art IX. See Proceedings and Debates of the Constitutional Convention of the State of New York 1867-68 (1868).

should have full equality in the enjoyment of all civil and political rights and privileges.[358]

Subsequently, in 1873, the legislature passed an "Act to Provide for the Protection of Citizens in Their Civil and Public Rights."[359] The Act made it unlawful for any person to exclude any other person on the ground of race or color from the equal enjoyment of any place of public accommodation, place of public amusement, public conveyance, "*common schools and public instruction* [sic] of learning. . . ." (emphasis supplied). It also annulled the use of the word "white" or any other discriminatory term in all existing laws, statutes, ordinances and regulations.[360] The New York Court of Appeals did not give vitality to this act in the case of *People ex rel. King* v. *Gallagher*, 92 N. Y. 438 (1883). But cf. *Railway Mail Association* v. *Corsi*, 326 U. S. 88.

The Western Reserve States.

The five states in the Western Reserve all ratified the Fourteenth Amendment. Each of them had rather well established public school systems prior to the Civil War. In Ohio, the first public school legislation expressly denied

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[358] "First. Strike out all discriminations based on color. Slavery, the vital source and only plausible ground of such invidious discrimination, being dead, not only in this State, but throughout the Union, as it is soon to be, we trust, throughout this hemisphere, we can imagine no tolerable excuse for perpetuating the existing proscription. Whites and blacks are required to render like obedience to our laws, and are punished in like measure for their violation. Whites and blacks are indiscriminately drafted and held to service to fill our State's quotas in a war whereby the Republic was saved from disruption. We trust that we are henceforth to deal with men according to their conduct, without regard to their color. If so, the fact should be embodied in the Const." Documents of the Convention of the State of New York, 1867-68, Doc. No. 15 (1868).

[359] N. Y. Laws 1873, c. 186 § 1.

[360] *Id.*, § 3.

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Negroes the benefit of free schools.[361] Twenty years later, in 1847, this act was amended to permit the maintenance of separate schools for colored children if the residents of a school district objected to their admission into the white schools.[362] At its next session, the legislature repealed the provision in an earlier law that had prohibited the application of taxes paid by white residents toward the support of colored schools.[363] And in 1853 the school law was revised to require the allocation of public school funds in proportion to the number of children of school age regardless of color.[364]

Separate schools, however, were still maintained except in Cleveland, Oberlin and other northern cities despite the general feeling that this act had relaxed the stringent restrictions of the antecedent laws. Furthermore, the State Supreme Court held this law not to entitle colored children, as of right, to admission into white schools. *Van Camp* v. *Board of Education*, 9 Ohio St. 406 (1859).

After ratification of the Amendment,[365] the legislature did not immediately modify the schools laws. In fact, it did nothing until after the Ohio Supreme Court upheld compulsory segregated schools in *State ex rel. Garnes* v. *McCann*, 21 Ohio St. 198 (1872). Then the legislature enacted a statute which permitted rather than required seg-

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[361] Ohio Laws 1828-29, p. 73.

[362] Ohio Laws 1847-48, pp. 81-83.

[363] Ohio Laws 1848-49, pp. 17-18.

[364] Ohio Laws 1852, p. 441.

[365] Ohio Sen. J. 9 (1867); Ohio House J. 13 (1867). The Amendment was ratified within two days of its submission to the legislature by the Governor. He observed that the Amendment had four provisions; the first of which was "the grant of power to the National Government to protect the citizens of the whole country . . . should any state attempt to oppress classes or individuals, or deprive them of equal protection of the laws . . ." Ohio Exec. Doc., Part I, 282 (1867).

regated schools.[366] Later, it denied local school authorities the power to exercise their discretion in the premises.[367] By this act, all public schools were opened to all children without distinction on account of race or color. *State* v. *Board of Education*, 2 Ohio Cir. Ct. Rep. 557 (1887).

Indiana's pre-Fourteenth Amendment school law provided for the support of public schools but exempted "all Negroes and mulattoes" from the assessment.[368] This law was interpreted as excluding colored children from public schools wherever the parents of white children objected. *Lewis* v. *Henley*, 2 Ind. 332 (1850).

On January 11, 1867, Governor Morton submitted the Fourteenth Amendment to the legislature. His message urged ratification but suggested that schools should be provided for Negroes and that they be educated in separate schools to relieve any friction which could arise if they were required to be admitted to white schools.[369] A resolution to ratify the Amendment was introduced on the same day and referred to a joint committee. Five days later the resolution was reported out favorably with a recommendation of prompt ratification.[370] A minority report was made which objected to the Amendment primarily because it conferred civil and political equality upon Negroes, including the same rights that were then enjoyed by the white race.[371]

The resolution was adopted on the same day in the Senate.[372] No speeches were made in support of the resolution in this chamber but two senators spoke at length against it.[373] In the House, the main contention of the opponents was that the Amendment would impose Negro equality,[374]

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[366] Ohio Laws 1878, p. 513.

[367] Ohio Laws 1887, p. 34.

[368] Ind. Rev. Stats. 314 (1843).

[369] Ind. Doc. J., Part I, p. 21 (1867).

[370] Ind. House J. 101 (1867).

[371] *Id.* at 102.

[372] Ind. Sen. J. 79 (1867).

[373] Brevier, Legislative Reports 44-45 (1867).

[374] *Id.* at 79.

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seat Negroes on juries, grant them suffrage and admit them into the white schools.[375] The proponents only denied that the Amendment conferred suffrage.[376] And the lower chamber adopted the resolution on January 23, 1867.[377]

Two years after ratification of the Fourteenth Amendment, the legislature revised its law to require the organization of separate schools.[378] The act also authorized the maintenance of non-segregated schools in areas where there were insufficient Negro children residing within a reasonable distance to justify a separate school. In 1874, the compulsory segregation section of this law was declared valid in the case of *Cory* v. *Carter,* 48 Ind. 327 (1874).

The legislature, however, revised the school laws at its next session to permit (*not require*) segregated schools.[379] The revised law, furthermore, required that colored children be admitted to the regular schools if a separate school was not maintained. This provision was applied in sustaining mixed schools in *State* v. *Grubbs,* 85 Ind. 213 (1883).

Illinois statutes never specifically required separate schools. But the ante-bellum school statute provided that school districts with Negro populations should allow these residents a portion of the school fund equal to the amount of taxes collected from them.[380] As construed by the state superintendent of schools, this law was applied to require segregated schools.[381]

The Illinois legislature received the governor's message endorsing ratification of the Fourteenth Amendment on

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[375] *Id.* at 80, 88-89, 90.

[376] *Id.* at 90.

[377] Ind. House J. 184 (1867).

[378] Ind. Laws 1869, p. 41.

[379] Ind. Laws 1877, p. 124.

[380] Ill. Stats. 1858, p. 460.

[381] Sixth Biennial Report of the Superintendent of Public Instruction of the State of Illinois, 1865-66, pp. 27-29; 2 Reports Made to the General Assembly at its Twenty-Fifth Session, pp. 35-37.

January 7, 1867. Both chambers then ratified it on the same day with virtually no discussion or debate.[382] About one year later, in December 1869, Illinois called a constitutional convention. It adopted the present organic law which provides for a free public school system for the education of "all children".[383] This provision stems from a resolution in which the convention directed the Education Committee to submit an article which would call for the establishment of a public school system for the education of every "susceptible child—without regard to color or previous condition".[384] Furthermore, the convention rejected two resolutions which would have directed the establishment of a compulsory segregated school system.[385]

Of all the states of the Western Reserve, Michigan was most deeply affected by the tide of abolitionism which swept this section during the pre-war years. By its Constitution of 1850 the word "white" was eliminated from the section establishing voting qualifications [386] and slavery was declared intolerable.[387] Neither this constitution nor the general law of the state recognized any racial distinctions in the enjoyment of public education. But as early as 1842 and as late as 1866, special statutes were passed granting school boards in certain of the larger cities discretionary power to regulate the apportionment of school funds and distribution of pupils among the several schools under their

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[382] Ill. House J. 40, 154 (1867); Ill. Sen. J. 40, 76 (1867).

[383] ILL. CONST. 1870, Art. VIII, § 1.

[384] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, Convened at Springfield, December 13, 1869, p. 234.

[385] *Id.* at 429-431, 860-861.

[386] Compare MICH. CONST. 1850, Art. VII, § 1 with MICH. CONST. 1835, Art. II, § 1.

[387] Art. XVIII, § 11.

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jurisdiction. Pursuant to this authority some school boards, e.g., in Detroit and Jackson, established separate schools.[388]

The Amendment was submitted to the legislature on January 6, 1867. On January 12th, a resolution was adopted in the Senate instructing the Committee on Public Instruction to report out a bill "to prevent the exclusion of children from the primary or graded or other public schools of this state on account of race or color." And four days later the general school law was amended to provide that "all residents of any district shall have an equal right to attend any school therein. . . ." [389] The Fourteenth Amendment was subsequently ratified on February 16, 1867.[390]

The legislative record of Michigan during the next several years is replete with more blows against segregation and other distinctions based on race or color. In 1869, insurance companies were prohibited from making any distinction between white and Negro insureds.[391] The ban against interracial marriages was removed in 1883.[392] Then in 1885, the civil rights law was enacted prohibiting racial separation on public conveyances, in places of public accommodation, recreation, and amusement.[393]

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[388] See People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400 (1869) for reference to these special statutes and notice of separate schools in these two cities. Since the decision in this case, there have been no segregated schools maintained by state authorities.

[389] 1 Mich. Laws 42 (1867); Mich. Acts 1867, Act 34 § 28.

[390] The journals of the Michigan legislature indicate that both houses promptly ratified the Amendment without reference to a committee. Mich. Sen. J. 125, 162 (1867); Mich. House J. 181 (1867).

[391] Mich. Acts 1869, Act 77 § 32. See Mich. Comp. Laws § 7220 (1897).

[392] Mich. Acts 1883, Act 23, p. 16.

[393] Mich. Acts 1885, Act 130 § 1. See Mich. Comp. Laws § 11759 (1897).

Wisconsin, since 1848, provided for a public school system free to all children.[394] Moreover, during the crucial years, its Negro population was insignificant—less than two-tenths of one percent,[395] Thus, it seems obvious why segregation in schools or elsewhere never merited the attention of the legislature at the time of its ratification of the Amendment or thereafter.[396]

The Wisconsin legislature met on January 3, 1867 and was addressed by the Governor. His speech suggests that in his thinking the Fourteenth Amendment which he asked them to ratify was designed to apply solely to the South and required that "they must assent to the proposed amendment with all of its guarantees, securing to all men equality before the law. . . ." [397] A joint resolution was introduced to ratify the Amendment and referred to a committee of three, two of whom reported a recommendation to adopt. The report filed by the minority member condemned the Amendment at some length. "The apparent object," to him, was to allow Congress to enfranchise Negroes, legislate generally on civil rights, "give to the federal government the supervision of all the social and domestic relations of the citizen of the state and to subordinate state governments to federal power." [398]

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[394] Wis. Const. 1848, Art. X, § 3; Wis. Rev. Stats. Title VII (1849).

[395] Legal Status of the Colored Population in Respect to Schools and Education, Special Report of the Commissioner of Education, 400 (1871).

[396] Wis. Sen. J. 119, 149 (1867); Wis. Ass. J. 224-226, 393 (1867). The entire series of Journals covering the War and Reconstruction years shows but a single reference to color in connection with education. This was a proposal to amend an 1863 bill so as to limit certain educational privileges to children of "white parentage". The amendment failed and the matter was never revived. Wis. Ass. J. 618 (1863).

[397] Wis. Sen. J. 32 (1867); Wis. House J. 33 (1867).

[398] *Id.* at 96, 98 *et seq.* (Report filed by Sen. Garrett T. Thorne).

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It appears that this understanding of the Amendment was not disputed. Rather, one supporter of the Amendment is reported as stating: "If the states refuse to legislate as to give all men equal civil rights and equal protection before the laws, then, sir, there should be supervisory power to make them do that, and a consolidation of that kind will be a benefit instead of an injury.[399] And, another answered:[400]

> "We therefore need such a provision in the Constitution so that if the South discriminates against the blacks the United States courts can protect them. I know it is objected that this is an enlargement of the power of the United States Supreme Court. But it is a power given on the side of liberty—power to protect and not power to oppress. For the appeal will come up to this court from the aggrieved individual against the aggressing state. . . ."

The Western States.

Of the states west of the Mississippi which ratified the Amendment, Nebraska is quite significant because it was admitted to the Union during the life of the 39th Congress and conditions were imposed upon its admission which demonstrate that the Congress which prepared the Amendment intended to eradicate all distinctions based upon race. Nebraska won statehood without having ratified the Amendment. But the enabling Act provided that "this act shall take effect with the fundamental and perpetual condition that there shall be no abridgement or denial of the exercise of the elective franchise, *or any other right,* to any person by reason of race or color. . . ." Act of February 9, 1867, ch. 9, sec. 3, 14 Stat. 377 (emphasis supplied). The Act, furthermore, required Nebraska to publicly proclaim

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[399] Wisconsin State Journal, Feb. 7, 1867 (Reporting speech of Assemblyman C. B. Thomas).

[400] Daily Wisconsin Union, Feb. 7, 1867 (Reporting speech of Assemblyman H. C. Hobart).

this fundamental condition "as a part of the organization of this state."

While the enabling Act was still being considered by Congress, the territorial legislature forthwith passed a "Bill to remove all distinctions on account of race or color in our public schools" [401] since the existing school law restricting the enumeration of pupils to white youths [402] had heretofore been administratively construed to exclude colored children from the public schools. This bill failed to enter the statute books for lack of gubernatorial endorsement.[403]

The same session of the legislature by an appropriate resolution recognized the enabling Act's "fundamental condition" on February 20, 1867 and on March 1st Nebraska was proclaimed the 37th state. Two months later, a special session of the legislature was called to ratify the Amendment and to enact legislation to "render Nebraska second to no other state in the facilities offered to all her children, irrespective of sex or condition. . . ." [404] The Amendment was ratified in June 1867,[405] and the school law was amended to require the enumeration of "all the children" in the school census.[406] The new school law did not in specific language prohibit segregation, but colored children entered the public schools on a non-segregated basis at the next school term in September, 1867.[407]

Another school law was enacted in 1869 which provided an increase in the taxes for the support of public schools

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[401] Neb. House J., 12th Terr. Sess. 99, 105 (1867). See Omaha Weekly Republican, January 25, 1867, p. 2; *Id.*, February 8, 1867.

[402] Neb. Comp. Laws 1855-65, pp. 92, 234, 560, 642 (1886).

[403] MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF NEBRASKA. COLLECTED IN PUBLICATIONS OF THE NEBRASKA STATE HISTORICAL SOCIETY, 249 (1942).

[404] *Id.* at 274.

[405] Neb. House J. 148 (1867); Neb. Sen. J. 174 (1867).

[406] 2 Neb. Comp. Laws 1866-77, p. 351 (1887).

[407] See Nebraska City News, August 26, 1867, p. 3; *Id.*, September 4, 1867, p. 3.

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"affording the advantages of a free education to all youth;" [408] and thereafter no school law has contained any language describing the system of public schools operated by the state.

Prior to its ratification of the Amendment, Kansas, a loyal border state, had adopted a policy of permissive segregation whereby boards of education were authorized, but not required, to establish separate schools.[409] The legislature ratified the Amendment on January 16, 1867,[410] and changed the school law on February 26th by an act which made it illegal for "any" school board to refuse to admit "any" child.[411] In 1868, it reenacted the earlier permissive school segregation law.[412] Subsequently, an 1876 revision of the school laws omitted any authorization for segregation in cities of the first class and specifically forbade segregated schools in cities of the second class.[413] The same session also passed a civil rights act which is still the law and proscribes any distinction on account of race or color in "any state university, college, or other school of public instruction" or in any licensed place of public accommodation or amusement, or on any means of public carriage.[414] In 1879, the legislature reenacted the law permitting racial

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[408] 2 Neb. Comp. Laws 1866-77, pp. 451, 453 (1887).

[409] Kan. Laws 1862, c. 46, Art. 4 §§ 3, 18; Kan. Laws 1864, c. 67, § 4; Kan. Laws 1865, c. 46, § 1.

[410] The Amendment was ratified without reference to a committee within three days after it was submitted to the legislature. Kan. Sen. J. 43, 76, 128 (1867); Kan. House J. 62, 79 (1867).

[411] Kan. Laws 1867, c. 125, § 1; KAN. GEN. STATS., c. 92, § 1 (1868). The punitive feature of this statute directed county superintendents to withhold school funds from any offending schools.

[412] Kan. Gen. Stats., c. 18, Art. V § 75, c. 19, Art. V § 57 (1868).

[413] Kan. Laws 1876, 238.

[414] Kan. Laws 1874, c. 49, § 1. See KAN. REV. STATS. § 21-2424 (1935).

separation in schools but limited it to cities of the first class.[415]

Minnesota ratified the Fourteenth Amendment on January 16, 1867.[416] Its legislature was not obliged to contemplate whether the Amendment nullified segregated schools because such practices had been made a penal offense in 1864.[417] However, in submitting the Amendment to the legislature, the governor urged that its adoption was necessary because of the failure of the former seceding states "to reorganize their civil government on the basis of equal . . . rights, without distinction of color. . . ."[418] In 1873, the legislature rephrased the school law so as to specifically prohibit segregated schools.[419]

In Nevada, the school law in existence prior to its consideration of the Amendment excluded Negroes from public schools and prescribed a penalty against any school which opened its doors to such persons.[420] However, the statute provided that school authorities might, if they deemed it advisable, establish a separate school for colored children and maintain it out of the general school fund. While the legislature took no affirmative action after it ratified the Amendment on January 22, 1867,[421] it similarly remained

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[415] Kan. Laws 1879, c. 81, § 1. This is the current law in Kansas. KAN. REV. STATS. § 27-1724 (1935).

[416] The governor laid the proposed Amendment before the legislature with the observation that it would secure equal civil rights to all citizens and both houses voted at once to ratify the Amendment without further reference. Minn. Exec. Doc. 26 (1866); Minn. House J. 26 (1866); Minn. Sen. J. 22, 23 (1866).

[417] Minn. Laws 1864, c. 4, § 1, amending Minn. Laws 1862, c. 1, § 33.

[418] Minn. Exec. Docs. 25 (1866).

[419] Minn. Stats., ch. 15 § 74 (1873).

[420] Nev. Laws 1864-65, p. 426.

[421] The governor presented the Amendment to the legislature with an admonition that they were expected to ratify it and the ratification was accomplished three days later. The journals indicate virtually no opposition or advocacy of the Amendment. Nev. Sen. J. 9, 47 (1867); Nev. Ass. J. 25 (1867).

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inactive after the decision in *State* v. *Duffy*, 7 Nev. 342 (1872), which vitiated the first section of the school law. There is no subsequent reference to the subject of separate schools in the statute books and the segregatory statute itself was dropped from subsequent compilations of laws.[422]

The Oregon evidence is singularly meager. There were no laws requiring or permitting racial separation in schools either prior or subsequent to ratification of the Amendment on September 9, 1866. What the ratifying legislature understood as to the force of the Amendment and the significance of the abortive attempt to withdraw its ratification in 1868 on this subject is unavailable from the bare notations contained in the legislative journals.[423] The contemporary newspapers are also barren of information on this point.[424] What evidence there is, indicates that separate schools did exist at least in Portland as late as 1867 and that they were discontinued in 1871.[425]

Almost two years after the Amendment was submitted to the states, Iowa ratified on April 3, 1868.[426] Neither the state constitution nor laws required or in any manner au-

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[422] See Nev. Comp. Laws (1929).

[423] Ore. Sen. J. 25, 34-36 (1866); *Id.*, at 271-272 (1868); Ore. House J. 273 (1868); Ore. Laws 1868, 114; *Id.*, "Joint Resolutions and Memorials" 13.

[424] The Oregonian, the state's leading newspaper, purportedly carried all the legislative happenings in full. See The Oregonian, September 14, 1866. None of its 1866 issues indicate more than that the legislature considered the Amendment dealt with "equality" and that the primary controversy was with respect to suffrage. *Ibid.*, September 21, 1866.

[425] See Reynolds, Portland Public Schools, 1875, 33 Ore. Hist. Q. 344 (1932); W. P. A. Adult Education Project, History of Education in Portland 34 (1937).

[426] Ratification was almost perfunctorily effected. Iowa Sen. J. 265 (1868) Iowa House J. 132 (1868).

thorized racial separation in schools at that time.[427] Instances of exclusion and segregation were being quickly remedied without recourse to the courts.[428] Where the courts were called upon, local practices of segregation in schools were never sustained as lawful. *Clark* v. *School Directors*, 24 Iowa 266 (1868); *Smith* v. *Directors of Independent Schools Dist.*, 40 Iowa 518 (1875); *Dove* v. *Independent School Dist.*, 41 Iowa 689 (1875). The state supreme court also forbade segregation by a common carrier in its dining facilities, predicating its decision squarely upon the Fourteenth Amendment. *Coger* v. *N. W. Union Packet Co.*, 37 Iowa 145 (1873).

In sum, the legislatures in all of the Union States which ratified the Fourteenth Amendment, except three, understood and contemplated that the Amendment proscribed State laws compelling segregation in public schools.

C. The Non-Ratifying States Understood that the Fourteenth Amendment Forbade Enforced Segregation in Public Schools.

Four states did not ratify the Amendment, three specifically withholding endorsement and the other being unable to arrive at any definitive position. Delaware, in the anomalous position of a former slave state which sided with the Union, rejected it on February 7, 1867 with a resolution which declared that "this General Assembly believes the adoption of the said proposed amendment to the Constitution would have a tendency to destroy the rights of the States in their Sovereign capacity as states, would be an attempt to establish an equality not sanctioned by the laws

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[427] Iowa Const. 1857, Art. IX, § 12; Iowa Laws 1866, p. 158, reinforcing the Acts of 1860 and 1862 which required the instruction of all children without regard to race. Schaffter, The Iowa Civil Rights Act, 14 Iowa L. Rev. 63, 64-65 (1928).

[428] Dubuque Weekly Herald, January 30, 1867, p. 2; Des Moines Iowa State Register, January 29, 1868, p. 1; *Id.*, February 19, 1868, p. 1.

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of nature or God. . . ." [429] Again, in 1873, the state legislators denounced

> ". . . all other measures intended or calculated to equalize or amalgamate the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public office, to sit on juries, and to their admission into public schools where white children attend, and to the admission on terms of equality with white people in the churches, public conveyances, places of amusement or hotels, and to any measure designed or having the effect to promote the equality of the Negro with the white man in any of the relations of life, or which may possibly conduce to such result." [430]

Then, shortly thereafter, the General Assembly in a series of discriminatory statutes demonstrated that it fully understood that equality before the law demanded non-segregation. It passed laws permitting segregation in schools,[431] places of public accommodation, places of public amusement and on public carriers.[432] Delaware, however, deferred sanctioning compulsory racial separation in public schools until after this Court handed down the *Plessy* decision.[433]

Maryland.

Maryland was also a loyal former slave-holding state. It rejected the Amendment on March 23, 1867.[434] The

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[429] 13 Del. Laws 256. See Del. Sen. J. 76 (1867); Del. House J. 88 (1867) for speech of Governor Saulsbury recommending rejection on the ground that it was a flagrant invasion of state rights.

[430] Del. Laws 1871-73, pp. 686-87.

[431] Del. Rev. Stats. c. 42 § 12 (1874); Del. Laws 1875, pp. 82-83; Del. Laws 1881, c. 362.

[432] Del. Laws 1875-77, c. 194.

[433] Del. Const. 1897, Art. X, § 2.

[434] Md. Sen. J. 808 (1867); Md. House J. 1141 (1867).

establishment of universal free public education here coincided with the Reconstruction Period. Although Maryland has always maintained a dual school system, it has never enacted a law specifically forbidding racial integration in its public schools. Rather, separate and parallel provisions were made for the education of white and colored children.[435]

Kentucky.

The third of the states which rejected the Amendment was Kentucky, a state with a slaveholding background and generally sympathetic with the South with regard to the status of Negroes although it did not secede. It was the first to refuse ratification: its rejection was enrolled on January 10, 1867.[436] While Negroes were denied or severely limited in the enjoyment of many citizenship rights at that time, including exclusion from juries,[437] the legislature was silent on the specific question of compulsory segregated schools.[438] Like its Maryland brothers, it passed two discrete series of laws, one for the benefit of white children and the other for colored children. But no definite compulsory education statute was enacted until 1904[439] although the constitution had been previously amended so as to support such legislation.[440]

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[435] Md. Laws 1865, c. 160, tit. i-iv; Md. Rev. Code §§ 47, 60, 119 (1861-67 Supp.); Md. Laws 1868, c. 407; Md. Laws 1870, c. 311; Md. Laws 1872, c. 377; Md. Rev. Code, tit. xvii §§ 95, 98 (1878).

[436] Ky. House J. 60 (1867); Ky. Sen. J. 63 (1867).

[437] Ky. Laws 1865-66, pp. 38-39, 49-50, 68-69.

[438] Ky. Laws 1869, c. 1634; 1 Ky. Laws 1869-70, pp. 113-127; Ky. Laws 1871-72, ch. 112; Ky. Stats., c. 18 (1873); Ky. Gen. Stats., c. 18, pp. 371 *et seq.* (1881).

[439] Ky. Laws 1904, pp. 181-82.

[440] Ky. Const. 1891, § 187.

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California.

California was the only state whose legislature considered the Amendment and yet did not reach an official stand on the matter.[441] Before the Fourteenth Amendment was proclaimed the law of the land, the legislature in 1866, relaxed the pattern of compulsory segregation when the school law was revised to permit Negro children to enter "white" schools, provided a majority of the white parents did not object.[442] This provision survived changes made in the school laws in 1870 and 1872; and, in 1874, a bill to eliminate segregated schools led to the adoption of a law which required the admission of colored children "into schools for white children" if separate schools were not provided.[443] Later in this same year the state supreme court upheld segregated schools despite the petitioner's claim that this practice violated the Amendment. *Ward* v. *Flood*, 48 Cal. 36 (1874). The legislature then revised the school laws and eliminated the provisions which had been held to require separate schools for Negro children.[444]

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[441] The Committee on Federal Relations in the Assembly and Senate, respectively, recommended rejection and ratification of the Amendment and no further action was taken. Cal. Ass. J., 17th Sess., p. 611 (1867-68); Cal. Sen. J., 17th Sess., p. 676 (1867-68), p. 676. See Flack, The Adoption of the Fourteenth Amendment 207 (1908).

[442] Cal. Stats. 1866, p. 363. Purusant to this statute a number of "white" schools admitted colored children without untoward incident. Cloud, Education in California 44 (1952).

[443] Cal. Stats. 1873-74, p. 97.

[444] Cal. Stats. 1880, p. 48. See Wysinger v. Crookshank, 82 Cal. 588 (1890). The laws segregating Chinese children remained on the books probably because it was the general impression that only discriminatory laws aimed at Negroes were forbidden by the Fourteenth Amendment. Debates of the California Constitutional Convention of 1873, pp. 631, 642, 649 (1880).

The evidence from the non-ratifying states also indicates that their legislatures understood or contemplated that the Fourteenth Amendment forbade legislation which enforced the separation of white and colored children in public schools.

CONCLUSIONS OF PART II

There is, therefore, considerable evidence and, we submit, conclusive evidence that the Congress which submitted and the state legislatures and conventions which considered the Fourteenth Amendment contemplated and understood that it would proscribe all racial distinctions in law including segregation in public schools. A part of this evidence consists of the political, social and legal theories which formed the background of the men who framed the Fourteenth Amendment and the Radical Republican majority in Congress at that time.

Congressional debates following the Civil War must be read and understood in the light of the equalitarian principles of absolute and complete equality for all Americans as exemplified throughout the Abolitionist movement prior to the Civil War.

Many of the members of Congress, in debating the bill which became the Civil Rights Act of 1875, made it clear in no uncertain terms that it was generally understood in the 39th Congress that the Fourteenth Amendment was intended to prohibit all racial distinctions, including segregation in public school systems.

Running throughout the 39th Congress was a determination of the Radical Republican majority to transform these equalitarian principles into federal statutory and constitutional law. They realized that these high principles could not be achieved without effective federal legislation. The infamous Black Codes were demonstrative proof that the southern states were determined to prevent the newly freed Negroes from escaping from an inferior

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status even after the Thirteenth Amendment. The Radical Republican majority realized that in the status of American law at that time, the only way to achieve fulfillment of their determination to remove caste and racial distinctions from our law would be for them to effect a revolutionary change in the federal-state relationship.

After many drafting experiments, the Committee of Fifteen introduced in Congress the proposed amendment to the Constitution which was to become the Fourteenth Amendment. The broad and comprehensive scope of the bill was clearly set forth by Senator Howard, Chairman of the Judiciary Committee. An appraisal of the Congressional debates during the period the Fourteenth Amendment was being considered show conclusively that in so far as section 1 was concerned, there could be no doubt that it was intended to not only destroy the validity of the existing Black Codes, but also to deprive the states of power to enact any future legislation which would be based upon *class* or *caste* distinctions. It is likewise clear that the Fourteenth Amendment was intended to be even more comprehensive than the scope of the original bill which, subsequently weakened by amendment, became the Civil Rights Act of 1866.

Throughout the debates in the 39th Congress and subsequent Congresses, the framers of the Amendment, the Radical Republican majority in Congress, over and over again, made it clear that: (1) future Congresses might in the exercise of their power under section 5 take whatever action they might deem necessary to enforce the Amendment; (2) that one of the purposes of the Amendment was to take away from future Congresses the power to diminish the rights intended to be protected by the Amendment; and (3) they at all times made it clear that the Amendment was meant to be self-executing and that the judiciary would have the authority to enforce the provisions of the Amendment without further implementation by Congress. All of

the decisions of this Court, without exception, have recognized this principle.

Other Congressional debates, including those on the readmission of certain states, the amnesty bills and other legislation give further evidence of the intent of Congress in regard to the broad scope of the Fourteenth Amendment. The debates in Congress on legislation which was later to become the Civil Rights Act of 1875 made it clear that efforts of states to set up segregated school systems violated the Fourteenth Amendment. These debates were more specific on the question of segregation in public education because some states were already beginning to violate the Fourteenth Amendment by setting up segregated systems.

A study of the statements and actions of those responsible for state ratification of the Amendment remove any doubt as to their understanding that the Fourteenth Amendment was intended to prohibit state imposed racial segregation in public schools.

After addressing ourselves to questions 1 and 2 propounded by this Court, we find that the evidence not only supports but also compels the conclusions reached in Part One hereof. Wherefore, we respectfully submit, this Court should decide that the constitutional provisions and statutes involved in these cases are in violation of the Fourteenth Amendment and therefore unconstitutional.

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PART THREE

This portion is directed to questions four and five of the Court's Order:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

I.

This Court should declare invalid the constitutional and statutory provisions here involved requiring segregation in public schools. After careful consideration of all of the factors involved in transition from segregated school systems to unsegregated school systems, appellants know of no reasons or considerations which would warrant postponement of the enforcement of appellants' rights by this Court in the exercise of its equity powers.

The questions raised involve consideration of the propriety of postponing relief in these cases, should the Court declare segregation in public schools impermissible under the Constitution. The basic difficulty presented is in the correlation between a grant of effective relief and temporary postponement. After carefully addressing ourselves to the problem, we find that difficulty insurmountable.

A. The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color.

"It is fundamental that these cases concern rights which are personal and present". *Sweatt* v. *Painter*, 339 U. S. 629, 635; see also *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633. These rights are personal because each appellant [445] is asserting his individual constitutional right to grow up in our democratic society without the impress of state-imposed racial segregation in the public schools. They are present because they will be irretrievably lost if their enjoyment is put off. The rights of the adult students in the *Sipuel*, *Sweatt*, and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori*, this is true of the rights of

[445] As used herein "appellant" includes the respondents in No. 10.

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children to a public education that they must obtain, if at all while they are children. It follows that appellants are entitled to be admitted forthwith to public schools without distinction as to race and color.

B. There is no equitable justification for postponement of appellants' enjoyment of their rights.

Even if the Court should decide that enforcement of individual and personal constitutional rights may be postponed, consideration of the relevant factors discloses no equitable basis for delaying enforcement of appellants' rights.

Appellants have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power in a proper case to mold its relief to individual circumstances in ways and to an extent which it is now unnecessary to define with entire precision. But the rights established by these appellants are far outside the classes as to which, whether for denial or delay, a "balance of convenience" has been or ought to be struck.

These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

The Fourteenth Amendment can hardly have been intended for enforcement at a pace geared down to the mores of the very states whose action it was designed to limit. The balance between the customs of the states and the personal rights of these appellants has been struck by that

Amendment. "[A] court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable jurisdiction." *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 610 (concurring opinion).

Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest Court of Delaware epitomized equity in one of the cases now before this bar when it declared in *Gebhart* v. *Belton*, 91 A. 2d 137, 149 that

> "To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

Appellants, in the main, are obliged to speculate as to factors which might be urged to justify postponement of the enforcement of their rights. Hitherto, appellees have offered no justification for any such postponement. Instead they have sought to maintain a position which is, essentially, that a state may continue governmentally enforced racism so long as the state government wills it.

In deciding whether sufficient reason exists for postponing the enjoyment of appellants' rights, this Court is not resolving an issue which depends upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the vital rights of children accruing to them under the Constitution, must make out an affirmative case of crushing conviction to sustain his plea for delay.

The problem of effective gradual adjustment cannot fairly arise in three of the five cases consolidated for argument. In the Kansas case, there was a frank concession on oral argument that elimination of segregation would not have serious consequences. In Delaware, court-compelled desegregation in this very case has already been accomplished. The case from the District of Columbia is here

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on a dismissal of the complaint on motion. In the oral argument the counsel for respondents implied that he foresaw no difficulties in enforcing a decree which would abolish segregation. Surely it would be curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital. Cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

We can, however, put out of the case what is not in dispute. We concede that there may well be delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying appellants their full rights beyond the beginning of the next school year.

But we do not understand that the "effective gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such conceded necessities. We proceed then, to consider possible grounds that might be put forth as reasons for added delay, or for the postponement of relief to appellants.

It has been suggested that desegregation may bring about unemployment for Negro teachers. (Appellees' Brief in *Davis* v. *County School Board*, p. 31; *Transcript of Argument* in the same case, p. 71) If this is more than a remote possibility, it undoubtedly can be offset by good faith efforts on the part of the responsible school boards.[446] On the other hand, if appellees' suggestion is based upon an unexpressed intention of discriminating against Negro teachers by wholesale firings, it is not even worthy of notice in a court of equity.

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[446] In view of the nationwide shortage of teachers, it is doubtful that any unemployment would be more than transitory. See *e.g.*, New York Times, August 19, 1953, 31:8 (S. M. Bouthardt puts elementary teachers shortage at 116,000; August 24, 1953, 21:1 (Comm. Thurston and NEA on shortage); 22 J. Neg. Ed. 95 (1953).

It has been bruited about that certain of the states involved in this litigation will cease to support and perhaps even abolish their public school systems, if segregation is outlawed. (*Davis* v. *County School Board, Transcript of Argument,* pp. 69-70; *Gebhart* v. *Belton, Transcript of Argument,* p. 17; *Briggs* v. *Eliott, Record on Appeal,* p. 113.) We submit that such action is not permissible. *Cf. Rice* v. *Elmore,* 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875. Any such reckless threats cannot be relevant to a consideration of effective "gradual adjustment"; they are based upon opposition to desegregation in any way, at any time.

Finally, there are hints and forebodings of trouble to come, ranging from hostility and deteriorated relations to actual violence. (Appellees' brief in *Briggs* v. *Eliott,* p. 267; Appellees' brief in *Davis* v. *County School Board,* p. 17) Obviously this Court will not be deterred by threats of unlawful action. *Buchanan* v. *Warley,* 245 U. S. 60, 81.

Moreover, there are powerful reasons to confirm the belief that immediate desegregation will not have the untoward consequences anticipated. The states in question are inhabited in the main by law-abiding people who up to now have relied upon what they believe—erroneously, as we have demonstrated—to be the law. It cannot be presumed that they will not obey the law as expounded by this Court. Such evidence as there is lends no support to defendants' forebodings. Note, *Grade School Segregation: The Latest Attack on Racial Discrimination,* 61 Yale L. J. 730, 739, 743 (1952).

A higher public interest than any yet urged by appellees is the need for the enforcement of constitutional rights fought for and won about a century ago. Public interest requires that racial distinctions proscribed by our Constitution be given the fullest protection. Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.

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The greatest strength of our democracy grows out of its people working together as equals. Our public schools are "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people...." Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 206, 216-217.

C. Appellants are unable, in good faith, to suggest terms for a decree which will secure effective gradual adjustment because no such decree will protect appellants' rights.

Question 5 assumes that the Court, having decided that segregation in public schools violates the Fourteenth Amendment, will, nevertheless, in the exercise of its equity powers, permit an effective gradual adjustment from segregated schools to systems not operated on the basis of color distinctions. This necessarily assumes further that reasons might be produced to justify consideration of postponement of the enforcement of the present and personal rights here involved. As we have pointed out immediately hereinbefore we are unable to identify any such reason.

Appellants obviously are aware of the existence of segregated school systems throughout the South similar to those presently before this Court. Similarly, appellants realize that the thrust of decisions in these cases may appear to present complex problems of adjustment because segregated schools have existed for nearly a century in many areas of this country. Generalizations, however, as to the scope and character of the complexities which might arise from immediate enforcement of appellants' rights would be unwarranted. This is demonstrated in part by the fact that even in the five cases joined for hearing, there appears to be no uniformity in the extent of the task of adjustment from segregated to non-segregated schools.

Necessarily, consideration of the specific issues which decrees should reach on the basis of the assumptions of Question 5 likewise requires the assumption that reasons will be adduced to warrant consideration of postponement of enforcement of appellants' rights.[447]

Though no cogent reasons were offered to support them, two suggestions of methods of postponement of relief to appellants were made to this Court in the original brief for the United States. The first of these was "integration on a grade basis," i.e., to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools (Brief, pp. 30-31). The second was integration "on a school-by school" basis (Brief, p. 31).

The first suggestion is intolerable. It would mean the flat denial of the right of every appellant in these cases. The second plan is likewise impossible to defend because it would mean the deliberate denial of the rights of many of the plaintiffs. If desegregation is possible in some schools in a district, why not in all? Must some appellants' rights be denied altogether so that others may be more conveniently protected?

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[447] It follows that there is no need for this Court to appoint a Master. Since repeal in 1948 of the 1805 statute, 28 U. S. C., § 863 (1946), forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed. Certainly respected authorities have recommended the practice of appellate courts' taking evidence. See 1 WIGMORE, EVIDENCE 41 (3d ed., 1940); POUND, APPELLATE PROCEDURE IN CIVIL CASES pp. 303, 387 (1941); Note, 56 HARV. L. REV. 1313 (1943), and in other times and jurisdictions it has been respected practice. See SMITH, APPEALS OF THE PRIVY COUNCIL FROM AMERICAN PLANTATIONS 310 (1950); Rules of the Supreme Court of Judicature, Order 58, Rules 1, 2; cf. New Mexico, Stat. 1949, c. 168, § 19. However, taking of evidence by a Master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of plaintiffs' rights.

Whether any given plan for gradual adjustment would be effective would depend on the showing of reasons valid in equity for postponement of enforcement of appellants' rights. In accordance with instructions of this Court we have addressed ourselves to all of the plans for gradual adjustment which we have been able to find. None would be effective. We recognize that the appellees, as school officials and state officers, might offer reasons for seeking postponement of the effect of decrees in these cases. Therefore, we submit, affirmative answers to questions 4(b) and 5 can come only from appellees since they alone can adduce reasons for postponement of enforcement of appellants' rights.

In the absence of any such reasons the only specific issue which appellants can recommend to the Court that the decrees should reach is the substantive one presented here, namely, that appellees should be required in the future to discharge their obligations as state officers without drawing distinctions based on race and color. Once this is done not only the local communities involved in these several cases, but communities throughout the South, would be left free to work out individual plans for conforming to the then established precedent free from the statutory requirement of rigid racial segregation.

In the very nature of the judicial process once a right is judicially declared proposals for postponement of the remedy must originate with the party desiring that postponement.

We submit that it would be customary procedure for the appellees to first produce whatever reasons they might urge to justify postponement of relief. Appellants then would be in a position to advise the Court of their views with respect to the matter.

Conclusion

Under the applicable decisions of this Court the state constitutional and statutory provisions herein involved are clearly unconstitutional. Moreover, the historical evidence surrounding the adoption, submission and ratification of the Fourteenth Amendment compels the conclusion that it was the intent, understanding and contemplation that the Amendment proscribed all state imposed racial restrictions. The Negro children in these cases are arbitrarily excluded from state public schools set apart for the dominant white groups. Such a pratice can only be continued on a theory that Negroes, *qua* Negroes, are inferior to all other Americans. The constitutional and statutory provisions herein challenged cannot be upheld without a clear determination that Negroes are inferior and, therefore, must be segregated from other human beings. Certainly, such a ruling would destroy the intent and purpose of the Fourteenth Amendment and the very equalitarian basis of our Government.

WHEREFORE, it is respectfully submitted that the judgments in cases No. 1, 2 and 4 should be reversed and the judgment in No. 10 should be affirmed on the grounds that the constitutional and statutory provisions involved in each of the cases violate the Fourteenth Amendment.

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SUPPLEMENT

An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment

The first Section of the Fourteenth Amendment did not spring full blown from the brow of any individual proponent. Primitive natural rights theories and earlier constitutional forms were the origins of its equal protection-due process-privileges and immunities trilogy. The occasion for the metamorphosis of moral premises to full-fledged constitutional status was the attack on the American system of slavery. During the long antislavery crusade, the trilogy became a form of shorthand for, and the spearhead of, the whole of the argument against distinctions and caste based on race.

Section One of the Fourteenth Amendment thus marks the "constitutionalization" of an ethico-moral argument. The really decisive shifts occurred before the Civil War, and the synthesis was made, not by lawyers or judges, but by laymen. Doctrines originally worked out and propagated by a dissident minority became, by 1866, the dominant constitutional theory of the country.

In both language and form, Section One was the distillation of basic constitutional and legal theories long understood and voiced by leaders in a Congress upon which history had cast both the opportunity and the obligation to amend the Constitution to regulate relationships profoundly altered by the abolition of slavery.[1] None can doubt that the thrust of the Amendment was equalitarian and that it was adopted to wipe out the racial inequalities that were the legacies of that system. But beyond this, the majestic generalities of the Section can be seen to have

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[1] Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479-507, 610-661, hereinafter cited *Early Antislavery Backgrounds*.

evolved naturally and logically in the minds of the anti-slavery generation.[2]

At the outset we point out that we do not set forth the arguments of pamphleteers, or even of lawyers or congressmen, to justify the validity of their constitutional theories. We do not say that these theories were universally held, or deny that they were vigorously challenged. Nor do we urge that the pre-Civil War Constitution contained the sweeping guarantees that the Abolitionists claimed for Negroes. These are beside our present point. What we do undertake in this section is illumination of the constitutional language—the moral and ethical opinions that were the matrix of the Amendment, the development under terriffic counter-pressures of the principal texts and forms, the meaning of "equal protection" and "due process" as understood and contemplated by those who wrote those phrases into the Amendment.

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[2] Basic monographs and articles on the Fourteenth Amendment and its major clauses are: 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES cc. 31-32 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); THE JOURNALS OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (Kendrick ed. 1914); tenBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) hereinafter cited ANTISLAVERY ORIGINS; WARSOFF, EQUALITY AND THE LAW (1938); Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N. Y. U. L. Q. REV. 19 (1938); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371, 48 YALE L. J. 171 (1938); McLaughlin, *The Court, The Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940).

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1. The Declaration of The "Self-Evident Truths"

The roots of our American equalitarian ideal extend deep into the history of the western world. Philosophers of the seventeenth and eighteenth centuries produced an intellectual climate in which the equality of man was a central concept. Their beliefs rested upon the basic proposition that all men were endowed with certain natural rights, some of which were surrendered under the so-called "social contract." The state, in return, guaranteed individual rights, and owed protection equally to all men. Thus, governments existed, not to give, but to protect rights; and allegiance and protection were reciprocal. For his allegiance, the citizen was guaranteed his rights and the equal protection of the law.[3]

This doctrine was the core of the first great statement of American principles. To Jefferson and the other draftsmen of the Declaration of Independence, it was "self-evident" that "all men are created equal," and "are endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty and the pursuit of Happiness," and that "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[4]

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[3] LOCKE, SECOND TREATISE ON GOVERNMENT c. 2 (1698). See also BECKER, THE DECLARATION OF INDEPENDENCE (1926); SMITH, AMERICAN PHILOSOPHY OF EQUALITY (1927); WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW (1931); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928); Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 610-611; Hamilton, *Property According to Locke*, 41 YALE L. J. 864 (1932).

[4] It is interesting to note in this context that Jefferson's original draft of the Declaration, accepted by Franklin and Adams, the other members of the sub-committee responsible for the drafting, contained severe strictures on the King because of the slave trade. See BECKER, *op. cit. supra* note 3, at 212-213.

Abhorrence of arbitrariness—the central element of due process—and the ideal of a general and equal law—the core of equal protection—both were implicit in the Lockean-Jeffersonian premises. Slavery—with its theories of racial damnation, racial inferiority, and racial discrimination—was inherently repugnant to the American creed and the Christian ethic. This fact was being rapidly and increasingly sensed. As men sensed it, they had to fit it into the only political theory they knew: Governments existed, not to give, but to *protect* human rights; allegiance and protection were reciprocal—i.e., *ought to be reciprocal;* rights and duties were correlative—i.e., *had to be correlative* if Americans ever were to live with their consciences and to justify their declared political faith.

Long before the Revolution, Quakers and Puritans attacked slavery as a violation of the social compact and Christian ethic.[5] After 1776, Jefferson's "self-evident truths" put a cutting edge on all such pleas—made them the broadswords in every attack. Idealists demanded that America live up to her Declaration. "All men" must mean all men. "Unalienable Rights . . . of Life, Liberty and the pursuit of Happiness" must be given its full human, not merely a restricted racial, application. Race and color were arbitrary, insubstantial bases for accord or denial of natural, human rights. Sensitive leaders soon found themselves confronted with what Gunnar Myrdal

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[5] German Quakers of Pennsylvania had argued as early as 1688, "Though they are black, we cannot conceive there is more liberty to have them slaves [than] . . . to have other white ones. . . . We should do to all men like as we will be done ourselves, making no difference of what descent or colour they are. . . . Here is liberty of conscience, which is right and reasonable; here ought to be likewise liberty of body. . . ." MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 75 (1866). In 1700, in his antislavery tract, THE SELLING OF JOSEPH, the great Puritan elder, Judge Samuel Sewall, declared, "All men, as they are . . . Sons of Adam, are co-heirs, and have equal Right unto Liberty." *Id.* at 83-87. See also Graham, *Early Antislavery Backgrounds, supra* note 1, at 614-615.

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treated recently as *An American Dilemma*.[6] Having pledged their "Lives . . . Fortunes, and sacred Honor" to the causes of liberty and freedom, either Americans endeavored to live up to their creed or stultified themselves before the world.

After the Revolution, the "self-evident truths" and the provisions of the state Bills of Rights were employed as weapons against slavery and against racial distinctions.[7] Down through the Civil War, moreover, the "self-evident truths" constituted precisely what Jefferson declared them to be—political axioms—except in the South after the invention of the cotton gin.[8] They were on every tongue as rhetorical shorthand, and were popularly regarded as the marrow of the Constitution itself. In justifying one

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[6] 2 vols. (1944).

[7] In 1783, Chief Justice Cushing, pointing to the "All men are born free and equal" clause of the Massachusetts Bill of Rights, declared that ". . . slavery is inconsistent with our conduct and Constitution, and there can be no such thing as perpetual servitude of a rational creature." MOORE, *op. cit. supra* note 5, at 209-221. Four years later, Congress passed the Northwest Ordinance outlawing slavery in the territories. 2 THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 957-962 (1909). Vermont effected abolition by constitutional clause; other northern states by prospective legislative action. Graham, *Early Antislavery Backgrounds, supra* note 1, at 617.

[8] While early southern leaders in Virginia accepted Jeffersonian concepts of natural rights, contract, and equality, later leaders and theorists defended the slave society on the basis of Greek concepts. Man had no rights save those created by the state. Men were inherently unequal, and the end of the state was not equality but justice. Each man would have status in accordance with his ability. Such theorists posited the inherent inferiority of the Negro. Their theory was broad enough to justify slavery for any man, irrespective of race or color. See THE PRO-SLAVERY ARGUMENT, AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES (1853). See also 1 THE WORKS OF JOHN C. CALHOUN 393-394, 6 *id.* at 182-183 (Crallé ed. 1854-1855); SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN c. 8 (1951).

revolution, Jefferson no less than Locke had laid the groundwork for another. The dominating premise that governments were instituted for protection and that they derived their just powers from the consent of the governed had begun to make slavery, and with it race distinctions, untenable. What slowly took shape was an ethical interpretation of American origins and destiny.

2. The Moral Suasion Campaign and Its Rejection

The Age of Enlightenment of the seventeenth and eighteenth centuries gave birth to a world-wide antislavery movement. A wave of humanitarianism, embracing quests for abolition of slavery, suffrage for women, and penal, land, and other reforms, swept across the United States of the early nineteenth century. Because of its dramatic qualities, the American antislavery movement assumed even larger proportions and eventually overshadowed the other phases.[9] Like them, it was based fundamentally on Judeo-Christian ethic and was formulated in terms of equalitarianism and natural rights.

The early antislavery movement was a campaign of moral suasion. Rational men appealed to other rational men to square precept with practice. Proponents of equality, who were by that definition opponents of slavery, sought to persuade slaveholders of the error of enslaving other men, i.e., of denying equality to those held as slaves. That campaign bore early fruit in Virginia, in the uplands of the Carolinas, and even in the deeper South. The appeal to the South ultimately broke on the hard rock of economic self-interest after invention of the cotton gin. Geography and migrations tended further to sectionalize the institution. Quakers and Scotch-Irish yeomen from Virginia and the Carolinas, unable to arrest spread of a labor system they detested, and others from the deeper South, fled *en masse*, settling generally in Ohio and Indiana. There

[9] Nye, Fettered Freedom 2, 10-11, 217-218, and *passim* (1949).

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they were joined by staunch Puritan and Calvinist stocks from New York and New England. Thus, the antislavery movement became sectionalized with important centers in Ohio, western New York, and Pennsylvania.

Spearheading the movement was the American Anti-Slavery Society, founded in 1833 and headed by the wealthy Tappan brothers. Recruited and led by Theodore Weld,[10] a brilliant orator and organizer, and by his co-leader, James G. Birney,[11] a converted Alabama slaveholder and lawyer, whole communities were abolitionized in the years 1835-1837. Appeals were aimed at influential leaders; lawyers in particular were sought out and recruited by the score.

This appeal was an ethico-moral-religious-natural rights argument. It was addressed by the revivalists to their countrymen as patriots, Christians, and "free moral agents." "The law of nature *clearly teaches the natural* republican equality of all mankind. *Nature* revolts at human slavery. . . . The Law of God renders all Natural Rights inalienable. . . . Governments and laws are estab-

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[10] See THOMAS, THEODORE WELD (1950); LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKE WELD AND SARAH GRIMKE, 1822-1844, 2 vols. (Barnes and Dumond ed. 1934) cited hereinafter as WELD-GRIMKE LETTERS. See also BARNES, THE ANTI-SLAVERY IMPULSE, 1830-1844 (1933). Weld was a tireless speaker and pamphleteer who turned out documents that became guide posts in the antislavery movement: SLAVERY AS IT IS (1839); THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA (1838); THE BIBLE AGAINST SLAVERY (1837). Such persons as William Jay, John Quincy Adams and Senator Robert C. Winthrop relied on Weld for legal research. See 2 WELD-GRIMKE LETTERS 748, 956-958. The evangelical character of the antislavery movement helps account for the flood of arguments that poured from it. It was even organized on an analogy drawn from early Christian evangelists with its Seventy and its Council of Twelve.

[11] See BIRNEY, JAMES G. BIRNEY AND HIS TIMES (1890); LETTERS OF JAMES G. BIRNEY, 1831-1857, 2 vols. (Dumond ed. 1938), referred to hereinafter as BIRNEY LETTERS.

lished, not to give, but to protect . . . rights."[12] Negroes, they continued, were "not naturally inferior." They simply had been degraded by slavery. They were persons, endowed by God with all the attributes of personality. Their enslavement could no more be justified than could chattelization of men with red hair. Slavery rested on a capricious, discredited classification.[13] It simply was institutionalized false imprisonment. White men were protected against enslavement and against false imprisonment. "What abolitionists demand as naked justice is that the benefit and protection of these just laws be extended to all human being alike . . . without regard to color or any other physical peculiarities."[14]

Racial discrimination, in short, was repugnant both as a breach of equality and as a breach of protection. Because it was a breach of protection, it also was a breach of equality; and because it was a breach of equality, it was thereby an even greater breach of protection. This was the outcome of Americans' triple-barreled major premise which posited the purpose of *all* government to be the protection of inalienable rights bestowed upon *all* men by their Creator. Once that compound premise was granted—and in the generations since 1776 virtually all Americans

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[12] OLCOTT, TWO LECTURES ON THE SUBJECT OF SLAVERY AND ABOLITION 24-29 (1838).

[13] The idea that race and color were arbitrary, capricious standards on which to base denial of human rights was implicit in all anti-slavery attacks on discrimination and prejudice. Yet it was when the constitutional-legal attack began to reinforce the religious one that such arguments became explicit, and the concept of an arbitrary classification developed. Lawyers like Ellsworth, Goddard, Birney (Philanthropist, Dec. 9, 1836, p. 3, cols. 4-5), Gerrit Smith (see AMERICAN ANTI-SLAVERY SOCIETY, 3 ANNUAL REPORTS 16-17 (1836)) and Salmon P. Chase (SPEECH . . . IN THE CASE OF THE COLORED WOMAN, MATILDA . . . 32 (1837)) helped to formulate the concept and linked it with the principles of equality, affirmative protection, and national citizenship.

[14] OLCOTT, *op. cit. supra* note 12, at 44.

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outside the South had *spoken* as if they granted it—the abolitionists' conclusions were unassailable. The heart of it was that these basic ideals of liberty, equality, and protection were deemed to be paramount by reason of their place in the Declaration and determinative by reason of the place of the Declaration in American life and history.

The issue had to be resolved within the framework of the constitutional system. Appeals to ethico-moral concepts and to natural rights were good enough to argue as to what ought to be. Reality was something else again. Constitutional reality was that the status of inhabitants of the United States, white or Negro, was fixed by the Constitution. Social reality was that the great mass of Negroes were slaves.

Inevitably, then, the first skirmishes as to the rights claimed for Negroes had to be fought out in the case of free Negroes.[15] The targets here were northern black laws—the laws in Ohio and Connecticut; the techniques were persuasion, conversion, and demonstration. It was in the course of this campaign that what presently became the constitutional trinity of the antislavery movement received its decisive synthesis.

The first comprehensive crystallization of antislavery constitutional theory occurred in 1834 in the arguments of W. W. Ellsworth and Calvin Goddard, two of the outstanding lawyers and statesmen of Connecticut, on the appeal[16] of the conviction of Prudence Crandall for viola-

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[15] For characteristic references to plans for bettering the lot of the free Negro, see 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 132-135, 262; AMERICAN ANTI-SLAVERY SOCIETY, 4 ANNUAL REPORTS 32-35, 105-111 (1837), 5 ANNUAL REPORTS 127 (1838). For evidence of how large the condition of the free Negroes, and plans for their betterment, figured in the early A. A. S. S. strategy, see *The Condition of Free People of Color in the United States*, The Anti-slavery Examiner #13a (1839), apparently written by Judge William Jay, reprinted in his MISCELLANEOUS WORKS 371-395 (1853).

[16] Crandall v. State, 10 Conn. 339 (1834).

tion of an ordinance forbidding the education of non-resident colored persons without the consent of the civil authorities.[17] They reveal this theory as based on broad natural rights premises and on an ethical interpretation of American origins and history. Four ideals were central and interrelated: the ideal of human equality, the ideal of a general and equal law, the ideal of reciprocal protection and allegiance, and the ideal of reason and substantially as the true bases for the necessary discriminations and classifications by government. Race as a standard breached every one of these ideals, as did color. What was attacked was denial of human equality and denial of protection of the laws—denials inherent in any racial discrimination backed by public authority. Slavery was the arch evil in this respect, and the primary one, both because of the magnitude of its denials and deprivations and abridgments, and because these necessarily established a whole pattern of discrimination based upon race and color alone. It was this pattern of public discrimination that was combatted no less than slavery. It had to be combatted because it was deemed a part of slavery.

Although neither slavery nor segregated schools was the issue in the case, the Ellsworth-Goddard argument is one of the classic statements of the social and ethical case for equality of opportunity irrespective of race. It gave immense impetus to the emerging concept of American nationality and citizenship. Fully reported and widely cir-

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[17] REPORT OF THE ARGUMENTS OF COUNSEL IN THE CASE OF PRUDENCE CRANDALL, PLFF. IN ERROR, VS. STATE OF CONNECTICUT. BEFORE THE SUPREME COURT OF ERRORS, AT THEIR SESSION AT BROOKLYN, JULY TERM, 1834. The arguments are printed in condensed form in the official report, Crandall v. State, *supra* note 16, at 349-353 (1834). See also JAY, MISCELLANEOUS WRITINGS ON SLAVERY 34-51 (1853); STIENER, HISTORY OF SLAVERY IN CONN. 45-52 (1893); VON HOLST, CONSTITUTIONAL HISTORY 1828-1846 98, 99 (1881); McCarron, *Trial of Prudence Crandall*, 12 CONN. MAG. 225-232 (1908); NYE, *op. cit. supra* note 9, at 83.

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culated as a tract, it soon became one of the fountainheads of antislavery constitutional theory. It figured prominently in Abolitionist writings throughout the 'thirties. In the spring of 1835, Judge William Jay, Abolitionist son of the first Chief Justice and one of the founders and vice-presidents of the American Anti-Slavery Society, devoted fifteen pages of his *Inquiry into the Character and Tendency of the Colonization and Anti-Slavery Societies* [18] to a slashing attack on the trial court's decision.

The due process element of our modern trilogy was introduced in the course of a determined attack made in 1835 by the Weld-Birney group upon Ohio's black laws. Enacted in 1807, these laws embodied prohibtions against Negro immigration, employment, education, and testimony. A report [19] prepared at Weld's direction by a committee of the newly formed Ohio Anti-Slavery Society appealed to the American and Christian conscience. Notwithstanding the affirmative duty of all government to "promote the happiness and secure the rights and liberties of man," and despite the fact that American government was predicated on the "broad and universal principle of equal and unalienable rights," these statutes had singled out a "weak and defenseless class of citizens—a class convicted of no crime —no natural inferiority," and had invidiously demanded their exclusion from "the rights and privileges of citizenship." This, it was argued, the Constitution forbade. "Our Constitution does not say, *All men* of a *certain color* are entitled to certain rights, and are born free and independent. . . . The expression is unlimited. . . . *All* men are so born, and have the *unalienable* rights of life and liberty —the pursuit of happiness, and the acquisition and possession of wealth."

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[18] Reprinted in JAY, MISCELLANEOUS WRITINGS ON SLAVERY 36 (1853).

[19] PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION HELD AT PUTNAM 17-36 (April 22-24, 1835).

These were the doctrinal cornerstones.[20] They were the heart of the ethico-moral-historical-natural rights argument which the American Anti-Slavery Society broadcast in the mid- and late-'thirties. They were broadcast particularly throughout Ohio, western New York and Pennsylvania,

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[20] It is not implied that these arguments were without antecedents. Earlier (1819-21) in the controversy over Missouri's admission, the provision in its Constitution prohibiting immigration of free Negroes prompted antislavery arguments based on the republican form of government and comity clauses. See BURGESS, THE MIDDLE PERIOD, 1817-58 c. 4 (1897); MCLAUGHLIN, CONSTITUTIONAL HISTORY OF THE UNITED STATES c. 29 (1935); WILSON, RISE AND FALL OF THE SLAVE POWER cc. 11-12 (1872), especially at 154.

Later, the Horton episode, and the protracted controversy over southern seamen's laws whereunder northern and British free Negro seamen were confined to quarters or jailed while in southern ports, gave further impetus to theories of *national* or *American* citizenship. The former was a *cause célèbre* of 1826-1827 involving a statute of the District of Columbia which authorized sale for jail fees of *suspected* fugitive slaves. Horton, a free Negro of New York, who had been arrested and threatened with sale, was saved by timely aid of Abolitionist friends who capitalized the incident. See JAY, MISCELLANEOUS WRITINGS ON SLAVERY 48, 238-242 (1853); TUCKERMAN, WILLIAM JAY AND THE CONSTITUTIONAL MOVEMENT FOR ABOLITION OF SLAVERY 31-33 (1893); 3 CONG. DEB. 555 (1826). Regarding the seamen's controversy, see Hamer, *Great Britain, the United States and the Negro Seamen Acts, 1822-1848*, 1 J. OF SO. HIST. 1-28 (1935); H. R. REP. No. 80, 27th Cong., 3rd Sess. (1843).

Later, in 1844, the Hoar incident occurred, in which Judge Samuel Hoar of Massachusetts, proceeding to Charleston to defend imprisoned Negro seamen, was expelled from South Carolina by legislative resolution. See Hamer, *supra*, and the elaborate documentation in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 237-238 (Ames ed. 1904).

The Hoar expulsion and the numerous laws, both North and South, excluding free Negroes and mulattoes, were cited repeatedly in the debates of the 'fifties and in 1866. See, for example, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Remarks of Sen. Trumbull).

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Rhode Island, and Massachusetts.[21] Weld was the director and master strategist; Birney, the forensic quartermaster and attorney general. The "Twelve" and the "Seventy" were the chosen instruments. These were the two dedicated hand-picked groups of trained teachers, ministers, divinity students, self-named after the early Christian Apostles. Their revivals converted thousands before funds ran out and southern antagonism crippled the movement. Numerous anti-slavery newspapers and coordinated pamphlet and petition campaigns were reinforcing media.

The trouble, of course, was that northerners were still largely indifferent to or unreached by this program, while the South rejected it almost without a hearing. Coincidence played a great part here. Alarmed lest educated Negroes foment slave insurrections, the South further tightened its controls.[22] Fortuitously, the Vesey and Turner uprisings had seemed to offer frightening confirmation of fears in this regard. Meanwhile, cotton profits and politics had begun to rationalize slavery as "a positive good." The insidious belief spread that the South must insulate herself, safeguard her "peculiar institutions," and remove them even from discussion and criticism.[23] In the Pinckney Report of 1836,[24] pro-slave theorists sought to implement these convictions. To reinforce Calhoun's defensive doctrines of concurrent majority and state interposition, and in a de-

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[21] See especially BARNES, *op. cit. supra* note 10, cc. 2, 3, 4, and WELD-GRIMKE LETTERS and BIRNEY LETTERS, *op. cit. supra* notes 10, 11.

[22] See EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH c. 5 (1940) and statutes there cited; SYDNOR, DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848 (1948).

[23] See JENKINS, PROSLAVERY THOUGHT IN THE OLD SOUTH (1935); and the histories of Eaton and Sydnor, *op. cit. supra* note 22; and WILTSIE, JOHN C. CALHOUN, NULLIFIER, 1828-1839 c. 20, esp. 283-286 (1949); *cf.* Corwin, *National Power and State Interposition, 1787-1861*, 10 MICH. L. REV. 535 (1912).

[24] H. R. REP. No. 691, 24th Cong., 1st Sess. (1836).

termined attempt to protect slavery in the Federal District from possible interference or abolition by Congress under its sweeping powers over the District and territories, Pinckney and his colleagues in the House employed the due process clause of the Fifth Amendment and "the principles of natural justice and of the social compact." [25]

3. The Political Action Campaign

A. Systemization

Thus, the antislavery campaign was set back, its piecemeal conversion and demonstration program was frustrated at the outset by barriers that held slavery to be a positive good—untouchable even where Congress had full powers over it. Antislavery men were denied the use of the mails. Their antislavery petitions were throttled by Congressional "gags". They were forced to defend even their own rights to speak and write and proselytize. In consequence, the antislavery leaders had to reorient their whole movement and strategy.[26]

This reorientation, greatly accelerated by the Pinckney Report, was marked by rapid "constitutionalization" of the higher law argument. There was a shift from an overwhelming faith in moral suasion to a reluctant resort to political action, from efforts to convince Americans of the expediency and justice of freeing their slaves, to a search for constitutional power to free them.[27]

These tendencies may be traced today in the pages of the *Weld-Grimke* and *Birney Letters,* in a vast pamphlet literature, in annual reports of the state and national

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[25] *Id.* at 14.

[26] DUMOND, THE ANTISLAVERY ORIGINS OF THE CIVIL WAR (1938); NYE, *op. cit. supra* note 9.

[27] DUMOND, *op. cit. supra* note 26, especially cc. 5-6; T. C. SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST (1897); NYE, *op. cit. supra* note 9. *Cf.* CRAVEN, THE COMING OF THE CIVIL WAR (1943); NEVINS, ORDEAL OF THE UNION (1947).

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societies,[28] but most satisfactorily in the columns of Birney's *Philanthropist*.[29] Calhoun and "positive good" theorists had fashioned a constitional system that promised absolute protection for slavery and ignored the constitutional reference to slaves as "persons," referring to them whenever possible as "property." These theorists also employed the "compact" and "compromises" of 1787 as a device that removed slavery from the reach not merely of state and federal legislatures but from adverse discussion and criticism.

Birney and his colleagues now formulated a counter-system, one which exalted liberty and exploited the founding fathers' use of "persons." Denying all limiting force to the "compact" or "compromises," this group hailed the spirit of the Declaration, of the Constitution, and American institutions generally. They seized on the leading provisions of the state and federal bills of rights as affirmative guarantees of the freedom of the slaves.[30]

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[28] Read straight through, the six ANNUAL PROC. AND REP. OF AMERICAN ANTISLAVERY SOCIETY (1833-1839) and the five ANNIVERSARY PROC. OF THE OHIO ANTISLAVERY SOCIETY (1836-1840) reveal the shift from confident evangelism to determined self-defense and political action. Not until after the Pinckney Report (*supra* note 24), the "Gags" denying antislavery petitions, and the refusal of the South to countenance discussion of the issue, does one find serious interest in political movements and tactics. The THIRD ANNUAL REPORT OF THE A. A. S. S. (May 10, 1836) signed by Elizur Wright is thus the turning point and a catalog of the factors that had reoriented opinion. By the SIXTH ANNUAL REPORT OF THE A. A. S. S. (1839), the "imperative necessity of political action" caused Wright to devote much of his space to convincing the still hesitant and divided membership.

[29] Birney's career as an editor can be followed in the BIRNEY LETTERS, *op. cit. supra* note 11 (see index entries "Philanthropist"), and in his pamphlet NARRATIVE OF THE LATE RIOTOUS PROCEEDINGS AGAINST THE LIBERTY OF THE PRESS IN CINCINNATI (1836).

[30] Sometimes Abolitionists, in desperation, appealed to a higher law beyond the Constitution, but this was not a consistent argument or one possible within the legal framework.

In his earlier writings,[31] Birney's ethical interpretation of American origins and history was essentially that of the *Crandall* argument and the Ohio Anti-Slavery Society reports. The natural rights creed of the Declaration, the universality of guarantees of the state bills of rights, the Signers' and the Fathers' known aversion to slavery, the "color blindness" of the Articles of Confederation, the outright prohibition of slavery in the territories by the Northwest Ordinance, and above all, the silence, the euphemisms, the circumlocutions of the Constitution—these were the recurrent and expanding points. Not merely slavery, but *all public race discrimination* was ethically and morally wrong. It was so because it was a denial of the rights and protections that governments were established to secure.

After the Pinckney Report, however, and especially after the growing mob action against Abolitionists began to make it clear that state bills of rights were not self-executing but rested on local enforcement, Birney re-examined his position. Everywhere there was this anomaly: the great natural and fundamental rights of conscience, inquiry and communication, secured *on paper* in every constitution, nevertheless were denied and abridged daily for want of sanctions. All men by nature "possessed" these indispensable rights; all constitutions "declared" and "secured" them. It was the bounden duty of all governments "created for the purposes of protection" to safeguard and enforce them. Yet the hard fact was that state and local governments were flagrantly, increasingly derelict. Nothing, southerners argued, could be done about it.

Challenged in this manner, Birney and his aides shifted their ground. They advanced from the old position that

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[31] BIRNEY LETTERS, *op. cit. supra* note 11. For a fuller and documented summary, see Graham, *Early Antislavery Backgrounds*, *supra* note 1, at 638-650.

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the Federal Constitution was neutral—"or at least not pro-slavery"—to the stand that the document was anti-slavery. Constitutionalization of the natural rights agrument proceeded at a much more rapid pace. No longer was the fight waged merely defensively in behalf of the right to proselytize, or counter-defensively to support sweeping Federal powers over the District and territories; more and more the antislavery forces took the offensive against slavery itself.[32]

Thus, by December 1836, the Abolitionists' argument was recrystallizing around three major propositions:

First, the great natural and fundamental rights of life, liberty, and property, long deemed inherent and inalienable, were now held to be secured by *both* state and national constitutions.

Second, notwithstanding this double security, and in disregard of the obligation of governments to extend protection in return for allegiance, these rights were being violated with impunity both on national soil and in the states, (a) by the fact of slavery itself, (b) by mob action directed against those working for abolition, (c) by flagrant discriminations against free Negroes and mulattoes.

Third, race and color—"grades and shades"—whenever and wherever employed as criteria and determinants of fundamental rights, violated both the letter and spirit of American institutions; race *per se* was not only an ignoble standard; it was an irrational and unsubstantial one.

The problems of implementing this theory, Birney worked out in several series of articles during 1837. Rescrutinizing the document, he began to make the same rigorous use of the Federal Bill of Rights that previously

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[32] See Graham, *Early Antislavery Backgrounds, supra* note 1, at 650-653.

he and others had made of Ohio's. Ultimately, he focused on the due process clause employed in Pinckney's Report:[33]

> "The Constitution contains provisions which, if literally carried out, would extinguish the entire system of slavery. It guarantees to every state in the union a republican form of government, Art. IV, Sec. 4th. A majority of the people of South Carolina are slaves; can she be said properly to have a republican form of government? It says, that 'the right of the people to be secure in their *persons*, houses, papers and effects . . . against unreasonable searches and *seizures*, shall not be violated.' Slaves, Sir, are men, constitute a portion of the people: Is that no 'unreasonable seizure,' by which the man is deprived of all his earnings [effects?]—by which in fact he is robbed of his own person? Is the perpetual privation of liberty 'no unreasonable seizure'? Suppose this provision of the Constitution were literally and universally enforced; how long would it be before there would not be a single *slave* to mar the prospect of American liberty? Again, '*no* person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, [sic] nor shall any person be compelled in any case to witness against himself; nor be deprived of life, liberty or property without due process of law.' Art. V Amendments.
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> "Are slaves ever honored with indictment by a grand jury? Are they never compelled 'to witness against themselves'? never tortured until they lie against their own lives? never deprived of life without 'due process of law'? By what 'due process of law' is it, that two millions of 'persons' are deprived every year of the millions of dollars produced by their labor? By what due process of law is it that

[33] Philanthropist, Jan. 13, 1837, p. 2. Birney continued his "Reply to Judge L." in the Jan. 20 and 27, 1837 numbers, and in the former demonstrated his forensic powers by brilliant caricature of the South's efforts to suppress discussion of slavery.

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> 56,000 'persons,' the annual increase of the slave population, are annually deprived of their 'liberty'? Such questions may seem impertinent, to Mr. L., but when he shall feel that the slave is a 'person,' in very deed, and has rights, as inalienable as his own, he will acknowledge their propriety. Again 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel for his defense.' Art. VI of the Amendments. Take all the above provisions in connection with that clause under Art. VI, which declares that 'This Constitution and the laws of the United States which shall be made in pursuance thereof' etc., 'shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'—and then carry them out to their full extent, and how long would it be ere slavery would be utterly prostrated? I do not say they were inserted with a specific view toward this end, but I do say, that so long as they shall stand, the Constitution of these U[nited] States will be a perpetual rebuke to the selfishness and injustice of the whole policy of the slaveholder. The provisions embody principles which are at entire enmity with the spirit and practice of slavery. How an instrument, containing such principles, can be tortured to express a *sanction* to slavery, I am yet to learn.'' [34]

Reassimilation of the old theory into the Bill of Rights now proceeded rapidly.[35] The various clauses restraining the powers of Congress began to be popularly regarded as *sources* of Congressional power. The initial premise in

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[34] *Ibid.*

[35] Resolutions and petitions still were the chief media in evolving this system of constitutional shorthand. Similarity of the revivalists' lectures from place to place, their widespread circulation of the Philanthropist and printed tracts, Birney's own speaking tours, all contributed to resulting stereotypes.

this regard was that the provisions of the Bill of Rights were not *rights,* they were *guarantees,* and guarantees customarily presumed the intent and capacity, as well as the duty, to make them good.[36] An open letter[37] to his Congressman from an unnamed Abolitionist in Batavia[38] reveals the hold and spread and reach of these ideas:

> "The very Constitution of the United States is attempted to be distorted and made an ally of domestic slavery. That Constitution was established, not by the *citizens* or *voters,* but by '*the people*' of the United States to secure the blessings of *liberty* and establish *justice.* The Union . . . was formed for the same great purposes, . . . yet we have been told that petitioning for *liberty* endangers this Union, that the partnership will be dissolved by extending to all the very right it was intended to secure.
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> "Slavery in the District of Columbia violates the most important and sacred principles of the Constitution. . . . I speak not of the mere *letter,* but of the *principles* . . . —of the *rights* it guarantees, of the *form,* in which the guarantee is expressed. The 5th Amendment declares 'no person shall be deprived of life, *liberty* or property without due process of law.' This petition informs you free men in the District . . . have been first imprisoned, and then sold for their jail fees. [Suppose, he continued, this had happened to American seamen in a foreign port]. Would not Congress upon petition enquire into the fact and redress the wrong if it existed? Would not you, Sir, be one of the foremost in repelling the insult to our seamen and punishing the aggressor? Would you not consider it your *duty*—your *official* duty to do so? And yet you have no power to dis-

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[36] For a striking statement of this theory in 1866 see CONG. GLOBE, 39th Cong., 1st Sess. 1270 (Rep. Thayer, later a distinguished Philadelphia judge).

[37] Graham, *Early Antislavery Backgrounds, supra* note 1, at 655.

[38] Perhaps John Joliffe, a local antislavery lawyer, who was a close friend of Birney. See Graham, *Early Antislavery Backgrounds, supra* note 1, at 655, n. 256.

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> criminate in the object of your protection—a colored sailor is entitled to the *protection* of his country's laws, and Constitution, and flag, and honor, as well as a white one,—he is as much entitled to that protection in Washington city beneath the flag of his country and while he reposes under the tower of the Capitol as he is at *Qualla Balloo* or Halifax, or anywhere on the face of the earth. And all should be protected with equal and exact justice, whether sailors or laborers—citizens or soldiers: if so, you are bound to enquire into the alleged abuses, and if they exist to redress them."

Thus, by October, 1837, the date of Birney's retirement as editor of the Philanthropist, the motivating premise of Abolitionism already was coming to be this: Americans' basic civil rights were truly national, but in practice their basic civil liberty was not. By acts in support and in toleration of slavery and by failure to protect the friends of the enslaved race, the states and the federal government all abridged, and all allowed to be abridged, the dearest privileges and immunities of citizenship. Humanitarianism had attempted to soften race prejudice and meet this challenge squarely but had been frustrated. Failure left no alternative but political action and the instinctive answer that government had the power to do what the governed had the job to do. The answer to denied power and to defective power was the concept of an inherent power derived from the standing duty to protect. The gist of it was that because allegiance and protection were reciprocal—i.e., ought to be reciprocal—because the government protected its citizens abroad without discrimination, and because the text of the Federal Bill of Rights gave no warrant for discrimination, Congress was duty bound *not* to discriminate. It must do "equal and exact justice" irrespective of race. It had no other choice. It lacked power to discriminate between those persons who were equally entitled to protection. It was duty bound also to remove such discrimination as existed. Implicitly, and morally, these same obligations rested on

the states; yet respect for the constitutional division of power here introduced conflict. Few were yet ready for the extreme proposition that Congress might *constitutionally* abolish slavery *in the states.* The original form, as shown by the Batavian communication, was more often that Congress was duty bound to hear petitions to abolish slavery, or that slavery had been abolished in federal territory by the force of the Preamble and Declaration. Because the great natural rights were now also national constitutional rights, they began to generate and carry with them—*even into the states*—the power for their enforcement.

B. Popularization

Four routes and media of political action "constitutionalizing" the antislavery argument are to be noted.

First were the countless petitions, resolutions, declarations, letters, editorials, speeches, and sermons broadcast by the original antislavery proponents and converts—uniformly men and women of influence and position whose idealism was extraordinary and undoubted. One has to read only the *Weld-Grimke* and the *Birney*[39] *Letters,* or the

[39] The legal and constitutional argument in the BIRNEY LETTERS is remarkable both in range and interest. Note especially the due process arguments at 293, 647, 805-806, 835; the declaration that colored people are "citizens" at 815, and "persons" at 658 and 835; the exceptionally strong references to "natural equality of men" at 272; the composite synthesis of all these elements in the Declaration of 1848 drafted by William Goodell at 1048-1057; the various references to major law cases at 386-387 (Nancy Jackson v. Bulloch, 12 Conn. 38 (1837)), at page 658, 667-670 (Birney's arguments in The Creole, 2 Moore, Digest of International Law 358-361 (1906), for which Weld did much of the research), at 758 (Jones v. Van Zandt, 46 U. S. 215 (1846)) in which Salmon P. Chase was of counsel). By contrast, the legal argument in the WELD-GRIMKE LETTERS is more limited, but see page 798 for the letter of Ebenezer Chaplin, an Athol, Massachusetts physician, to Weld, dated October 1, 1839, urging greater emphasis on the unconstitutionality of slavery and less on its cruelties, and specifically mentioning the Declaration of Independence, the common law, the Ordinance of 1787, the Preamble, and the due process clause of the Fifth Amendment.

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monographs of Barnes,[40] Dumond[41] and Nye[42]—and Nevins' great history[43]—to realize the appeal of these peoples' character and of their example and argument. Moreover, many of them were southerners, and of the proudest type who practiced what they preached—Birney alone freeing slaves to the value of thousands of dollars,[44] and the Grimke sisters doing likewise with those they inherited. Every antislavery society was a band of disciples, workers, petitioners, writers, and "free moral agents" committed to the spread of doctrine that had immense intrinsic appeal.

In consequence, simply as an incident of the intense revival campaigns, the equal protection-due process-privileges and immunities theory became the core of thousands of abolitionist petitions, resolutions, and lectures. Now one, now another of the elements was accented, depending on the need and circumstances, but in an astonishing number of cases two or three parts of the trilogy were used. The whole thus became, even before 1840, a form of popular constitutional shorthand.

After that date even stronger forces enter the picture. First, were the compilers and synthesizers—pamphleteers and journalists like Tiffany[45] and Goodell[46] and Mellen[47]

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[40] *Op. cit. supra* note 10.

[41] *Op. cit. supra* note 26.

[42] *Op. cit. supra* note 9.

[43] THE ORDEAL OF THE UNION, 2 vols. (1947).

[44] 1 BIRNEY LETTERS, *op. cit. supra* note 11, at 52, 494, 498, 500-501.

[45] TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849).

[46] GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844).

[47] MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY . . . (1841).

who wrote the articles and treatises on the "Unconstitutionality of Slavery" which Dr. tenBroek analyzes so well.[48] Others annotated copies of *Our National Charters*[49] setting down after each clause or phrase of the Constitution and the Declaration (much as Birney had done in his early articles) antislavery arguments and doctrines gleaned "both from reason and authority." Such materials, broadcast by the thousand, reprinted, condensed and paraphrased, were themselves powerful disseminators.

It was the minority party platform that gave antislavery theory its most concise, effective statement. Drafted generally by Salmon P. Chase or Joshua R. Giddings, these documents, first of the Liberty and Free Soil parties in the 'forties, then of the Free Democracy and Republican parties in the 'fifties, and in 1860, all made use, in slightly varying combination, of the cardinal articles of faith: human equality, protection, and equal protection from the Declaration, and due process both as a restraint and a source of congressional power. Such consistent repetition testifies both to the nature and extent of previous distillations and to the power and significance of current ones:

1. Liberty Party Platform (adopted in 1843 for the 1844 campaign):

> "*Resolved*, That the fundamental truth of the Declaration of Independence, that all men are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government by that amendment of the Constitution which declares that no person shall

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[48] TENBROEK, ANTISLAVERY ORIGINS, *op. cit. supra* note 2, c. 3 and pp. 86-91.

[49] (Goodell ed. 1863).

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be deprived of life, liberty, or property without due process of law.'"[50]

2. Free Soil Party Platform, 1848:

"*Resolved*, That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the federal government, which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.

"*Resolved*, that, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them."[51]

3. Free Democracy Platform, 1852:

"1. That governments deriving their just powers from the consent of the governed are instituted among men to secure to all those unalienable rights of life, liberty, and the pursuit of happiness with which they are endowed by their Creator, and of which none can be deprived by valid legislation, except for crime.

"4. That the Constitution of the United States, ordained to form a more perfect Union, to establish justice, and secure the blessings of liberty, expressly

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[50] The full platform is in STANWOOD, HISTORY OF THE PRESIDENCY 216-220 (1904). In addition to the plank quoted, it contains numerous references to "equality of the rights among men," "the principle of equal rights with all its practical consequences and applications," the "higher law" and "moral law," and the sacredness of rights of speech, press and petition.

[51] *Id.* at 240. This platform was drafted by Salmon P. Chase. See SMITH, THE LIBERTY AND FREE SOIL PARTIES IN THE NORTHWEST 140 (1897).

denies to the general government all power to deprive any person of life, liberty, or property without due process of law; and, therefore, the government, having no more power to make a slave than to make a king, and no more power to establish slavery than to establish a monarchy, should at once proceed to relieve itself from all responsibility for the existence of slavery wherever it possesses constitutional power to legislate for its extinction."[52]

4. Republican Party Platform, 1856:

"*Resolved*, That with our republican fathers we hold it be a self-evident truth, that all men are endowed with the unalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior designs of our federal government were to secure these rights to all persons within its exclusive jurisdiction; that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its existence or extension therein; that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any Territory of the United States, while the present Constitution shall be maintained."[53]

5. Republican Party Platform, 1860:

"8. That the normal condition of all the territory of the United States is that of freedom; that

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[52] STANWOOD, *op. cit. supra* note 50, 253-254. This platform was drafted by Salmon P. Chase (see WARDEN, LIFE OF CHASE 338 (1874)) and Joshua R. Giddings (see SMITH, *op. cit. supra* note 51, 247-248).

[53] STANWOOD, *op. cit. supra* note 50, at 271. This platform was drafted by Joshua R. Giddings. JULIAN, THE LIFE OF JOSHUA R. GIDDINGS 335-336 (1892).

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as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any Territory of the United States.

"14. That the Republican party is opposed to any change in our naturalization laws, or any state legislation by which the rights of citizenship hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized, both at home and abroad."[54]

True, these were party platforms, but these were the platforms of parties to which leaders in the Congress that would frame the Fourteenth Amendment had given their allegiance.[55]

Many Congressmen whose names later loomed large in the formulation of and debates on the Thirteenth and Fourteenth Amendments and the Civil Rights Acts were men of anti-slavery backgrounds[56] which, it will be recalled, had sought out community leaders, particularly

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[54] STANWOOD, *op. cit. supra* note 50, at 293.

[55] See *infra* pp. 27-36, and notes 56-69.

[56] Among them the following members of the Joint Committee on Reconstruction: George H. Williams, Oregon; Henry W. Grimes, Iowa; William Pitt Fessenden, Maine; Henry T. Blow, Missouri; John A. Bingham, Ohio; George S. Boutwell, Massachusetts; Justin S. Morrill, Vermont; Roscoe Conkling, New York; Elihu B. Washburne, Illinois; and Thaddeus Stevens, Pennsylvania. Two others, Jacob M. Howard of Michigan and Ira Harris of New York, invariably voted with the so-called Radicals. See KENDRICK *op. cit. supra* note 2, at 155-195.

lawyers.[57] Even in the 'forties, antislavery Whigs, Liberty Party-Free Soilers, and later, members of the Free Democracy, converted by the Weld-Birney group, began to enter Congressmen like Joshua R. Giddings,[58] E. S. Hamlin,[59] the Wade brothers,[60] Horace Mann,[61] Philomen Bliss,[62] A. P. Granger,[63] Thaddeus Stevens,[64] Gerrit Smith,[65]

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[57] Among Weld's converts were Reps. Edward Wade, and Philemon Bliss, and John H. Paine, Liberty Party leader. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 236-240.

[58] 1795-1864; represented Ohio's Ashtabula and Jefferson Counties (Western Reserve) in House, 25th-34th Congresses, 1838-1859; with John Quincy Adams one of the original antislavery leaders in the House. 7 DICT. AM. BIOG. 260 (1931).

[59] 1808-1894; represented Lorain County district in 28th Cong. 1844-45; one of the political lieutenants of Salmon P. Chase in the 'fifties. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 1025.

[60] Edward Wade, 1803-1862, elected as a Free Soiler from Cleveland, 1853-55, and as a Republican, 1855-61; Ben Wade, 1800-1878, law partner of Giddings, and Radical Senator, 1851-1869. See 2 BIRNEY LETTERS, *op. cit. supra* note 11, at 710. 19 DICT. AM. BIOG. 303 (1936).

[61] 1796-1859; one of the organizers of the American public school system; elected as a Whig to succeed J. Q. Adams, Mass. district; re-elected as Free Soiler, served 1848-53; President, Antioch College, 1852-59. 12 DICT. AM. BIOG. 240 (1933).

[62] 1813-1889; Ohio Circuit Judge, 1848-51; elected as a Republican from Elyria-Oberlin district, Ohio, served 1855-59; Chief Justice of Dakota Territory, 1861; Assoc. Justice Missouri Supreme Court, 1868-72; Dean of Univ. of Missouri Law School, 1872-1889. 2 DICT. AM. BIOG. 374 (1929).

[63] 1789-1866; antislavery Whig from Syracuse, N. Y.; served 1855-59. BIOG. DIR. AM. CONG., H. R. Doc. No. 607, 81st Cong., 2d Sess. 1229 (1950).

[64] 1792-1868; elected as a Whig from Lancaster, Pa. district, 1849-53; as a Republican, 1859-68; Radical Republican leader in the House. 17 DICT. AM. BIOG. 620 (1935).

[65] 1797-1874; elected from Peterboro, N. Y. district, one of the regions converted by Weld; served 1853-1854, resigned. 17 DICT. AM. BIOG. 270 (1935).

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William Lawrence,[66] James M. Ashley[67] (who introduced the Thirteenth Amendment in the House), Samuel Galloway[68] (a former member of the "Seventy") and John A. Bingham.[69] All were either associates, converts, or disciples of the Weld-Birney group; and after 1854, all were Republicans.

In addition to the western group of antislavery leaders, there was an equally strong and determined group with its focus in New England. From this group emerged Charles Sumner, Wendell Phillips, and Henry Wilson. Sumner later became one of the most intransigent leaders of the Republican party during and after the Civil War.[70] Wilson was also in Congress during the Reconstruction period; and became Vice-President and voted with the Radicals on important tie votes.[71] Other New Englanders who served in Congress, and were members of the Joint Committee on Reconstruction, include William Pitt Fessenden of Maine, Justin Morrill of Vermont, and George S. Boutwell of Massachusetts.[72]

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[66] 1819-1899; grad. Franklin College, New Athens, Ohio, 1838; Cincinnati Law School, 1840; Supreme Court Reporter, 1851; Judge, 1857-64; elected as a Republican, served 1865-71, 1873-77. 11 DICT. AM. BIOG. 52 (1933).

[67] 1824-1896; elected as a Republican from Scioto County, 1859-69. See 1 WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 333. 1 DICT. AM. BIOG. 389 (1928).

[68] 1811-1872, elected as a Republican from Columbus, 1855-57. See WELD-GRIMKE LETTERS, *op. cit. supra* note 10, at 228.

[69] For eight terms (1855-63, 1865-73) Bingham represented the 21st Ohio District, composed of Harrison, Jefferson, Carroll and Columbiana Counties, including the Quaker settlements along Short Creek and the Ohio. See 3 BRENNAN, BIOGRAPHICAL ENCYCLOPEDIA . . . OF OHIO 691 (1884).

[70] 18 DICT. AM. BIOG. 208 (1936).

[71] 20 DICT. AM. BIOG. 322 (1936).

[72] Fessenden was the son of General Samuel Fessenden, the leading Abolitionist of Maine, who was one of the national vice-presidents of the American Anti-Slavery Society. 6 DICT. AM. BIOG. 348 (1931); on Morrill, see 13 DICT. AM. BIOG. 198 (1934); on Boutwell, see 2 DICT. AM. BIOG. 489 (1929).

Because Bingham is known to have drafted Sections One and Five of the Fourteenth Amendment, his speeches are of special interest. From 1855-63 and from 1865-73, he represented the Twenty-first Ohio District, which included the Cadiz-Mt. Pleasant Quaker settlements, antislavery strongholds. Furthermore, as a youth he had attended Franklin College at New Athens in 1837-38. At that date Franklin was second only to Oberlin as an antislavery stronghold;[73] the Weld-Birney crusade was at its height. Indeed, in Birney's Philanthropist, 1836-37, we find various antislavery petitions and resolutions from the Cadiz and Mt. Pleasant societies.[74] These are couched in the very phraseology for which Bingham in 1856-66 manifested his decisive preference.

Four of Bingham's speeches are of particular significance:

I. In his maiden speech in the House, March 6, 1856, attacking laws recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery, Bingham argued:

> "These infamous statutes . . . [contravene] the Constitution of the United States. . . . [A]ny territorial enactment which makes it a felony for a citizen of the United States, within the territory of the United States 'to know, to argue and to utter freely', according to conscience is absolutely void. . . . [A] felony to utter there, in the hearing of a slave, upon American soil, beneath the American flag . . . the words of the Declaration 'All men are born free and equal, and endowed by their Creator with the inalienable rights of life and liberty;' . . . [A] felony to utter . . . those other words. . . . 'We, the people of the United States, in order to

[73] See Graham, *Early Antislavery Backgrounds*, *op. cit. supra* note 1, at 624, n. 150.

[74] For an example see Philanthropist, Mar. 10, 1837, p. 3, col. 4.

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> establish justice,' the attribute of God, and 'to secure liberty,' the imperishable right of man, do 'ordain this Constitution'. . . . It is *too late* to make it a felony to utter the self-evident truth that life and liberty belong of right to every man. . . . This pretended legislation . . . violates the Constitution in this—that it abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law, or any process but that of brute force, while the Constitution provides that Congress shall make no law abridging the freedom of speech or of the press; and it expressly prescribes that 'no person shall be deprived of life, liberty, or property without due process of law.'" [75]

II. On January 13, 1857, Bingham spoke in support of Congress' power over slavery in the territory and attacked President Buchanan's recent defense of the Kansas-Nebraska Act of 1854 repealing the Missouri Compromise. After a long analysis of the provisions of the Federal Bill of Rights, of the Northwest Ordinance, the enabling acts and constitutions of the states carved from the Ohio Territory—emphasizing especially the Federal due process clause and the "all men are born equally free and independent" clauses of the state constitution, he said:

> "The Constitution is based upon EQUALITY of the human race. . . . A State formed under the Constitution and pursuant to its spirit, must rest upon this great principle of EQUALITY. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights. . . .

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[75] CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856). Three other antislavery Republicans representing constituencies converted in the Weld-Birney crusade also used all the old rhetoric and theory including due process: Rep. Granger (N. Y.) *id.* at 295-296; Reps. Edward Wade (*id.* at 1076-1081) and Philemon Bliss (*id.* at 553-557), both Ohioans and among Weld's early converts. See also the speech of Rep. Schuyler Colfax (Ind.), *id.* at 644.

"It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life." [76]

III. On January 25, 1858, attacking "The Lecompton Conspiracy"—the proposed pro-slave constitution of Kansas declaring that only "All *freemen*, when they form a compact, are equal in rights,"—and absolutely barring free Negroes from the state, Bingham declared:

"The [Federal] Constitution . . . declares upon its face that no person, whether white or black, shall be deprived of life, liberty, or property, but by due process of law; and that it was ordained by the people to establish justice! . . . [By sanctioning these provisions] we are asked to say, that the self-evident truth of the Declaration, 'that ALL MEN ARE CREATED EQUAL' is a self-evident lie. . . . We are to say . . . to certain human beings in the Territory of Kansas, though you were born in this Territory, and born of free parents, though you are human beings, and no chattel, yet you are not free to live here . . .; you must be disseized of your freehold liberties and privileges, without the judgment of your peers and without the protection of law. Though born here, you shall not, under any circumstances, be permitted to live here." [77]

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[76] CONG. GLOBE, 34th Cong., 3rd Sess. app. 135-140 (1857).

[77] CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858).

IV. On February 11, 1859, Bingham attacked the admission of Oregon because its constitution forbade immigration of free Negroes and contained other discriminations against them:

> "[T]his constitution . . . is repugnant to the Federal Constitution, and violative of the *rights of citizens of the United States*. . . .
>
> "Who *are citizens of the United States?* They are those, and those only, who owe allegiance to the Government of the United States; not the base allegiance imposed upon the Saxon by the Conqueror . . .; but the allegiance which requires the citizen not only to obey, but to support and defend, if need be with his life, the Constitution of his country. All free persons born and domiciled within the jurisdiction of the United States; all aliens by act of naturalization, under the laws of the United States."

"The people of the several States", who according to the Constitution are to choose the representatives in Congress, and to whom political powers were reserved by the Tenth Amendment, were to Bingham "the same community, or body politic, called by the Preamble . . . 'the people of the United States' ". Moreover, certain "distinctive political rights"—for example the right to choose representatives and officers of the United States, to hold such offices, etc.—were conferred only on "citizens of the United States."

> ". . . I invite attention to the significant fact that natural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this Constitution guaranteed by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those *sacred rights* which *are* as *universal and indestructible* as the human race, that 'no person shall be deprived of life, liberty, or property, but by due process of law, nor shall private property be taken without just com-

pensation.' And this guarantee *applies* to all citizens within the United States."

Against infringement of "these wise and beneficent guarantees of political rights to the citizens of the United States as such, and of natural rights to all persons, whether citizens or strangers," stood the supremacy clause.

"There, sir, is the limitation upon State sovereignty—simple, clear, and strong. No State may *rightfully*, by Constitution or statute law, impair any of these guarantied rights, either political or natural. They may not *rightfully or lawfully* declare that the strong citizens may deprive the weak citizens of their rights, natural or political. . . .

". . . This provision [excluding free Negroes and mulattoes] seems to me . . . injustice and oppression incarnate. This provision, sir, excludes from the State of Oregon eight hundred thousand of the native-born citizens of the other States, who are, therefore, *citizens of the United States.* I grant you that a State may restrict the exercise of the elective franchise to certain classes of citizens of the United States, to the exclusion of others; but I deny that any State may exclude a law abiding citizen of the United States from coming within its territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the 'privileges and immunities' of *a citizen of the United States.* What says the Constitution:

" 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Art. 4, Section 2.'

"Here is no qualification. . . . The citizens of each State, all the citizens of each State, *being citizens of the United States,* shall be entitled to 'all privileges and immunities of citizens of the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State

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authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States. *There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the* United States . . .' that it guaranties. . . .

". . . [S]ir, I maintain that the persons thus excluded from the State by this section of the Oregon Constitution, are citizens by birth of the several States, and therefore *are citizens of the United States,* and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which *are* the rights of life and liberty and property, and their due protection in the enjoyment thereof by law; . . . .

"Who, sir, are citizens of the United States? First, all free persons born and domiciled within the United States—not all free white persons, but all free persons. You will search in vain, in the Constitution of the United States, for that word *white;* it is not there. You will look in vain for it in that first form of national Government—the Articles of Confederation; it is not there. The omission of this word—this phrase of caste—from our national charter, was not accidental, but intentional. . . .

". . . This Government rests upon the absolute equality of natural rights amongst men. . . .

". . . Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for crime; nor of his property, against his consent and without due compensation? . . .

"*The equality of all* to the right to live; *to the right to know;* to argue and to utter, according to conscience; to work and enjoy the product of their toil, is the rock on which that Constitution rests— . . . . The charm of that Constitution lies in the great democratic idea which it embodies, that *all men,*

> *before the law, are equal in respect of those rights of person which God gives* and *no man or State may rightfully take away*, except as a forfeiture for crime. Before your Constitution, sir, *as it is*, as I trust it ever will be, all men are sacred, whether white or black. . . ."[78]

Several points must here be emphasized. It will be noted that Bingham disavows the color line as a basis for citizenship of the United States; that he regards Milton's rights of communication and conscience, including the *right to know*, to *education*, as one of the great fundamental natural "rights of person which God gives and no man or *state* may *rightfully* take away," and which hence are "embodied" also within, and secured by, "the great democratic idea that all men before the law are equal." In short, the concept and guarantee of the equal protection of the laws is already "embodied" in the Federal Constitution as of 1859; this same concept, moreover, embraces "*the equality of all . . . to the right to know*"; and above all, there is no color line in the Constitution, even of 1859.

Conclusions

From this consideration of the historical background against which the Fourteenth Amendment was written, submitted by Congress, and ratified by the requisite number of states, these important facts develop:

1. To the opponents of slavery, equality was an absolute, not a relative, concept which comprehended that no legal recognition be given to racial distinctions of any kind. Their theories were formulated with reference to the free Negro as well as to slavery—that great reservoir of prejudice and evil that fed the whole system of racial distinctions and caste. The notion that any state could

[78] CONG. GLOBE, 35th Cong., 2nd Sess. 981-985 (1859) (emphasis added throughout).

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impose such distinctions was totally incompatible with antislavery doctrine.

2. These proponents of absolute equalitarianism emerged victorious in the Civil War and controlled the Congress that wrote the Fourteenth Amendment. Ten of the fifteen members of the Joint Committee on Reconstruction were men who had antislavery backgrounds.

3. The phrases—"privileges and immunities," "equal protection," and "due process"—that were to appear in the Amendment had come to have specific significance to opponents of slavery. Proponents of slavery, even as they disagreed, knew and understood what that significance was. Members of the Congress that formulated and submitted the Amendment shared that knowledge and understanding. When they translated the antislavery concepts into constitutional provisions, they employed these by now traditional phrases that had become freighted with equalitarian meaning in its widest sense.

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Preliminary Statement

On May 17, 1954, this Court disposed of the basic constitutional question presented in these cases by deciding that racial segregation in public education is unconstitutional. The Court said, however, that the formulation of decrees was made difficult "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions . . . ." The cases were restored to the docket, and the parties were requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument last Term.

Questions Involved

Questions 4 and 5, left undecided and now the subject of discussion in this brief, follow:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

   (*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

   (*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which question 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

   (*a*) should this Court formulate detailed decrees in these cases;

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(*b*) if so, what specific issues should the decrees reach;

(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Developments in These Cases Since the Last Argument

The Kansas Case

On September 3, 1953, the Topeka School Board adopted the following resolution:

> Be it resolved that it is the policy of the Topeka Board of Education to terminate the maintenance of segregation in the elementary schools as rapidly as is practicable.

On September 8, 1953, appellees ordered segregation terminated in two of the nineteen school districts in Topeka. In September, 1954, segregation was completely terminated in ten other school districts and partially in two.

There is now a total school enrollment of approximately 8,500 children of elementary school age attending 23 elementary schools. Of the 8,500 children enrolled, approximately 700 Negro children are in four elementary schools for Negroes. There are 123 Negro children now attending schools on a non-segregated basis pursuant to appellees' implementation of its policy of removing segregation from the public school system. The blunt truth is that

85% of the Negro children in Topeka's elementary schools are still being denied the constitutional rights for which appellants sought redress in their original action.

While Topeka has been effectuating its plan, several other cities of the first class have undertaken the abolition of segregated schools. Lawrence and Pittsburg have completely desegregated. Kansas City, Abilene, Leavenworth and Parsons have ordered partial desegregation. Wichita and Salina have revised their school regulations to permit Negro children to attend schools nearest their homes. Only Coffeeville and Fort Scott have not taken any affirmative action whatsoever.

The Delaware Case

By order of the Court of Chancery, affirmed by the Supreme Court of Delaware, the named plaintiffs were immediately admitted to the schools to which they applied. These plaintiffs and other members of the class are in their third year of uninterrupted attendance in the two Delaware schools named in the order. That attendance has been marked by no untoward incident. The order, however, did not result in elimination of separate schools for Negroes in the two school districts involved, in each of which one segregated elementary school is yet maintained by petitioners.

The State Board of Education has statutory authority to "exercise general control and supervision over the public schools of the State, including . . . the determination of the educational policies of the State and the seeking in every way to direct and develop public sentiment in support of public education." Delaware Code, Title 14, Section 121 (1953). Accordingly, the State Board of Education, on June 11, 1954, adopted a statement of "Policies Regarding Desegregation of Schools of the State" and announced "a general policy" that it "intends to carry

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out the mandates of the United States Supreme Court decision as expeditiously as possible." It further requested that "the school authorities together with interested citizen groups throughout the State should take immediate steps to hold discussions for the purpose of (1) formulating plans for desegregation in their respective districts and (2) presenting said plans to the State Board of Education for review."

On August 19, 1954, the State Board of Education requested "that *all schools,* maintaining four or more teachers, present a *tentative plan* for desegregation in their area on or before *October 1, 1954.*"

The desegregation plans of the Claymont Board of Education, whose members are petitioners here, providing for the complete termination of segregation, were approved by the State Board of Education on August 26, 1954. These plans have been partially put into operation.

No plan ending segregation in the Hockessin schools, the other Delaware area in the litigation here, has yet been formulated.

Delaware statutes provide for two types of public school districts, exclusive of the public school system in Wilmington which is practically autonomous. One type is commonly known as the State Board District. As to it, the statute provides that the "Board of School Trustees shall be the representative in the District of the State Board of Education." DELAWARE CODE, Title 14, Section 702 (1953). There are 98 such units. The other type is the Special School District, concerning which the statute provides that "There shall be a Board of Education which shall be responsible for the general administration and supervision of the free public schools and educational interests of the District." DELAWARE CODE, Title 14, Section 902 (1953). There are fifteen Special School Districts.

Desegregation in the school districts of Delaware is illustrated by the table below:

STATE BOARD DISTRICTS

	Partial Desegregation	*Complete Desegregation*	*No Desegregation*	*Total*
New Castle County ..	4	1	26	31
Kent County	0	0	24	24
Sussex County	0	0	43	43
				98

SPECIAL SCHOOL DISTRICTS

	Partial Desegregation	*Complete Desegregation*	*No Desegregation*	*Total*
New Castle County ..	3	1	1	5
Kent County	1	0	3	4
Sussex County*	0	0	6	6
				15

Wilmington, which is in New Castle County and contains 34% of the population of the State, in June desegregated all elementary and secondary schools for the 1954 summer session. It has also completely desegregated its night school sessions. Beginning in September, 1954, desegregation of all elementary schools was effectuated, with some integration of teachers.

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* Partial desegregation, that is, on the high school level, was instituted by the Milford Board of Education, in Sussex County. This action was later revoked and a test of the revocation is now pending in the Delaware courts. See Simmons v. Steiner, 108 A. 2d 173 (Del. Ct. Chanc. 1954). In that case the Vice-Chancellor found the Negro plaintiffs' rights to remain as students in Milford High School "clear and convincing" and restrained the Board of Education from excluding them. However, the Supreme Court of Delaware temporarily stayed the injunction to give that court sufficient time to examine "serious questions of law." Argument has been scheduled for December 13, 1954. • Steiner v. Simmons (Del. Sup. Ct. No. 27, 1954).

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The school districts involved in this litigation also are in New Castle County, which has 68% of the State's population. Desegregation in varying degrees has started in every major school district in this county, except one.

The State Board of Education has made specific requests to 58 of the 113 school districts in the State to submit such plans. Another six districts have stated that any kind of plan they may have would be more or less nullified by overcrowded classroom conditions. Fourteen others have indicated that they desire to await the mandate of this Court. The remaining districts have not responded to the State Board.

In summary, school districts in areas comprising more than 50% of the population of Delaware have undertaken some desegregation of the public schools. Many school districts in semi-urban and rural areas have undertaken no step. The ultimate responsibility for effectuating desegregation throughout Delaware rests with petitioners here, members of the State Board of Education.

The South Carolina Case

Since May 17, 1954, South Carolina's fifteen-man legislative "Segregation Study Committee" was reorganized and has conferred with the Governor, State education officials, other legislators and spokesmen from various civic and teacher organizations. All of their meetings have been closed to the public. The Committee also visited Louisiana and Mississippi "to observe what was being done in those states to preserve segregated schools."

On July 28, the committee issued an interim report which recommended that public schools be operated during the coming year "in keeping with previously established policy." The committee construed its assignment as being the formulation of courses of action whereby the State could continue public education "without unfortunate disruption by outside forces and influences which have no

knowledge of recent progress and no understanding of the problems of the present and future. . . ." Moreover, the report stated that the committee also recognized "the need for a system in keeping with public opinion and established traditions and living patterns."

The State Attorney General insisted that this Court should not undertake to direct further action even by the school district involved and announced that he considered the Clarendon County case "purely a local matter as far as the parties to the suit are concerned."

In Rock Hill (population 25,000 with 20% Negroes) a Catholic grade school voluntarily desegregated. Opening day enrollment was 29 white students and five Negroes. There has been no report of overt action against this development; but the parents of some of the children have been remonstrated with by neighbors and workers.[1]

A newspaper report [1a] of a public speech of E. B. McCord, one of the appellees herein, superintendent of education for Clarendon County, states in part:

> There will be no mixed schools in Clarendon County as long as there is any possible way for present leadership to prevent them.
>
> So declared L. B. McCord of Manning, Clarendon County superintendent of education, in an address before the Lions Club here Monday night.
>
> Decrying the fact that "Our churches seem to be letting their zeal run away in leading the way," he denounced de-segregation as contrary to the Scriptures and to good sense.

The Virginia Case

On May 27, 1954, the State Board of Education advised city and county school boards to continue segregation during the present school year.

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[1] Southern School News, Sept. 3, 1954, p. 12, col. 3-4.

[1a] Charleston News and Courier, August 4, 1954.

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On August 28, the Governor named a thirty-two-man, all-white legislative commission to study the problems raised by the Court's ruling and to prepare a report and recommendations to the legislature and to him. The Governor then announced:

> . . . I am inviting the commission to ascertain, through public hearings and such other means as appear appropriate, the wishes of the people of Virginia; to give careful study to plans or legislation or both, that should be considered for adoption in Virginia after the final decree of the Court is entered, and to offer such other recommendations as it may deem proper as a result of the decision of the Supreme Court affecting the public schools.[2]

At its first meeting the commission adopted a rule that:

> All meetings of the commission shall be executive and its deliberations confidential, except when the meeting consists of a public hearing or it is otherwise expressly decided by the commission.[3]

By October, the local school boards or boards of supervisors of approximately 25 of the state's 98 counties had adopted and forwarded to the Governor resolutions urging the continuation of segregated schools.

In May, 1954, the Richmond Diocese of the Roman Catholic Church, which includes all but 6 of Virginia's counties, announced that during the Fall of 1954, Negroes would for the first time be admitted to previously all-white Catholic parochial schools where there was no separate parochial school for Negroes. Approximately 40 Negro pupils of a total of 3,527 are enrolled in four high and six

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[2] Southern School News, Sept. 3, 1954, p. 13, col. 5.

[3] Southern School News, Oct. 1, 1954, p. 14, col. 2-3.

elementary parochial schools formerly attended only by white pupils. The Superintendent of the Richmond Diocese states that integration in these schools "has worked out magnificiently, without a ripple of discontent, ..."[4]

ARGUMENT

I.

Answering Question 4: Only a Decree Requiring Desegregation as Quickly as Prerequisite Administrative and Mechanical Procedures Can Be Completed Will Discharge Judicial Responsibility for the Vindication of the Constitutional Rights of Which Appellants Are Being Deprived.

In the normal course of judicial procedure, this Court's decision that racial segregation in public education is unconstitutional would be effectuated by decrees forthwith enjoining the continuation of that segregation. Indeed, in *Sipuel* v. *Board of Regents,* 332 U. S. 631, when effort was made to secure postponement of the enforcement of similar rights, this Court not only refused to delay action but accelerated the granting of relief by ordering its mandate to issue forthwith.

In practical effect, such disposition of this litigation would require immediate initiation of the administrative procedures prerequisite to desegregation, to be followed by the admission of the complaining children and others similarly situated to unsegregated schools at the beginning of the next academic term. This means that appellees will have had from May 17, 1954, to September, 1955, to complete whatever adjustments may be necessary.

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[4] *Id.* at p. 14, col. 5.

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If appellees desire any postponement of relief beyond that date, the affirmative burden must be on them to state explicitly what they propose and to establish that the requested postponement has judicially cognizable advantages greater than those inherent in the prompt vindication of appellants' adjudicated constitutional rights. Moreover, when appellees seek to postpone the enjoyment of rights which are personal and present, *Sweatt* v. *Painter*, 339 U. S. 629; *Sipuel* v. *Board of Regents*, 332 U. S. 631, that burden is particularly heavy. When the rights of school children are involved the burden is even greater. Each day relief is postponed is to the appellants * a day of serious and irreparable injury; for this Court has announced that segregation of Negroes in the public schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ." And, time is of the essence because the period of public school attendance is short.

A. Aggrieved Parties Showing Denial of Constitutional Rights in Analogous Situations Have Received Immediate Relief Despite Arguments For Delay More Persuasive Than Any Available Here.

Where a substantial constitutional right would be impaired by delay, this Court has refused to postpone injunctive relief even in the face of the gravest of public considerations suggested as justification therefor. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, this Court upheld the issuance of preliminary injunctions restraining the Government's continued possession of steel mills seized under Presidential order intended to avoid a work stoppage that would imperil the national defense during the Korean conflict. The Government argued that even though the seizure might be unconstitutional, the

* As used in this Brief, "appellants" include the respondents in No. 5.

public interest in uninterrupted production of essential war materials was superior to the owners' rights to the immediate return of their properties. It is significant that in the seven opinions filed no Justice saw any merit in this position. If equity could not appropriately exercise its broad discretion to withhold the immediate grant of relief in the *Youngstown* case, such a postponement must certainly be inappropriate in these cases where no comparable overriding consideration can be suggested.

Similarly in Ex parte *Endo,* 323 U. S. 283, this Court rejected the Government's argument that hardship and disorder resulting from racial prejudice could justify delay in releasing the petitioner. There, the argument made by the Government to justify other than immediate relief was summarized in the Court's opinion as follows (pp. 296-297):

> It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the Federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations

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> necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

In a unanimous decision, with the Court's opinion by Mr. Justice Douglas and two concurring opinions, the Court held that the petitioner must be given her unconditional liberty because the detention was not permissible by either statutory or administrative authorization. Viewing the petitioner's right as being in that "sensitive area of rights specifically guaranteed by the Constitution" (p. 299), the Court rejected the Government's contention that a continuation of its unlawful course of conduct was necessary to avoid the harmful consequences which otherwise would follow.

It is true that in the *Endo* case the contention rejected was that an executive order (which on its face did not authorize the petitioner's detention) ought to be extended by "construction" so as to entitle the Relocation Authority to delay the release of the petitioner until it felt that social conditions made it convenient and prudent to do so. In this case, the suggestion is that this Court, in the exercise of its equity powers, ought to withhold appellants' constitutional rights on closely similar grounds. But this is not a decisive distinction. If, as the *Endo* case held, the enjoyment of a constitutional right may not be deferred by a process of forced construction on the basis of factors closely similar to the ones at work in the instant case, then certainly this Court ought not to find in its equitable discretion a mandate or empowerment to obtain the same result.

In the *Endo* case, the national interest in time of war was present. In these cases, no such interest exists. Thus, there is even less basis for delaying the immediate enjoyment of appellants' rights.

Counsel have discovered no case wherein this Court has found a violation of a present constitutional right but has postponed relief on the representation by governmental officials that local mores and customs justify delay which might produce a more orderly transition.

It would be paradoxical indeed if, in the instant cases, it were decided for the first time that constitutional rights may be postponed because of anticipation of difficulties arising out of local feelings. These cases are brought to vindicate rights which, as a matter of common knowledge and legal experience, need, above all others, protection against local attitudes and patterns of behavior.[5] They are brought, specifically, to uphold rights under the Fourteenth Amendment which are not to be qualified, substantively or remedially, by reference to local mores. On the contrary, the Fourteenth Amendment, on its face and as a matter of history, was designed for the very purpose of affording protection against local mores and customs, and Congress has implemented that design by providing redress against aggression under color of state laws, customs and usages. 28 U. S. C. § 1343; 42 U. S. C. § 1983.

Surely, appellants' rights are not to be enforced at a pace geared down to the very customs which the Fourteenth Amendment and implementing federal laws were designed to combat.

Cases in which delays in enforcement of rights have been granted involve totally dissimilar considerations. Such cases generally deal with the abatement of nuisances, e.g., *New Jersey* v. *New York*, 283 U. S. 473; *Wisconsin* v. *Illinois*, 278 U. S. 367; *Arizona Copper Co.* v. *Gillespie*, 230 U. S. 46; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230; or with violations of the anti-trust laws, e.g., *Schine*

[5] In the instant cases, dark and uncertain prophecies as to anticipated community reactions to school desegregation are speculative at best.

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Chain Theaters v. *United States,* 334 U. S. 110; *United States* v. *National Lead Co.,* 332 U. S. 319; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1.

These cases are readily distinguishable, and are not precedents for the postponement of relief here. In the nuisance cases, the Court allowed the offending parties time to comply because the granting of immediate relief would have caused great injury to the public or to the defendants with comparatively slight benefit to the plaintiffs. In the instant cases, a continuation of the unconstitutional practice is as injurious to the welfare of our government as it is to the individual appellants.

In the anti-trust cases, delay could be granted without violence to individual rights simply because there were no individual rights on the plaintiff's side. The suits were brought by the Government and the only interest which could have been prejudiced by the delays granted is the diffuse public interest in free competition. The delays granted in anti-trust cases rarely, if ever, permit the continuance of active wrongful conduct, but merely give time for dissolution and dissipation of the effects of past misconduct. Obviously, these cases have nothing to do with ours.

It should be remembered that the rights involved in these cases are not only of importance to appellants and the class they represent, but are among the most important in our society. As this Court said on May 17th:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our

> recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Neither the nuisance cases nor the anti-trust cases afford any support for delay in these cases. On the contrary, in cases more nearly analogous to the instant cases, this Court has held that the executive branch of the government could not justify the detention of wrongfully seized private property on the basis of a national economic crisis in the midst of the Korean conflict. Nor could the War Relocation Authority wrongfully detain a loyal American because of racial tension or threats of disorder. It follows that in these cases this Court should apply similar limitations to the judiciary in the exercise of its equity power when a request is made that it delay enjoyment of personal rights on grounds of alleged expediency.

B. Empirical Data Negate Unsupported Speculations That a Gradual Decree Would Bring About a More Effective Adjustment.

Obviously, we are not aware of what appellees will advance on further argument as reasons for postponing the enforcement of the rights here involved. Therefore, the only way we can discuss Question 4(b) is by conjecture in so far as reasons for postponement are concerned.

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There is no basis for the assumption that gradual as opposed to immediate desegregation is the better, smoother or more "effective" mode of transition. On the contrary, there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult; that, in fact, the problems of transition will be a good deal less complicated than might be forecast by appellees. Our submission is that this, like many wrongs, can be easiest and best undone, not by "tapering off" but by forthright action.

There is now substantial documented experience with desegregation in this country, in schools and elsewhere.[6] On the basis of this experience, it is possible to estimate with some accuracy the chances of various types of "gradual" plans for success in minimizing trouble during the period of transition.

Some plans have been tried involving a set "deadline" without the specification of intervening steps to be taken. Where such plans have been tried, the tendency seems to have been to regard the deadline as the time when action is to be initiated rather than the time at which desegregation is to be accomplished. Since there exists no body of knowledge that is even helpful in selecting an optimum time at the end of which the situation may be expected to be better, the deadline date is necessarily arbitrary and hence may be needlessly remote.[7]

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[6] See ASHMORE, THE NEGRO AND THE SCHOOLS (1954); CLARK, DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, 9 J. SOCIAL ISSUES 1-77 (1953); NEXT STEPS IN RACIAL DESEGREGATION IN EDUCATION, 23 J. NEGRO ED. 201-399 (1954).

See also REPORT BY THE PRESIDENT'S COMMITTEE ON EQUALITY OF OPPORTUNITY IN THE ARMED FORCES (1950).

[7] ASHMORE, *op. cit. supra* note 6, at 70, 71, 79, 80; CLARK, *op. cit. supra* note 6, at 36, 45.

A species of the "deadline" type of plan attempts to prepare the public, through churches, radio and other agencies, for the impending change. It is altogether conjectural how successful such attempts might be in actually effecting change in attitude. The underlying assumption—that change in attitude must precede change in action—is itself at best a highly questionable one. There is a considerable body of evidence to indicate that attitude may itself be influenced by situation [8] and that, where the situation demands that an individual act as if he were not prejudiced, he will so act, despite the continuance, at least temporarily, of the prejudice.[9] We submit that this Court can itself contribute to an effective and decisive change in attitude by insistence that the present unlawful situation be changed forthwith.

As to any sort of "deadline" plan, even assuming that community leaders make every effort to build community support for desegregation, experience shows that other forces in the community will use the time allowed to firm

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[8] CLARK, *op. cit. supra* note 6, at 69-76.

[9] KUTNER, WILKINS and YARROW, VERBAL ATTITUDES AND OVERT BEHAVIOR INVOLVING RACIAL PREJUDICE, 47 J. ABNORMAL AND SOCIAL PSYCH. 649-652 (1952); LA PIERE, ATTITUDES VS. ACTION, 13 SOCIAL FORCES 230-237 (1934); SAENGER and GILBERT, CUSTOMER REACTIONS TO THE INTEGRATION OF NEGRO SALES PERSONNEL, 4 INT. J. OPINION AND ATTITUDES RESEARCH 57-76 (1950); DEUTSCH and COLLINS, INTERRACIAL HOUSING, A PSYCHOLOGICAL STUDY OF A SOCIAL EXPERIMENT (1951); CHEIN, DEUTSCH, HYMAN and JAHODA, CONSISTENCY AND INCONSISTENCY IN INTERGROUP RELATIONS, 5 J. SOCIAL ISSUES 1-63 (1949).

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up and build opposition.[10] At least in South Carolina and Virginia, as well as in some other states affected by this decision, statements and action of governmental officials since May 17th demonstrate that they will not use the time allowed to build up community support for desegregation.[11] Church groups and others in the South who are seeking to win community acceptance for the Court's May

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[9] (cont.) ASHMORE, *op. cit. supra* note 6, at 42; New York Times, "Mixed Schools Set in 'Border' States", August 29, 1954, p. 88, col. 1-4; New York Times, "New Mexico Town Quietly Ends Pupil Segregation Despite a Cleric", August 31, 1954, p. 1, col. 3-4; ROSE, YOU CAN'T LEGISLATE AGAINST PREJUDICE—OR CAN YOU?, 9 COMMON GROUND 61-67 (1949), reprinted in RACE PREJUDICE AND DISCRIMINATION, (Rose ed. 1951); NICHOLS, BREAKTHROUGH ON THE COLOR FRONT (1954); MERTON, WEST and JAHODA, SOCIAL FICTIONS AND SOCIAL FACTS: THE DYNAMICS OF RACE RELATIONS IN HILLTOWN, COLUMBIA UNIVERSITY BUREAU OF APPLIED SOCIAL RESEARCH (mimeographed); MERTON, WEST, JAHODA and SELDEN, SOCIAL POLICY AND SOCIAL RESEARCH IN HOUSING, 7 J. SOCIAL ISSUES, 132-140 (1951); MERTON, THE SOCIAL PSYCHOLOGY OF HOUSING (1948).

South as well as North, people's actions and attitudes were changed not in advance of but after the admission of Negroes into organized baseball. See CLEMENT, RACIAL INTEGRATION IN THE FIELD OF SPORTS, 23 J. NEGRO ED. 226-228 (1954). Objections to desegregation have generally been found to be greater before than after its accomplishment. CLARK, *op. cit. supra* note 6, *passim*; CONFERENCE REPORT, ARIZONA COUNCIL FOR CIVIC UNITY CONFERENCE ON SCHOOL SEGREGATION (Phoenix, Arizona, June 2, 1951).

[10] CLARK, *op. cit. supra* note 6, at 43, 44; BROGAN, THE EMERSON SCHOOL—COMMUNITY PROBLEM, GARY, INDIANA, BUREAU OF INTERCULTURAL EDUCATION REPORT (October 1947, mimeographed); TIPTON, COMMUNITY IN CRISIS 15-76 (1953).

[11] For the latest example of this, see New York Times, "7 of South's Governors Warn of 'Dissensions' in Curb on Bias—Avow Right of States to Control Public School Procedures—Six at Meeting Refrain from Signing Statement", November 14, 1954, p. 58, col. 4-5.

17th decision cannot be effective without the support of a forthwith decree from this Court.

Besides the "deadline" plans, various "piecemeal" schemes have been suggested and tried. These seem to be inspired by the assumption that it is always easier and better to do something slowly and a little at a time than to do it all at once. As might be expected, it has appeared that the resistance of some people affected by such schemes is increased since they feel arbitrarily selected as experimental animals. Other members in the community observe this reaction and in turn their anxieties are sharpened.[12]

Piecemeal desegregation of schools, on a class-by-class basis, tends to arouse feelings of the same kind [13] and these feelings are heightened by the intra-familial and intra-school differences thus created.[14] It would be hard to imagine any means better calculated to increase tension in regard to desegregation than to so arrange matters so that some children in a family were attending segregated and others unsegregated classes. Hardly more promising of harmony is the prospect of a school which is segregated in the upper parts and mixed in the lower.

When one looks at various "gradual" processes, the fact is that there is no convincing evidence which supports the theory that "gradual" desegregation is more "effec-

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[12] TIPTON, *op. cit. supra* note 11, at 42, 47, 57, 71; CLARK, SOME PRINCIPLES RELATED TO THE PROBLEM OF DESEGREGATION, 23 J. NEGRO ED. 343 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 300 (1954).

[13] ASHMORE, *op. cit. supra* note 6, at 79, 80; CLARK, DESEGREGATION: AN APPRAISAL OF THE EVIDENCE, *op. cit. supra* note 6, at 36, 45.

[14] CLARK, EFFECTS OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENTS, MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (mimeographed, 1950).

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tive".[15] On the contrary, there is considerable evidence that the forthright way is a most effective way.[16]

The progress of desegregation in the Topeka schools is an example of gradualism based upon conjecture, fears and speculation regarding community opposition which might delay completion of desegregation forever. The desegregation plan adopted by the Topeka school authorities called for school desegregation first in the better residential areas of the city and desegregation followed in those areas where the smallest number of Negro children lived. There is little excuse for the school board's not having already completed desegregation. Apparently either the fact that the school board, in order to complete the transition, may have to utilize one or more of the former schools for Negroes and

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[15] ASHMORE, *op. cit. supra* note 6, at 80:

> Proponents of the gradual approach argue that it minimizes public resistance to integration. But some school officials who have experienced it believe the reverse is true. A markedly gradual program, they contend, particularly one which involves the continued maintenance of some separate schools, invites opposition and allows time for it to be organized. Whatever the merit of this argument, the case histories clearly indicate a tendency for local political pressure to be applied by both sides when the question of integration is raised, and when policies remain unsettled for a protracted period the pressures mount. One school board member in Arizona privately expressed the wish that the state had gone all the way and made integration mandatory instead of optional—thus giving the board something to point to as justification for its action.

[16] CLARK, *op. cit. supra* note 6, at 46, 47; WRIGHT, RACIAL INTEGRATION IN THE PUBLIC SCHOOLS OF NEW JERSEY, 23 J. NEGRO ED. 283 (1954); KNOX, RACIAL INTEGRATION IN THE SCHOOLS OF ARIZONA, NEW MEXICO, AND KANSAS, 23 J. NEGRO ED. 291, 293 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296, 300-302 (1954).

assign white children to them or the fact that it must now reassign some 700 Negro children to approximately seven former all-white schools, seems to present difficulties to appellees. One must remember that in Topeka there has been complete integration above the sixth grade for many years. The schools already desegregated have reported no difficulties. There can hardly be any basic resistance to nonsegregated schools in the habits or customs of the city's populace. The elimination of the remnants of segregation throughout the city's school system should be a simple matter.

No special public preparations involving teachers, parents, students or the general public were made, nor were they necessary in advance of either the first or second step in the implementation of the Board's decision to desegregate the school system. Indeed, the Board of Education adopted the second step in January, 1954, and the only reports of what was involved were those published in the newspapers. Negro parents living in these territories were not notified by appellees regarding the change, but transferred their children to the schools in question on the basis of information provided in the newspapers. As far as the teachers in those schools were concerned, they were merely informed in the Spring of 1954 that their particular schools would be integrated in September. Thus, delay here cannot be based upon need for public orientation.

It should be pointed out that of the 23 public elementary schools, there exists potential space for some additional 83 classrooms of which 16 such potential classrooms are in the four schools to which the majority of the Negroes are now assigned. No claim can be made that the school system is overcrowded and unable to absorb the Negro and white children under a reorganization plan. There is no discernable reason why all of the elementary schools of Topeka have not been desegregated.

As is pointed out in the Brief for Petitioners on Further Reargument in *Bolling* v. *Sharpe* (No. 4, October

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Term, 1954) the gradualist approach adopted by the Board of Education in Washington, D. C., produced confusion, hardship and unnecessary delay. Indeed, the operation of the "Corning Plan" has produced manifold problems in school administration which could have been avoided if the transition had been immediate. The argument that delay is more sound educationally has been shown to be without basis in fact in the operation of the District of Columbia plan—so conclusively, in fact, that the time schedule has been accelerated. The experience in the District argues for immediate action.

To suggest that this Court may properly mold its relief so as to serve whatever theories as to educational policy may be in vogue is to confuse its function with that of a school board, and to confuse the clear-cut constitutional issue in these cases with the situation in which a school board might find itself if it were unbound by constitutional requirements and were addressing itself to the policy problem of effecting desegregation in what seems to it the most desirable way. But even if a judgment as to the abstract desirability of gradualism could be supported by evidence, it is outside the province of this Court to balance the merely desirable against the adjudicated constitutional rights of appellants. The Constitution has prescribed the educational policy applicable to the issue tendered in this case, and this Court has no power, under the guise of a "gradual" decree, to select another.

We submit that there are various necessary administrative factors which would make "immediate" relief as of tomorrow physically impossible. These include such factors as need for redistricting and the redistribution of teachers and pupils. Under the circumstances of this case, the Court's mandate will probably come down in the middle or near the close of the 1954 school term, and the decrees of the courts of first instance could not be put into effect until September, 1955. Appellees would, therefore, have had from May 17, 1954, to September, 1955, to make necessary administrative changes.

II.

Answering Question 5: If This Court Should Decide to Permit an "Effective Gradual Adjustment" from Segregated School Systems to Systems Not Based on Color Distinctions, It Should Not Formulate Detailed Decrees but Should Remand These Cases to the Courts of First Instance with Specific Directions to Complete Desegregation by a Day Certain.

In answering Question 5, we are required to assume that this Court "will exercise its equity powers to permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions" thereby refusing to hold that appellants were entitled to decrees providing that, "within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice." While we feel most strongly that this Court will not subordinate appellants' constitutional rights to immediate relief to any plan for an "effective gradual adjustment," we must nevertheless assume the contrary for the purpose of answering Question 5.[17]

Question 5 assumes that there should be an "effective gradual adjustment" to a system of desegregated educa-

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[17] "5. On the assumption on which question 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

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tion. We have certain difficulties with this formulation. We have already demonstrated that there is no reason to believe that any form of gradualism will be more effective than forthwith compliance. If, however, this Court determines upon a gradual decree, we then urge that, as a minimum, certain safeguards must be embodied in that "gradual" decree in order to render it as nearly "effective" as any decree can be which continues the injury being suffered by these appellants as a consequence of the unconstitutional practice here complained of.

Appellants assume that "the great variety of local conditions", to which the Court referred in its May 17th opinion, embraces only such educationally relevant factors as variations in administrative organization, physical facilities, school population and pupil redistribution, and does not include such judicially non-cognizable factors as need for community preparation, Ex Parte *Endo,* 323 U. S. 283, and threats of racial hostility and violence, *Buchanan* v. *Warley,* 245 U. S. 60; *Monk* v. *City of Birmingham,* 185 F. 2d 859 (C. A. 5th 1950), *cert. denied,* 341 U. S. 940.

Further we assume that the word "effective" might be so construed that a plan contemplating desegregation after the lapse of many years could be called an "effective gradual adjustment." For, whenever the change is in fact made, it results in a desegregated system. We do not understand that this type of adjustment would be "effective" within the meaning of Question 5 nor do we undertake to answer it in this framework. Rather, we assume that under any circumstances, the question encompasses due consideration for the constitutional rights of each of these appellants and those presently in the class they represent to be free from enforced racial segregation in public education.

Ordinarily, the problem—the elimination of race as the criterion of admission to public schools—by its very nature would require only general dispositive directions by this Court. Even if the Court decides that the adjustment to

nonsegregated systems is to be gradual, no elaborate decree structure is essential at this stage of the proceedings. In neither event would appellants now ask this Court, or any other court, to direct or supervise the details of operation of the local school systems. In either event, we would seek effective provisions assuring their operation—forthwith in the one instance and eventually in the other—in conformity with the Constitution.

These considerations suggest appellants' answers to Question 5. Briefly stated, this Court should not formulate detailed decrees in these cases. It should not appoint a special master to hear evidence with a view to recommending specific terms for such decrees. It should remand these cases to the courts of first instance with directions to frame decrees incorporating certain provisions, hereinafter discussed, that appellants believe are calculated to make them as nearly effective as any gradual desegregation decree can be. The courts of first instance need only follow normal procedures in arriving at such additional provisions for such decrees as circumstances may warrant.

Declaratory Provisions

This Court should reiterate in the clearest possible language that segregation in public education is a denial of the equal protection of the laws. It should order that the decrees include a recital that constitutional and statutory provisions, and administrative and judicial pronouncements, requiring or sanctioning segregated education afford no basis for the continued maintenance of segregation in public schools.

The important legal consequence of such declaratory provisions would be to obviate the real or imagined dilemma of some school officials who contend that, pending the issuance of injunctions against the continuation of segregated education in their own systems, they are entitled or even obliged to carry out state policies the invalidity of

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which this Court has already declared. The dilemma is well illustrated by the case of *Steiner* v. *Simmons* (Del. Sup. Ct. No. 27, 1954), pending in the Delaware Supreme Court, wherein plaintiffs are suing for readmission to Milford's high school from which, on September 30, 1954, they were expelled because they are Negroes. The Vice Chancellor granted the requested mandatory injunction, finding that plaintiffs had a constitutional right to readmission to school. The Delaware Supreme Court, however, granted a stay pending determination of the appeal on the basis of its preliminary conclusion that "there are serious questions of law touching the existence of that legal right." [18]

This Court's decision of May 17th put state authorities on notice that thereafter they could not with impunity

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[18] Cf. Burr v. Bd. of School Commrs. of Baltimore, Superior Court of Baltimore City, Oct. 5, 1954 (unreported), in which case Judge James K. Cullen stated in part:

> In the instant case this Court is asked to issue a writ of mandamus requiring these defendants, the School Board, to continue with its policy of segregation. This Court finds the Board of School Commissioners have exercised their discretion legally and in accordance with a final and enforceable holding and decision of the Supreme Court. Those cases were undoubtedly argued before the Supreme Court fully, and the views of every division of thought of our citizenry was undoubtedly presented to the Court; but the Court has spoken. Whether the individual agrees or disagrees with the finding, he is bound thereby so long as it remains the law of the land. The Court realizes the change and the difficulty some may have accepting the reality or the inevitable from the standpoint of enforcement. We live in a country where our rights and liberties have been protected under a system of laws which has withstood the test of time. We must allow ourselves to be governed by those laws, realizing there are many differences among our people. Respect for the law is of paramount importance. The law must be accepted. We must all be forced to abide by it. We can gain nothing by demonstrations of violence except sorrow and possible destructions.

abrogate the constitutional rights of American children not to be segregated in public schools on the basis of race. This type of recital in the decree should foreclose further misunderstanding, real or pretended, of the principle of law that continuation of racial segregation in public education is in direct violation of the Constitution—state constitutions, statutes, custom or usage requiring such segregation to the contrary notwithstanding.

Time Provisions

We do not know what considerations may be presented by appellees to warrant gradualism. But whatever these considerations may be, appellants submit that any school plan embracing gradualism must safeguard against the gradual adjustment becoming an interminable one. Therefore, appellants respectfully urge that this Court's opinion and mandate also contain specific directions that any decree to be entered by a district court shall specify (1) that the process of desegregation be commenced immediately, (2) that appellees be required to file periodic reports to the courts of first instance, and (3) an outer time limit by which desegregation must be completed.

Even cases involving gradual decrees have required some amount of immediate compliance by the party under an obligation to remedy his wrongs to the extent physically possible.[19] In *Wisconsin* v. *Illinois,* 281 U. S. 179, the Court said:

> It already has been decided that the defendants are doing a wrong to the complainants, and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to

[19] See Wisconsin v. Illinois, 281 U. S. 179; Arizona Copper Co. v. Gillespie, 230 U. S. 46; Georgia v. Tennessee Copper Co., 206 U. S. 230; Westinghouse Air Brake Co. v. Great Northern Ry. Co., 86 Fed. 132 (C. C. S. D. N. Y. 1898).

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> dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created. If its Constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state (p. 197).
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> 1. On and after July 1, 1930,[20] the defendants, the state of Illinois and the sanitary district of Chicago are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago drainage canal and its auxiliary channels or otherwise in excess of an annual average of 6,500 c.f.s. in addition to domestic pumpage (p. 201).

Considering the normal time consumed before the issuance of the mandate of this Court and the time for submission and preparation of decrees by the courts of first instance, decrees in these cases will not issue until after February, 1955—after the normal mid-term in most school systems. Thus, the school boards would have until September, 1955—sixteen months after the May 17th opinions—to change to a system not based on color distinctions. This time could very well be considered as necessarily incidental to any decision by this Court requiring "forthwith" decrees by the courts of first instance.

Whatever the reasons for gradualism, there is no reason to believe that the process of transition would be more effective if further extended. Certainly, to indulge school authorities until September 1, 1956, to achieve desegregation would be generous in the extreme. Therefore, we submit that if the Court decides to grant further time, then the Court should direct that all decrees specify September, 1956, as the outside date by which desegregation must be accomplished. This would afford more than a year, in excess of the time necessary for administrative changes,

[20] This opinion was rendered April 30, 1930.

to review and modify decisions in the light of lessons learned as these decisions are put into effect.

We submit that the decrees should contain no provision for extension of the fixed limit, whatever date may be fixed. Such a provision would be merely an invitation to procrastinate.[21]

We further urge this Court to make it plain that the time for completion of the desegregation program will not depend upon the success or failure of interim activities. The decrees in the instant cases should accordingly provide that in the event the school authorities should for any reason fail to comply with the time limitation of the decree, Negro children should then be immediately admitted to the schools to which they apply.[22]

All states requiring segregated public education were by the May 17th decision of this Court put upon notice that segregated systems of public education are unconstitutional. A decision granting appellees time for gradual adjustment should be so framed that no other state maintaining such a system is lulled into a period of inaction and induced to merely await suit on the assumption that it will then be granted the same period of time after such suit is instituted.

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[21] ASHMORE, THE NEGRO AND THE SCHOOLS 70-71 (1954); CULVER, RACIAL DESEGREGATION IN EDUCATION IN INDIANA, 23 J. NEGRO ED. 296-302 (1954).

[22] See United States v. American Tobacco Co., 221 U. S. 106, where this Court directed the allowance of a period of six months, with leave to grant an additional sixty days if necessary, for activities dissolving an illegal monopoly and recreating out of its components a new situation in harmony with the law, but further directed that if within this period a legally harmonious condition was not brought about, the lower court should give effect to the requirements of the Sherman Act.

BLEED THROUGH

Conclusion

Much of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all. In consideration of the type of relief to be granted in any case, due consideration must be given to the character of the right to be protected. Appellants here seek effective protection for adjudicated constitutional rights which are personal and present. Consideration of a plea for delay in enforcement of such rights must be preceded by a showing of clear legal precedent therefor and some public necessity of a gravity never as yet demonstrated.

There are no applicable legal precedents justifying a plea for delay. As a matter of fact, relevant legal precedents preclude a valid plea for delay. And, an analysis of the non-legal materials relevant to the issue whether or not relief should be delayed in these cases shows that the process of gradual desegregation is at best no more effective than immediate desegregation.

WHEREFORE, we respectfully submit that this Court should direct the issuance of decrees in each of these cases requiring desegregation by no later than September of 1955.

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 1

OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants,*

VS.

R. W. ELLIOTT, ET AL., *Appellees.*

No. 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., *Appellees.*

No. 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

ETHEL LOUISE BELTON, ET AL., *Respondents.*

APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

REPLY BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

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—o—

REPLY BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT

The briefs filed on this reargument by appellees and *amici curiae* (with the exception of those in Nos. 1 and 5, and the brief filed on behalf of the Attorney General of The United States) are similar in substance despite some differences in details. Our reply to them can, therefore, be made in one joint brief.

ARGUMENT

Briefs Filed by Appellees and State Attorneys General Do Not Offer Any Affirmative Plan for Desegregation but Are Merely Restatements of Arguments in Favor of Interminable Continuation of Racial Segregation.

In our Brief on Further Reargument, we stated: [1]

> Much of the opposition to forthwith desegregation does not truly rest on any theory that it is better to accomplish it gradually. In considerable part, if indeed not in the main, such opposition stems from a desire that desegregation not be undertaken at all.

Similarly, the briefs filed at this time, both by appellees and state attorneys general seems to be directed against ending racial segregation in our time, rather than toward desegregation within a reasonable time. First, these briefs do not in fact offer any affirmative plan or elements of such a plan for accomplishing the task of desegregation. Secondly, and equally significant, the main reasons now proffered in support of indefinite delay are identical with arguments previously advanced for denying relief on the merits.

This Court has decided that racial segregation is unconstitutional—that it is a practice, moreover, which has

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[1] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, 1954 Term, p. 31.

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such effects on its victims that it can only be described as abhorrent. Yet, in answering questions 4 and 5, propounded by the Court, the States do not even get around to what must, in the light of that decision, be the main problem underlying those questions: How can this practice be most expeditiously done away with? Reasons for delay, which would seem to occupy at best a subsidiary position, are the sole preoccupation of state counsel, and the affirmative problem gets virtually no attention.[2]

The brief of the Attorney General of Florida does contain a Point entitled "Specific Suggestions to the Court in Formulating a Decree."[3] But, the effect of the suggested plan[4] would be to subject the constitutional rights of Negro children to denial on the basis of such a variety of intangible factors that the plan itself cannot be seriously regarded as one for implementing the May 17th decision.

Each individual Negro child must, under the Florida plan, petition a court of the first instance for admission to an unsegregated school, after exhausting his administrative remedies. It is up to him to establish to that court's satisfaction that there exists no "reasonable grounds" for delay in his admission. "Reasonable grounds" include lack of a reasonable time to amend the state school laws, good faith efforts of the school board in promoting citizens' educational committees, administrative problems, and "evidence of . . . a strong degree of *sincere* opposition and sustained hostility" [emphasis supplied] giving the school board ground to believe that

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[2] It is true that Delaware and Kansas catalogue the progress they have made thus far in accomplishing integration. But both states plead for delay without offering any valid reasons therefor.

[3] Brief of the Attorney General of the State of Florida as *amicus curiae*, pp. 57-65. Hereinafter, citations to briefs of appellees and *amici curiae* will be abbreviated. See, e.g., fn. 5, *infra*.

[4] Set out commencing at p. 61 of the Florida Brief.

admission of the applicant would "... create emotional responses among the children which would seriously interfere with their education." In other words, the applicant's right is to be postponed until everything seems entirely propitious for granting it. It is submitted that this is not a plan for granting rights, but a plan for denying them just as long as can possibly be done without a direct overruling of the May 17th decision.

Lest there be any doubt about this, the final criterion for admission to unsegregated schooling should be quoted:[5]

> (6) Evidence that the petitioner's application was made in good faith and not for *capricious* reasons. Such evidence should demonstrate:
>
> (a) That the petitioner personally feels that he would be handicapped in his education, either because of lack of school plant facilities or psychological or sociological reasons if his application for admission is denied.
>
> (b) That the petitioner is not motivated in his application solely by a desire for the advancement of a racial group on economic, social or political grounds, as distinguished from his personal legal right to equality in public school education as guaranteed by the 14th Amendment. This distinction should be carefully drawn [emphasis supplied].

Where the devisers of a plan are disposed to characterize opposition to desegregation as "sincere" and reasons for desiring admission as "capricious", we cannot be surprised at a rather peculiar procedural consequence of the dispensation they set up. The "petitioner", if he is to make timely application, exhaust his administrative remedies, and allow

[5] Florida Brief, p. 63.

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time for appeal, will have to draw this fine distinction at about four years of age, if he is to start the first grade in a desegregated school. Out of the mouths of babes and sucklings will have to come a wisdom in self-analysis which surely has never in the history of this country been required of any applicant for relief from the denial of a personal constitutional right. The Florida Brief is no real exception to the statement that none of the States has offered any plan for actually implementing the decision of this Court.

The quality and thrust of the reasons now advanced for delay may best be evaluated by noting that (except for those that deal with purely administrative matters obviously requiring little time for solution) they are arguments which were advanced at an earlier stage in this litigation as grounds for denying relief on the merits, and now, under slightly altered guise, they walk again after their suposed laying to rest on May 17. Thus, the impossibility of procuring community acceptance of desegregation, urged earlier as a ground for decision on the merits,[6] now turns up as an argument for indefinite postponement [7] with no convincing reasons given for supposing that community attitudes will change within the segregated pattern.

The prediction that white parents will withdraw their children from public schools is repeated,[8] with the implied hope, no doubt, that at some remote date they will have attained a state of mind that will result in their leaving their children in school. "Racial tensions" are again

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[6] South Carolina Brief (1952) p. 27. Cf. *Id.* at p. 35; Virginia Brief (1952) pp. 24-25.

[7] Virginia Brief (1954) p. 13; Delaware Brief (1954) pp. 16, 25; Florida Brief (1954) p. 201 ff.; Texas Brief (1954) pp. 16-17; North Carolina Brief (1954) pp. 7-8.

[8] *Compare* Florida Brief (1954) pp. 26-27 and North Carolina Brief (1954) pp. 36-37 *with* Virginia Brief (1952) p. 30.

predicted.[9] Negro teachers may lose their jobs.[10] Violence is warned of.[11] The people and the legislature will abolish the school system or decline to appropriate money for its support.[12]

All these are serious matters, but we have elsewhere shown solid reason for believing that those dire predictions, one and all, are unreliable. There is no reason for supposing that delay can minimize whatever unpleasant consequences might follow from the eradication of this great evil. Here, however, the point is that, where these arguments are resuscitated as grounds for delay, the inference is that their sponsors favor delay as long as present conditions prevail—that, in other words, they now want to delay desegregation just as long as the conditions exist which they formerly regarded as sufficient grounds for imposing segregation as a matter of legal right. The distinction is too fine to make such practical difference, either to the Negro child who is growing up or to this Court.

That it is opposition to the principle of the May 17th decision that animates these briefs is made clear by noting that the equality of schools, *Plessy* style, is now being urged as a ground for delay.[13] Nothing could make it

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[9] *Compare* Florida Brief (1954) p. 95 *with* Virginia Brief (1952) p. 27.

[10] *Compare* Florida Brief (1954) pp. 31-32; North Carolina Brief (1954) pp. 24-25; and Texas Brief (1954) pp. 10-11, *with* Virginia Brief (1952) p. 31.

[11] *Compare* North Carolina Brief (1954) p. 37 and Florida Brief (1954) p. 25 *with* South Carolina Brief (1952) p. 27.

[12] *Compare* North Carolina Brief (1954) p. 36; Virginia Brief (1954) p. 15; and Arkansas Brief (1954) pp. 7-8 *with* South Carolina Brief (1952) p. 27.

[13] *Compare* North Carolina Brief (1954) pp. 25-35, 43; Texas Brief (1954) pp. 2-4; and Maryland Brief (1954) p. 10 *with* Virginia Brief (1952) pp. 18-19 and South Carolina Brief (1952) pp. 8-9.

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clearer, moreover, that many responsible officials, taking a realistic view, will not regard the "separate but equal" doctrine as abolished until this Court orders its abandonment in practice. Most significant here is the *amicus curiae* brief of the Attorney General of Texas which, after making a straight-out *Plessy* argument, continues with the statement: "However, if the occasion arises whereby we are compelled to abolish segregation in Texas, it should be a gradual adjustment in view of the complexities of the problem" (p. 4).

Opinion Polls Are Immaterial to the Issues Herein and Do Not Afford Any Basis to Support An Argument that a Gradual Adjustment Would Be More Effective.

Several of the briefs filed herein refer to polls of public opinion in their respective States in support of arguments to postpone desegregation indefinitely.[14] These polls appear to have been made for the purpose of sampling opinions of various groups within the State as to whether they approved of the May 17th decision and whether they thought it could be enforced immediately without friction.

The information as to racial hostility obtained from these polls is indecisive of the issues before this Court. In *Buchanan* v. *Warley*, 245 U. S. 60, 80, this Court stated:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

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[14] Texas Brief, pp. 16-17; Virginia Brief pp. 13-14; North Carolina Brief pp. 7-9; Florida Brief pp. 23-24, 105 ff; Delaware Brief p. 12.

We believe the same answer should be given to any suggestion that the enforcement of constitutional rights be deferred to a time when it will have uniform public acceptance.

Even if relevant, results of polls are often not conclusive. For example, the Florida survey polled eleven "leadership" groups. These groups give evidence of a very high degree of "willingness" to comply. Although peace officers are greatly opposed to desegregation (Table 3, p. 138), only two of the eleven groups would not positively comply, and in those cases there is a very even division (Table 4, p. 139). Overall, six of the eleven groups are not opposed to the decision (Table 3, p. 138); 84.5% of white principals and supervisors who, would be charged with the duty of implementation, would comply (Table 4, p. 139). A majority of all groups expect neither mob violence nor "serious violence" (Table 5, p. 140).

Moreover, such polls are not a valid index of how the individuals questioned will in fact act in the event of desegregation. Modern psychological research shows that, especially in the case of broad public issues, many persons simply "do not follow through even on actions which they say they personally will take in support of an opinion."[15]

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[15] BUCHANAN, KRUGMAN AND VAN WAGENEN, AN INTERNATIONAL POLICE FORCE AND PUBLIC OPINION 13 (1954). For other studies dealing with the discrepancy between verbal statements and actions, see LINK AND FREIBERG, "THE PROBLEM OF VALIDITY VS. RELIABILITY IN PUBLIC OPINION POLLS", 6 PUBLIC OPINION QUARTERLY 87-98, esp. 91-92 (1942); JENKINS AND CORBIN, "DEPENDABILITY OF PSYCHOLOGICAL BRAND BAROMETERS II, THE PROBLEM OF VALIDITY", 22 JOURNAL OF APPLIED PSYCHOLOGY 252-260 (1938); HYMAN, "DO THEY TELL THE TRUTH?", 8 PUBLIC OPINION QUARTERLY 557-559 (1944); SOCIAL SCIENCE RESEARCH COUNCIL, COMMITTEE ON ANALYSIS OF PRE-ELECTION POLLS AND FORECASTS 302-303 (1949); LA PIERE, "ATTITUDES VS. ACTIONS", 13 SOCIAL FORCES 230-237 (1934); DOOB, PUBLIC OPINION AND PROPAGANDA 151 (1948); HARTLEY AND HARTLEY, FUNDAMENTALS OF SOCIAL PSYCHOLOGY 657 (1952). See also *Irvin* v. *State*, 66 So. 2d 288, 290-292, *cert. denied* 346 U. S. 927, *reh. denied* 347 U. S. 914.

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The Attorney General of Texas sets out in his brief in these cases a survey by the "Texas Poll" showing 71% disapproval of the May 17th decision and 65% approval of continued segregation notwithstanding this Court's decision. It is interesting to note that in *Sweatt* v. *Painter*, 339 U. S. 629, respondents included in their brief a survey made by the same "Texas Poll" showing that 76% of all Texans were "against Negroes and whites going to the same universities." However, this Court ordered Sweatt admitted to the University of Texas. He and other Negroes attended the University.[16] Since then Negroes have been admitted to and are attending this and other public universities in twelve southern States.[16a]

Finally, there is nothing to indicate that an extended delay in ordering the elimination of all segregation will improve public attitudes or eliminate the objections presently interposed. Clearly the polls are irrelevant and should be so treated by this Court.

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[16] It is also significant that many municipal junior colleges in Texas have also desegregated their student bodies. See SOUTHERN SCHOOL NEWS, October 1, 1954, p. 13, c. 5.

[16a] JOHNSON, "PUBLIC HIGHER EDUCATION IN THE SOUTH", 23 JOURNAL OF NEGRO EDUCATION 317 (1954), especially at 328 where Dr. Johnson, University of North Carolina Sociologist, concludes:

> The transition from complete segregation to some degree of integration of Negroes into the publicly-supported institutions of higher learning in the South has already been accomplished in all except five of the Southern states, and most of this change has occurred in the brief period, 1948-1953. Despite numerous predictions of violence, this transition has been accomplished without a single serious incident of interracial friction.

The Wide Applicability of the Decision in These Cases Should Not Affect the Relief to Which Appellants Are Entitled.

Effort is made throughout the briefs for appellees and the several attorneys general to balance the personal and present rights here involved against the large number of children of both races now attending public school on a segregated basis. This argument is made for a twofold purpose: to escape the uniformity of decisions of this Court on the personal character of the rights involved and, secondly, to destroy the present character of the right involved.

Of course, the decision of this Court in the instant cases will have wide effect involving public school systems of many states and many public school children. The mere fact of numbers involved is not sufficient to delay enforcement of rights of the type here involved.[17]

On the face of it, their position is both ill-taken and self-defeating. That it is ill-taken becomes clear when the suggestion itself is clearly stated; obviously, there is nothing in mere numerousness as such which has any tendency whatever to create or destroy rights to efficacious legal relief. Behind every numeral is a Negro child, suffering the effects spoken of by the Court on May 17. It is a manifest inconsequence to say that the rights or remedial needs of each child are diminished merely because others

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[17] We put to one side as obviously immaterial the mere technical character of these suits as class actions under Rule 23(a)(3). Obviously, the mere joinder of plaintiffs in a spurious class suit for reasons of convenience cannot have any effect on the nature of the rights asserted or on the availability of normal relief remedy. Whether a suit is or is not a class action tells us little, in this field of law, as to the magnitude of the interests involved; *Sweatt* v. *Painter* was an individual mandamus suit, but the effect of that decision spread throughout the segregating states.

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are in the same position. That this argument is self-defeating emerges when it is considered that its tendency is simply to establish that we have to do with an evil affecting a great many people; presumably, the abolition of a widespread evil is even more urgent than dealing with isolated cases of wrongdoing.

This Court has consistently treated the personal rights of litigants on a personal basis. Every leading case involving discrimination against Negroes has necessarily and demonstrably involved large numbers of people; yet this Court has given present relief on a personal basis to those who showed themselves entitled to it, without any hint of the possibility that the rights of citizenship are diminished because many people are being denied them. The *Sweatt*, *Sipuel* and *McLaurin* cases and *Smith* v. *Allwright*, all, as was well known to this Court and to the country, involved not merely the individuals or class-plaintiffs or geographical subdivision actually before the Court, but also the whole framework of law school, graduate school or primary election segregation. All major constitutional cases involve large numbers of people. Yet there is not a hint, in words or in action, in any past case, to the effect that the wide applicability of a decision was considered material to the right to relief. It is unthinkable that this Court would apply any such doctrine to limit the enjoyment of constitutional rights in general; there is no reason for its making a special and anomalous exception of the case at bar.

Actually, to point to the vast numbers of people whose lives will be affected by the relief granted here is only a diffuse way of raising all the questions as to the consequences of immediate desegregation. We have dealt with these questions elsewhere. The suggestion that mere numerousness makes a difference adds nothing new, but merely serves to confuse the issues by diverting attention from the extremely personal plight of each child, and from his need for present relief.

Average Differences in Student Groups Have No Relevance to the Individual Rights of Pupils: Individual Differences Can Be Handled Administratively Without Reference to Race.

Having attempted to subordinate appellants' personal and present constitutional rights to an alleged overriding consideration of the large numbers of people involved, these briefs for appellees then seek to further limit the individual rights of Negro students by broad characterizations of group intelligence, group morality and health.[18] Specifically, it is pointed out that statistics show that *on the average* Negro children in segregated schools score lower on achievement tests and are *in general* more retarded culturally than white children. This data, contrary to the conclusions advanced thereupon, merely underscores and further documents the finding quoted in this Court's opinion:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

We have come too far not to realize that educability and absorption and adoption of cultural values has nothing to do with race. What is achieved educationally and culturally, we now know to be largely the result of opportunity

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[18] North Carolina Brief, pp. 39-41; Florida Brief, pp. 19-21, 189.

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and environment.[19] That the Negro is so disadvantaged educationally and culturally in the states where segregation is required is the strongest argument against its continuation for any period of time. Yet those who use this argument as a basis for interminable delay in the elimination of segregation in reality are seeking to utilize the product of their own wrongdoing as a justification for continued malfeasance.

Our public school systems have grown and improved as an American institution. And in every community it is obvious that children of all levels of culture, educability, and achievement must be accounted for within the same system. In some school systems the exceptional children are separated from the rest of the children. In others there are special classes for retarded children, for slow readers and for the physically handicapped. But these factors have no relation to race. These are administrative problems with respect to conduct of the public school.

In the past, large city school systems, North and South, have had the problem of absorbing children from rural areas where the public schools and cultural backgrounds were below the city standards. On many occasions these migrations have been very sudden and in proportionately very large numbers. This problem has always been solved as an administrative detail. It has never been either insurmountable or has it been used as an excuse to force the rural children to attend sub-standard schools. Simi-

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[19] KLINEBERG, RACE DIFFERENCES: THE PRESENT POSITION OF THE PROBLEM, 2 INTERNATIONAL SOCIAL SCIENCE BULLETIN 460 (1950); MONTAGUE, STATEMENT ON RACE, THE UNESCO STATEMENT BY EXPERTS ON RACE PROBLEMS 14-15 (1951); MONTAGUE, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE 280 (1952); KIRKPATRICK, PHILOSOPHY OF EDUCATION 399-433 (1951). See KLINEBERG, RACE AND PSYCHOLOGY, UNESCO (1951); ALLPORT, THE NATURE OF PREJUDICE (1954); COMAS, RACIAL MYTHS, UNESCO (1951).

larly, large cities have met without difficulty the influx of immigrants from foreign countries.

Cultural and health standards have always been maintained in public schools and there could be no objection to the continuation of such standards without regard to race. All social scientists seem to be in agreement that race and color have no connection whatsoever with a student's ability to be educated. Achievement and cultural deficiencies are nonracial in character, also. Hence these factors in no wise relate to questions posed as to whether desegregation should take place immediately or over an extended period.

Perhaps the main reasons for rejecting appellees' argument are that the conditions they complain of can never be remedied as long as segregation in public schools is continued and these so-called problems, *i.e.*, average on achievement tests, health, etc., are administrative problems which can be solved by recognized administrative regulations made to fit the problems without regard to pigmentation of the skin. It is significant that appellees and the Attorneys-General who advance these arguments do not give any hope to anyone that the continuation of segregated public education will ever remove these problems which are the product of this segregation.

On the other hand, appellants have shown in their Brief on Further Reargument that on the basis of substantial documented experience: "There is no basis for the assumption that gradual as opposed to immediate desegregation is the better, smoother or more 'effective' mode of transition. On the contrary, there is an impressive body of evidence which supports the position that gradualism, far from facilitating the process, may actually make it more difficult; that, in fact, the problems of transition will be a good deal less complicated than might be forecast by appellees. Our submission is that this, like many wrongs, can be easiest and best undone, not by 'tapering off' but by forthright action" (p. 31).

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Official Reactions in States Affected by the May 17th Decision Make it Plain that Delay Will Detract From Rather Than Contribute to the "Effectiveness" of the Transition to Desegregated Schools.

Events occurring in the states affected by the decision of May 17, 1954, do not support the suggestions of appellees and *amici curiae* that further (and limitless) postponement of relief to Negro children will assure an "effective" adjustment from segregated to non-segregated school systems. In terms of legislative, executive or administrative reaction, the southern and border states may now be grouped in three loose categories:

(1) Those which have not waited for further directions from the Court, but have undertaken desegregation in varied measure during the current school year. Typical of the states falling in this category are Delaware,[20] Kansas,[21] Missouri,[22] and West Virginia.[23] Although not a state, the District of Columbia would fall within this group.

(2) Those which have decided to await a decision on the question of relief but have indicated an intention to

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[20] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, pp. 4-7; Brief for Petitioners on the Mandate in No. 5, pp. 10-12.

[21] Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument, pp. 3-4; Supplemental Brief for the State of Kansas on Questions 4 and 5 Propounded by the Court, pp. 13-22; Supplemental Brief for the Board of Education, Topeka, Kansas on Questions 4 and 5 Propounded by the Court, pp. 2-4.

[22] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 9, c. 2-5; *Id.*, October 1, 1954, p. 10, c. 1-5; *Id.*, November 4, 1954, p. 12, c. 1-5; *Id.*, December 1, 1954, p. 10, c. 1-5; *Id.*, January 6, 1955, p. 11, c. 1; *Id.*, February 3, 1955, p. 15, c. 1-5.

[23] SOUTHERN SCHOOL NEWS, October 1, p. 14, c. 1, 5; *Id.*, January 6, 1955, p. 2, c. 4-5.

obey the Court's directions. Kentucky,[24] Oklohoma,[25] and Tennessee[26] are among the states in this category.

(3) Those which have indicated an intention to circumvent the decision of this Court or interminably delay the enjoyment by Negro children of their constitutionally protected rights not to be segregated in public schools. Included in this category are states like South Carolina[27] and Mississippi,[28] which have enacted legislation designed to nullify any decision of this Court in these cases, and states like Virginia[29] and Florida,[30] where either the governors or special legislative committees studying the problem have recommended that "every legal means" be used to preserve segregated school systems.[31]

Against this background of state reaction to the decision of May 17, 1954, it is clear that postponement of relief will serve no purpose. The states in the first category have

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[24] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 7, c. 3; *Id.*, November 4, 1954, p. 16, c. 1; *Id.*, December 1, 1954, p. 9, c. 1, 3.

[25] SOUTHERN SCHOOL NEWS, February 3, 1955, p. 10, c. 1-2; *Id.*, March 3, 1955, p. 16, c. 1; THE NEW YORK TIMES, April 6, 1955, p. 20, c. 5.

[26] SOUTHERN SCHOOL NEWS, October 1, 1954, p. 11, c. 1; *Id.*, December 1, 1954, p. 12, c. 4; NEW YORK POST, March 16, 1955, p. 58, c. 4.

[27] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 12, c. 1-2; *Id.*, February 3, 1955, p. 3, c. 2-4; *Id.*, March 3, 1955, p. 14, c. 1-3.

[28] SOUTHERN SCHOOL NEWS, September 3, 1954, p. 8, c. 3; *Id.*, October 1, 1954, p. 9, c. 4-5; *Id.*, November 4, 1954, p. 11, c. 4-5; *Id.*, January 6, 1955, p. 10, c. 1-2; THE NEW YORK TIMES, April 6, 1955, p. 20, c. 5.

[29] SOUTHERN SCHOOL NEWS, February 3, 1955, p. 10, c. 4.

[30] SOUTHERN SCHOOL NEWS, January 6, 1955, p. 6, c. 2.

[31] Indeed, Governor Marvin B. Griffin of Georgia has asserted: "However, if this court is so unrealistic as to attempt to enforce this unthinkable evil upon us, I serve notice now that we shall resist it with all the resources at our disposal and we shall never submit to the proposition of mixing the races in the classrooms of our schools."

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already begun to implement this Court's decision and any delay as to them may imperil the progress already made.[32] The states in the second category have indicated a willingness to do whatever this Court directs and there is certainly no reason for delay as to them. The probable effect of delay, as to states in the third category, must be evaluated in the light of their declared intentions; we are justified in assuming that it would have no affirmative effect, but would merely provide additional time to devise and put into practice schemes expressly designed to thwart this Court's decision.

Conclusion

Appellants recognize that the problems confronting this Court, as it turns to the implementation of its decision in these cases, are of primary magnitude. Their high seriousness is enhanced by the fact that sovereign states are in effect, though not formally, at the bar and that the evil to which the Court's decree must be directed is no transitory wrong but is of the essence of the social structure of a great section of our nation.

Yet, it should be borne in mind that the very magnitude of these problems exists because of the assumption, tacitly indulged up to now, that the Constitution is not to be applied in its full force and scope to all sections of this country alike, but rather that its guarantees are to be enjoyed, in one part of our nation, only as molded and modified by the desire and customs of the dominant component of the sectional population. Such a view, however expressed, ignores the minimum requirement for a truly national constitution. It ignores also a vast part of the

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[32] See, *e.g.*, *Steiner* v. *Simmons*, 111 A. 2d 574 (Del. 1955), rev'g. 108 A. 2d 173 (Del. 1954). There the Supreme Court reversed a chancery court determination that forthwith desegregation was proper under the decision of this Court of May 17, 1954.

reality of the sectional interest involved, for that interest must be composed of the legitimate aspirations of Negroes as well as whites. It certainly ignores the repercussions which any reluctance to forthrightly enforce appellants' rights would have on this nation's international relations. Every day of delay means that this country is failing to develop its full strength.

The time has come to end the division of one nation into those sections where the Constitution is and those where it is not fully respected. Only by forthright action can the country set on the road to a uniform amenability to its Constitution. Finally, the right asserted by these appellants is not the only one at stake. The fate of other great constitutional freedoms, whether secured by the Fourteenth Amendment or by other provisions, is inevitably bound up in the resolution to be made in these cases. For delay in enforcement of these rights invites the insidious prospect that a moratorium may equally be placed on the enjoyment of other constitutional rights.

In disposing of the great issues before it, this Court should do no less than order the abolition of racial segregation in public education by a day certain, as heretofore set forth in Appellants' Brief on Further Reargument.

Respectfully submitted,

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IN THE

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Supreme Court of the United States

October Term, 1954

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OLIVER BROWN, ET AL., *Appellants,*

VS.

BOARD OF EDUCATION OF TOPEKA, ET AL., *Appellees.*

No. 2

HARRY BRIGGS, JR., ET AL., *Appellants,*

VS.

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No. 3

DOROTHY E. DAVIS, ET AL., *Appellants,*

VS.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., *Appellees.*

No. 5

FRANCIS B. GEBHART, ET AL., *Petitioners,*

VS.

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APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF KANSAS, THE EASTERN DISTRICT OF SOUTH CAROLINA AND THE EASTERN DISTRICT OF VIRGINIA, AND ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE, RESPECTIVELY

MEMORANDUM BRIEF FOR APPELLANTS IN NOS. 1, 2 AND 3 AND FOR RESPONDENTS IN NO. 5 ON FURTHER REARGUMENT WITH RESPECT TO THE EFFECT OF THE COURT'S DECREE

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Preliminary Statement

During oral argument question was raised concerning the class suit aspect of these cases—the extent of the class and effect of a decree on members of the class not before the Court. The Court then requested appellants to file this memorandum.

I

These Are Spurious Class Suits As Defined by Rule 23a(3) of the Federal Rules of Civil Procedure.

The complaint in each of the cases was filed by a number of Negro public school pupils enrolled in a local public school system and their parents or guardians, on behalf of themselves and an untold number of unnamed persons "similarly situated". The defendants in all of the cases were local public school authorities, *i.e.*, the local boards of education where they were incorporated bodies, the members of local school boards and local superintendents of schools. The gravamen of every complaint was that the defendants had operated and maintained the local public school system under their control and supervision on a racially segregated basis pursuant to state constitutional and/or statutory provisions; that defendants had denied both the named and unnamed minor Negro children admission to public schools set apart for white children, solely on the grounds of race or color; that both the named and unnamed minor Negro children had suffered discriminatory treatment and had been irreparably damaged thereby; and that as a result of this the named plaintiffs and all others similarly situated had been denied rights protected under the Fourteenth Amendment to the Federal Constitution. The relief sought was a declaratory judgment which decreed the unconstitution-

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ality of the state policy authorizing racially segregated schools plus an injunction restraining defendants from enforcing such legislation and from making any distinction based on race or color among children attending local public schools.

In view of the foregoing summary of the complaints, it is clear that there is in each case a specification of the essentials of the third or "spurious" type of class suit defined in Rule 23(a) of the Federal Rules of Civil Procedure.[1]

In *Briggs* v. *Elliot*, the class represented includes all Negro children within the statutory age limits eligible to attend public schools and in fact attending such schools in School District No. 22 and the Summerton High School District (parts of which now form School District No. 1), Clarendon County, South Carolina (R. 4-5).[2] It also

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[1] Rule 23 of the Federal Rules of Civil Procedure provides as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[2] The class as named in the complaint includes all the Negro children of school age in South Carolina. Obviously the class could only be that broad if the Court had before it a defendant with responsibility for all the State's public schools. Since these defendants' responsibilities are not that extensive, the class cannot be inclusive as the terms of the complaint.

includes their parents or guardians (R. 5); and both minor and adult members of the class are citizens of the United States and of the State of South Carolina and residents of Clarendon County. At the time of trial there were 959 minor members of the class (R. 50). During the recent oral argument before this Court, counsel for appellees reported that approximately 280 members of the class remain today (because of the redistricting in Clarendon County).

The class represented in *Davis v. County School Board of Prince Edward County, Virginia*, includes all Negroes within the statutory age limits to attend the public secondary schools of the Prince Edward County who possess the qualifications and satisfy all requirements for admission thereto (R. 9). Furthermore, the class here, as in the above suit, includes the parents or guardians of these children (R. 9); and all members are residents of Prince Edward County as well as citizens of the United States and the State of Virginia. The number of Negro children in the class was 450 at the time of trial (R. 81, 123), and the identical figure was given on reargument for the current population of the class.

In sum, the class represented in each case includes all Negro children attending or qualified to attend public schools in the local public school systems operated, maintained and controlled by the defendants.[3]

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[3] While the legal considerations are the same in both the Kansas and Delaware cases, we see no need to discuss these cases in this regard since all members of the class have been recognized by school authorities in those cases as entitled to benefit from adoption of a policy of school desegregation.

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II

Decrees Should Embrace Unnamed Members of the Class So They May Benefit Therefrom Without the Necessity of Bringing Individual Suits.

This Court has faced the specific question of the effect of judgment in a spurious class suit in only one case, *Hansberry* v. *Lee*, 311 U. S. 32. There the question presented was whether absentee members of a class who appeared to be represented in a prior suit were bound by a judgment adverse to the interests they asserted in the second suit. The Court, reversing the Illinois Supreme Court, ruled that the state court's decision offended due process when it held that absentee members of a class were bound by a decision in a prior suit. This Court's ruling was based upon the fact that members of the class clearly had conflicting interests; and its conclusion was that where the first action was brought by some members of the class representing a single interest, other members were inadequately represented and could not, within the limits of due process, be bound by the decision. The Court did not indicate that in other circumstances, where representation was adequate, members of the class would not be bound by an adverse decision. In fact, the Court said at pp. 42-43:

> It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, . . . or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.

Subsequently, federal courts have construed the decision in *Hansberry* v. *Lee* to mean, as applied to all

spurious class suits, that all members of the class whose interests are in accord with those of the plaintiff in the original action will be bound by an adverse decision. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (C. A. 7th 1941). Cf. *Kentucky Home Mutual Life Ins. Co.* v. *Duling*, 190 F. 2d 797, 802 (C. A. 6th 1951). Thus, there is some indication that, absent exceptional circumstances which raise questions of due process, members of a class will be bound by an adverse decision.

But even if it be assumed that unnamed members of a class are not bound by an adverse decision in the prior class action, it does not follow that such members may not avail themselves of the benefits of a favorable decision in that suit. A substantial argument may be made that members of a class should in no case be bound by an adverse decision in which they did not participate, because they have not had their day in court. But no comparable argument can be made for denying to members of a class the benefits of a decision in favor of the class. For defendant has had his day in court and he has lost. Knowing that the suit was a class action, defendant has been put on notice to defend to the hilt, and he has no more reason to relitigate the controversy against absentee members than he has to do so against the immediate plaintiff. To allow all members of the class to share in the benefits of the judgment would work no prejudice to the defendant; rather it would save him a multiplicity of separate suits. See Kalven and Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. R. 684, 713 (1941).

The question of the effect of a judgment has been litigated infrequently, for in many spurious class actions, especially those where injunctive and declaratory relief was sought, the benefits of such a decision automatically inured to all of the members of the class and nothing further was necessary to enforce their rights. See *McLaurin* v. *Okla-*

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homa State Regents, 339 U. S. 637; *Tureaud* v. *Board of Supervisors, Etc.,* 116 F. Supp. 248, 249, 251 (E. D. La. 1953), rev'd on other grounds, 207 F. 2d 807, vacated and remanded, 347 U. S. 971; *Gonzales* v. *Sheeley,* 96 F. Supp. 1004, 1007, 1009 (D. Ariz. 1951); *Wilson* v. *Board of Supervisors,* 92 F. Supp. 986, 988 (E. D. La. 1950), aff'd, 340 U. S 909; *Johnson* v. *Board of Trustees of University of Kentucky,* 83 F. Supp. 707, 709-710 (E. D. Ky. 1949); *Mendez* v. *Westminster School Dist.,* 64 F. Supp. 544, 545, 551 (S. D. Cal. 1946), aff'd, 161 F. 2d 774 (school cases): *Morris* v. *Williams,* 149 F. 2d 703, 704, 709 (C. A. 8th 1945); *Alston* v. *School Board of City of Norfolk,* 112 F. 2d 992, 994, 997 (C. A. 4th 1940), cert. denied, 311 U. S. 693; *Davis* v. *Cook,* 80 F. Supp. 443, 444, 452 (N. D. Ga. 1948), rev'd on other grounds, 178 F. 2d 595; *Whitmyer* v. *Lincoln Parrish School Board,* 75 F. Supp. 686, 687, 688 (W. D. La. 1948); *McDaniel* v. *Board of Public Instruction,* 39 F. Supp. 638, 639, 641 (N. D. Fla. 1941); *Mills* v. *Board of Education of Anne Arundel County,* 30 F. Supp. 245, 248, 249, 251 (D. Md. 1939) (teachers' salary cases); *Davis* v. *Schnell,* 81 F. Supp. 872, 874, 881 (S. D. Ala. 1949), aff'd, 336 U. S. 933; *Brown* v. *Baskin,* 78 F. Supp. 933, 935, 942 (E. D. S. C. 1948), aff'd, 174 F. 2d 391; *Elmore* v. *Rice,* 72 F. Supp. 516, 517, 528 (E. D. S. C. 1947), aff'd, 165 F. 2d 387, cert. denied, 333 U. S. 875, (voting cases); *Dawson* v. *Mayor and City Counsel of Baltimore,* —— F. 2d —— (C. A. 4th, decided March 4, 1955), reversing 123 F. Supp. 193; *Lopez* v. *Seccombe,* 71 F. Supp. 769, 771, 772, (S. D. Cal. 1944) (public recreation cases).

Where the question has been litigated, however, it has been held that those entitled to benefits were all who were members of the class at time of entry of final judgment. *National Hairdressers and Cosmetologists Association, Inc.* v. *Philad Co.,* 41 F. Supp. 701 (D. Del. 1941), aff'd, 129

F. 2d 1020. Other federal courts in spurious class suits have allowed members of the class to participate in the fruits of a favorable decision by intervention after the decree has been rendered, or have indicated that intervention at this time would be the proper procedure. *York* v. *Guaranty Trust Co. of New York*, 143 F. 2d 503 (C. A. 2nd 1944), rev'd on other grounds, 326 U. S. 99; *Speed* v. *Transamerica Corp.*, 100 F. Supp. 461 (D. Del. 1951); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W. D. Ky. 1951); *Tolliver* v. *Cadahy Packing Co.*, 39 F. Supp. 337 (E. D. Tenn. 1941); *Alabama Independent Service Station Assn.* v. *Shell Petroleum Corp.*, 28 F. Supp. 386 (N. D. Ala. 1939).

The court in *York* v. *Guaranty Trust Co. of New York*, *supra*, at page 529 approached the problem in practical and reasonable terms, saying:

> Since, any suit under clause (3), a judgment will not be res judicata for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such note holders [other members of the class] to intervene (if they have not theretofore done so), judgment to be entered in favor only of those who do so within a reasonable time.

Moreover, still other federal courts have by way of dicta regarded a judgment in a spurious class action as benefiting all members of the class. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 91 (C. A. 7th 1941); *Pennsylvania R. Co.* v. *United States*, 111 F. Supp. 80, 90 (D. N. J. 1953); *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703 (E. D. La. 1942). See also *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C. A. 6th 1950), where the court by means of a strained construction of the character of the right enforced in a prior proceeding concluded that that suit was a "true" rather

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than a "spurious" class suit and sustained a contempt proceedings instituted by an absentee member of the class on whose behalf the named plaintiffs had won a judgment enforcing seniority and promotional rights protected under the Railway Labor Act, 45 U. S. C. § 151 *et seq.*

Apart from these case authorities, the extention of the fruits of a favorable decree to unnamed members of the class would appear to follow from the mere existence of Rule 23(a)(3). If the rule were otherwise, what is denoted as a "spurious" class suit under Rule 23(a) would not be a class suit at all, but merely a device for permissive joinder. This is hardly a credible construction, for permissive joinder is amply provided for by Rule 20 of the Federal Rules. See Comment, 42 Ill. L. R. 518, 523-524 (1947); Kalven and Rosenfeld, *supra*, 8 U. of Chi. L. R. at 699. One commentator who contends that a "spurious" class suit is really only a permissive joinder device, attempts to explain its inclusion in the Federal Rules by suggesting that it also enlarged federal jurisdiction by permitting the intervention of parties who do not meet federal jurisdictional requirements. 3 Moore's Federal Practice 3448 (2nd ed. 1948.) But, apart from the fact that this would be a rather curious approach to enlarging federal jurisdiction, Rule 82 of the Federal Rules specifically states that the Rules shall not be construed to extend federal jurisdiction.

Logic does not support any interpretation which would emasculate the operation of Rule 23(a)(3). The rule provides for a situation where the "parties are too numerous" to be brought before the court. But if all in the class must become parties of record before trial if they are to share in the judgment, the rule is reduced to saying that where it is impracticable to bring all the parties before the court, they must still all be brought before the court. In this connection it should be noted that Rule 23(c) provides that no class suit defined in 23(a) may be dismissed

or compromised without the approval of the court. There would be no need for such a provision if it were not contemplated that there would be absentee members who require protection because they would be affected by the decision. Finally, as previously noted, no policy can be advanced to support such a strained construction of the Rule. A defendant, to resist participation by members of the class cannot claim that he is not liable to them, but only that they should endure the inconvenience of bringing a separate suit. Defendant is reduced to the claim that justice has been made too convenient and too complete. See Kalven and Rosenfeld, *supra,* 8 U. of Chi. L. R. at 699-701.

Conclusion

As pointed out in the recent arguments before this Court, these are spurious class suits under subsection (3) of Rule 23(a). They were treated as class actions by the courts below and they were described as such in this Court's opinion in *Brown* v. *Board of Education,* 347 U. S. 483.

The foregoing considerations also establish that the class which the individual plaintiffs brought on behalf of themselves and others similarly situated is precisely defined as to its racial, educational, residential and familial characteristics, as to the declaratory and injunctive relief sought, and as to the nature of the right asserted. Defendants have had their day in court and there is no equitable consideration which would justify any further litigation with the members of the class who were not individually named. Moreover, there is ample support in both case authority and logic for the issuance of a judgment or decree which will be beneficial to all members of the class involved in the individual cases.

The Negro children before the Court in these cases are entitled to public education on a non-segregated basis. The

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only way the relief can be meaningful to them is to abolish the policy of using race as a criterion for assignment of students. Thus, the only effective decree would be one which will enjoin the use of race in the assignment of *any* pupils in the school districts involved.

Therefore, we submit that this Court should enter a decree which will order the defendants to cease the conduct held unlawful in *Brown* v. *Board of Education, supra,* and which will command them to discontinue use of race or color as a criterion for admission of students. Indeed, this is the only way that the rights of even the named plaintiffs can be protected.

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APPENDIX

For the convenience of the Court, we are setting out in this appendix our suggestions as to the form of decree to be entered in these cases.

Form of Decree Suggested By Appellants

Judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and entry of a decree containing the following provisions:

(1) Article XI, section 7, of the Constitution of South Carolina, and section 5377 of the Code of Laws of South Carolina of 1942, and other legislative provisions of South Carolina requiring, directing or permitting defendants to maintain racial segregation in public schools in School District No. 1 of Clarendon County, South Carolina, are unconstitutional and of no force and effect;

(2) Defendants, their successors in office and their agents, employees and all other persons acting under their direction and supervision, are forthwith ordered to cease using race as a basis of determining admission, assignment or attendance in public schools in School District No. 1 of Clarendon County, South Carolina, so that at a time no later than the school term commencing in September, 1955, plaintiffs, and all others similarly situated, will be attending schools on a basis not involving race;

(3) Defendants are ordered to file with the District Court by July 15, 1955, for approval by August 15, 1955, a plan showing what changes they have made in the existing method of determining the public schools pupils attend so that race no longer will be used as a criterion;

(4) The District Court is to retain jurisdiction to make whatever further orders it deems appropriate to carry out the foregoing.

Suggested Decree to Be Entered if the Supreme Court Decides It Should Exercise Its Equity Powers to Permit An Effective Gradual Adjustment To Be Brought About From Existing Segregated Systems To Systems Not Based On Color Distinctions

Judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and the entry of a decree containing the following provisions:

(1) Article XI, section 7, of the Constitution of South Carolina and section 5377 of the Code of Laws of South Carolina of 1942 and other legislative provisions of South Carolina requiring, directing or permitting defendants to maintain racial segregation in public schools in School District No. 1 in Clarendon County, South Carolina are unconstitutional and of no force and effect;

(2) Defendants, their agents, employees, successors in office and all other persons acting under their direction and supervision are forthwith ordered to cease using race as a basis of determining admission, assignment and attendance in public schools in School District No. 1, Clarendon County, South Carolina so that beginning the next school term, (i.e. September, 1955) plaintiffs and all others similarly situated will be attending school on a basis not involving race;

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(3) Notwithstanding the foregoing if the defendants or other responsible officials by August 15, 1955,

(a) show the District Court that the transition to a school system not based on race or color distinctions involves such administrative factors as would cause serious and substantial dislocation in the operation of public schools should admission beginning the next school term be ordered; *and*

(b) submit a plan which, after public hearing, the District Court finds

> (i) will eliminate as soon as feasible but in no event later than September 1, 1956, racial segregation in the public schools presently subject to defendants' authority or control, in School District No. 1, Clarendon County, South Carolina; and
>
> (ii) will provide for an effective commencement of the actual transition (i.e., the admission of some Negroes to non-segregated schools) by the beginning of the next school term (September 1, 1955),

the District Court may allow defendants additional time and make such orders as are necessary to permit the effectuation of such a program.

(4) Defendants are ordered to make detailed periodic reports showing the progress made in carrying out the approved plan;

(5) The District Court under no circumstances will extend the time to effect actual transition to a school system not based on race or color distinctions beyond September, 1956.

FILED
DEC 8 19
FRANCIS E. WILEY,

No. 3 /

In the Supreme Court of the United States

OCTOBER TERM, 1952

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*, *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*, *Appellees*.

Appeal from the United States District Court for the District of Kansas

BRIEF FOR APPELLEES

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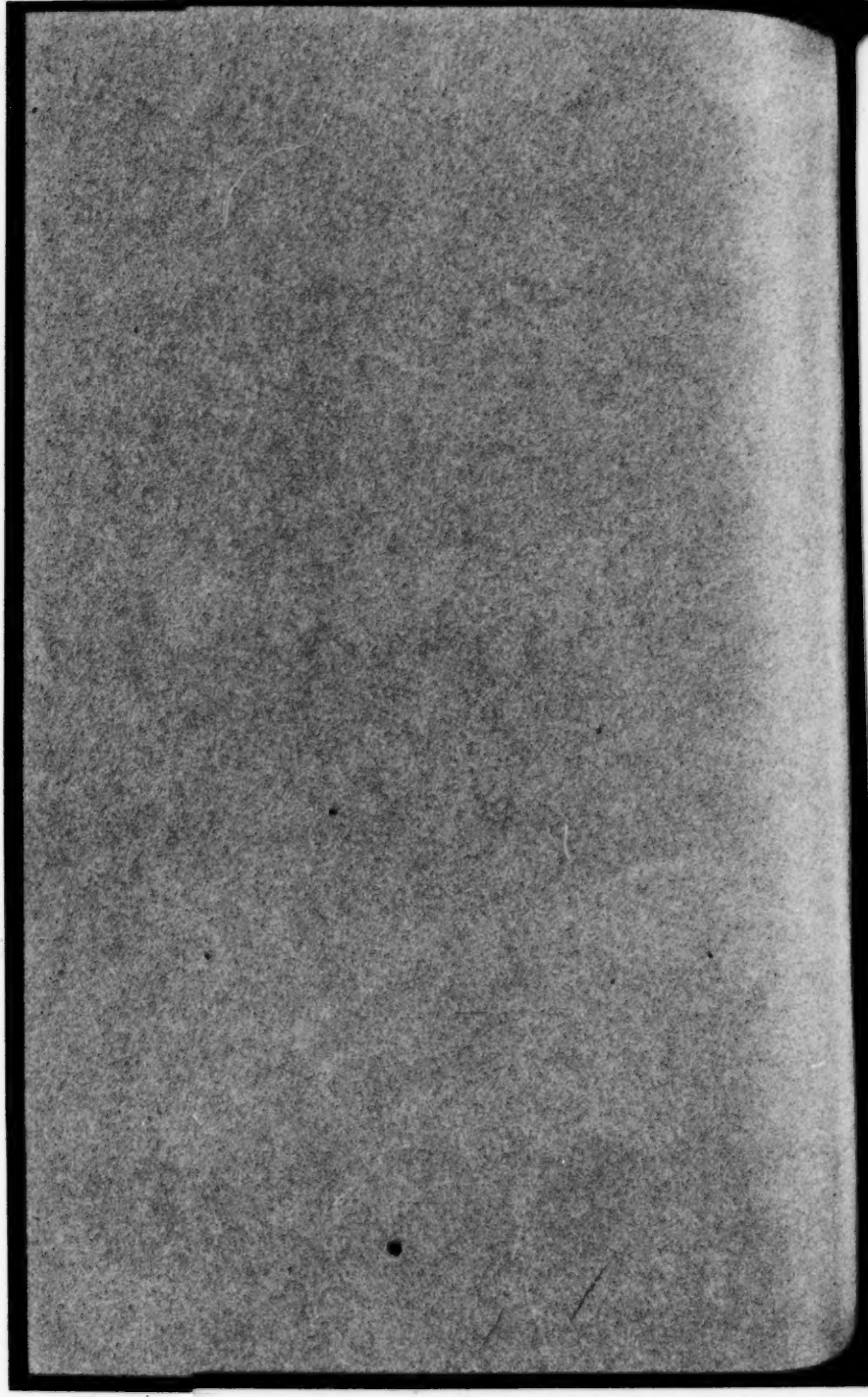
10-2000



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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*, *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*, *Appellees.*

Appeal from the United States District Court for the District of Kansas

BRIEF FOR APPELLEES

I

PRELIMINARY STATEMENT

The issue presented by this case is whether the Fourteenth Amendment to the Constitution of the United States is violated by a statute which permits boards of education in designated cities to maintain separate elementary school facilities for the education of white and colored children.

At the outset, counsel for the appellees desire to state

that by appearing herein they do not propose to advocate the policy of segregation of any racial group within the public school system. We contend only that policy determinations are matters within the exclusive province of the legislature. We do not express an opinion as to whether the practice of having separate schools of equal facility for the white and colored races is economically expedient or sociologically desirable, or whether it is consistent with sound ethical or religious theory. We do not understand that these extra-legal questions are now before the Court. The only proposition that we desire to urge is that the Kansas statute which permits racial segregation in elementary public schools in certain cities of the state does not violate the Fourteenth Amendment to the Constitution of the United States as that amendment has been interpreted and applied by this Court.

II

OPINION BELOW

The opinion of the three-judge District Court below: (R-238-244) is reported at 98 Fed. Supp. 797.

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III
JURISDICTION

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 251). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28 U. S. C. Sec. 1253 and 2201 (b).

IV
QUESTIONS PRESENTED

1. Does a statute which permits but does not require cities of more than 15,000 population to maintain separate school facilities for colored and white students, violate the Fourteenth Amendment to the Constitution of the United States in a situation where a court has specifically found that there is no discrimination or distinction in physical facilities, educational qualifications of teachers, curricula or transportation facilities?

2. Is a general finding of the trial court that segregation is detrimental to colored children and deprives them of some benefits they would receive in a racial integrated school sufficient to entitle the individual colored plaintiffs to an injunction prohibiting the maintenance of an existing system of segregated schools, and to require reversal of a judgment denying such relief?

V

THE STATUTE

The statute under attack in the present litigation is section 72-1724, General Statutes of Kansas of 1949, which is quoted hereafter:

> "*Powers of board; separate schools for white and colored children; manual training.* The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools, except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public school system of said city."

VI

STATEMENT OF THE CASE

The appellants here, who are plaintiffs below, are Negro citizens of the United States and the State of Kansas, who reside in Topeka, Shawnee County, Kansas. The infant plaintiffs are children of common school age. The defend-

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ants below and appellees herein are the duly constituted governing body and certain administrative officers of the public school system of Topek Kansas. The State of Kansas has intervened in the District Court to defend the constitutionality of the state statute under attack.

Acting pursuant to the authority conferred by G. S. 1949, 72-1724, *supra,* the appellee, Board of Education, many years ago created within the city of Topeka, which is one school district, eighteen school areas, and now maintains in each of said areas a kindergarten and elementary school for white children only. (R. 24.) At the same time the present Board of Education of Topeka and prior boards of education, acting under same statutory authority, have established and operated in said city four elementary schools in the same grades for Negro children. Negro children may attend any one of said elementary schools that they or their parents may select. It was stipulated in the Court below that the Negro schools are located in neighborhoods in which the population is predominantly Negro. (R. 31.) The stipulation also indicates that at the time the action was brought, the enrollment in the eighteen white schools was 6,019, as compared to 658 students enrolled in the four Negro schools. (R. 37.)

The administration of the entire Topeka school system is under the Board of Education, and the same adminis-

trative regulations govern both the white and Negro schools. The Court found specifically that there is no material difference in the physical facilities in colored and white schools; that the educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to, but are comparable with those in the white schools; and that the courses of study followed in the two groups of schools are identical, being that prescribed by state law. (R. 245.) Also, it was found that colored students are furnished transportation to the segregated schools without cost to the children or their parents. No such transportation is furnished to the white children in the segregated schools. (R. 246.)

VII

SUMMARY OF ARGUMENT

1. The Kansas statute which permits cities of the first class to maintain separate grade school facilities for colored and white students does not *per se* violate the Fourteenth Amendment to the Constitution of the United States.

The Court below found facilities provided for Negro children in the city of Topeka to be substantially equal to those furnished to white children. The appellants, in their specifications of error and in their brief, do not object to that finding. Under those circumstances and under au-

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thority of the decisions of the Supreme Court of the United States, the inferior federal courts, and the courts of last resort in numerous state jurisdictions, and particularly the decisions of the Kansas Supreme Court, the appellants herein are not denied equal protection of the laws by virtue of their being required to attend schools separate from those which white children are required to attend.

The decision of the court below should be affirmed.

2. Irrespective of the question of the constitutionality of the Kansas statute, the trial court's findings of fact are insufficient to establish appellants' right to injunctive relief and to require reversal of the judgment below. The only finding of fact relied upon by appellants is Finding of Fact No. VIII. That finding is couched in general language and in effect simply shows that segregation in the public schools has a detrimental effect upon colored children and a tendency to retain or retard their educational and mental development and to deprive them of some of the benefits they would receive in a racial integrated school system. The finding does not specifically show that any of the appellants have actually and personally suffered by reason of segregation in the public schools of Topeka nor that the mental development of any of the appellants in this case has been retarded; and the finding does not even purport to show discrimination against the appellants and in favor

of any other students in the Topeka school system. It no where discusses the effect of segregation upon children of any race other than colored children. Therefore, the District Court's Finding of Fact No. VIII fails to show either that the appellants have suffered any personal harm, or that they are being deprived of benefits or subjected to detriments which do not equally apply to other students in the Topeka school system. Thus, the appellants have failed to secure findings of fact sufficient to entitle them to injunctive relief or to a reversal of the judgment below.

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VIII

ARGUMENT

1

DOES A STATUTE WHICH PERMITS BUT DOES NOT REQUIRE CITIES OF MORE THAN 15,000 POPULATION TO MAINTAIN SEPARATE SCHOOL FACILITIES FOR COLORED AND WHITE STUDENTS VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN A SITUATION WHERE A COURT HAS SPECIFICALLY FOUND THAT THERE IS NO DISCRIMINATION OR DISTINCTION IN PHYSICAL FACILITIES, EDUCATIONAL QUALIFICATIONS OF TEACHERS, CURRICULA OR TRANSPORTATION FACILITIES?

Appellees contend that only a negative answer to this question is possible.

BACKGROUND OF SEGREGATION IN KANSAS

A meaningful examination of any statute must necessarily be made in the light of its context. In *Plessy v. Ferguson,* 163 U. S. 357, the Court comments:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question of whether the statute . . . is a reasonable regulation, and with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of

> their comfort, and the preservation of the public peace and good order."

Therefore, we deem it proper to pause briefly to examine the origins and attitudes of the people of the State of Kansas.

The birth of the State of Kansas was an incident of the intersectional struggle that culminated in the war between the states. Located midway between the north and the south, the territory of Kansas was coveted by both the pro-slavery and free-state elements. The Kansas-Nebraska Act which announced the principle of "squatter sovereignty" formally opened the territory for settlement and resulted in migration of large numbers of people from both the north and the south. In these early settlers were reflected the diverse attitudes and cultures of the regions from which they came. While the free-state elements from the north gained political ascendency, there remained in Kansas people who, in good faith, believed that the welfare of both the colored and the white races required that they live apart from one another. Migration following the war between the states followed the same pattern. While the greatest number came from Illinois, Ohio, Indiana and other northern states, a considerable segment of the population had its origin in Kentucky, Tennessee and Missouri. (Clark & Roberts, People of Kansas, 1936, p. 18.)

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The early legislatures were faced with the task of reconciling the divergent attitudes of the settlers from such varied cultural backgrounds.

The Wyandotte Constitution, under which the State of Kansas was admitted to the Union, provided for a system of public education specifically requiring the legislature to "encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate and university departments." (Const., Art. 6, Sec. 1.) It is significant that an effort was made in the Wyandotte convention to obtain a constitutional requirement for the separate education of Negro children. The proposal was defeated, not because of objection to the intrinsic policy of segregation, but because the dominant faction in the constitutional convention believed that the power to govern the public schools and to classify students therein should rest with the legislature. At no time was doubt expressed that the constitutional provision adopted at Wyandotte would preclude classification of students on the basis of color (Wyandotte Constitutional Convention, Proceedings and Debates, 1859, pp. 171 to 174).

As early as 1862 the power to classify students was exercised by the enactment of section 18, article 4, chapter 46,

Compiled Laws of 1862, applying to cities of not less than 7,000 inhabitants. That statute provided:

> "The city council of any city under this act shall make provisions for the appropriation of all taxes for school purposes collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons."

Chapter 18, Laws of 1868, entitled "An Act to Incorporate Cities of the First Class" authorized the organization and maintenance of separate schools for the education of white and colored children in cities of over 15,000 population. In 1876 the laws of the state pertaining to the common schools were codified and embodied in one comprehensive statute. (Chapter 122.) Article X of this chapter related to the public schools and cities of the first class, and provided that all cities of more than 15,000 inhabitants shall be governed thereby. The provision of the law of 1868 authorizing the maintenance of separate schools for white and colored children was omitted from that section and was thus deemed to have been repealed by implication. However, in 1879 a statute was passed (Laws of 1879, Chapter 81) amending the law relating to cities of the first class and specifically authorizing the boards of edu-

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cation therein to organize and maintain separate elementary schools for the education of white and colored children. The section was again amended by Laws of 1905, Chapter 414, and now appears without further change in G. S. 1949, 72-1724, quoted above.

Two features of the Kansas statute should be emphasized. In the first place, we invite the court's attention to the fact that the statute is permissive only and does not, as may be inferred from appellants' brief, require any board of education to maintain separate schools for colored children.

In the second place, it is again pointed out that the statute applies only to cities of the first class. Cities of the first class in Kansas include those cities having a population of more than 15,000 persons. Presently there are ~~fourteen~~ 12 cities in the state so classified. The special provision affecting only these communities may be accounted for by reference to the fact that the Negro population of Kansas is largely urban. According to the 1950 census, less than four percent of the total population of Kansas belongs to the Negro race. However, more than ninety percent of this colored population lives in cities classified as urban. Sixty percent of the total colored population live in the three largest cities of Kansas City, Wichita and Topeka, and at least thirty-five percent of this total live in Kansas

City alone. Thus, in enacting a school segregation statute applicable only to cities of the first class the Kansas legislature has simply recognized that there are situations where Negroes live in sufficient numbers to create special school problems and has sought to provide a law sufficiently elastic to enable Boards of Education in such communities to handle such problems as they may, in the exercise of their discretion and best judgment, deem most advantageous to their local school system under their local conditions.

THE KANSAS DECISIONS

The Supreme Court of Kansas has uniformly held that the governing bodies of school districts in the state may maintain separate schools for colored children only when expressly authorized by statute. (*Board of Education v. Tinnon*, 26 Kan. 1 (1881); *Knox v. Board of Education*, 45 Kan. 152, 25 Pac. 616 (1891); *Cartwright v. Board of Education*, 73 Kan. 302, 84 Pac. 382 (1906); *Rowles v. Board of Education*, 76 Kan. 361, 91 Pac. 88 (1907); *Wool-ridge, et al., v. Board of Education*, 98 Kan. 397, 157 Pac. 1184 (1916); *Thurman-Watts v. Board of Education*, 115 Kan. 328, 22 Pac. 123 (1924); *Webb v. School District*, 167 Kan. 395, 206 Pac. 2d 1066 (1949).

The rationale of each of these cases is expressed in *Thurman-Watts v. Board of Education*, supra, as follows:

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> "The power and duty of the school board are derived exclusively from the statutes. The school board has no greater power than is conferred on it by the statutes."

It is significant that in each of the cases cited above, the court expressly recognized or conceded that the legislature has power to classify students in the public schools on the basis of color. Illustrative of this attitude is the following statement from *Board of Education v. Tinnon,* supra, appearing on p. 16 of the reported decision:

> "For the purpose of this case we shall assume that the legislature has the power to authorize the board of education of any city or the officers of any school district to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools notwithstanding the Fourteenth Amendment to the Constitution of the United States;"

In each of the subsequent cases where the power to segregate was denied by reason of the absence of statutory authority, the court specifically recognized that the legislature had such authority to confer. (See cases above cited.)

The question of the constitutionality of a statute, antecedent to but substantially like the one here under attack, was squarely presened to the Supreme Court of Kansas in the case of *Reynolds v. Board of Education,* 66 Kan. 672,

72 Pac. 274. That was a proceeding in the nature of mandamus brought against the board of education of the city of Topeka by a colored resident. In the action he sought to compel the board of education to admit his child to a school maintained for white children only. In an exhaustive opinion the court found that the statute which permitted the policy of racial segregation to be valid and not in violation of the Fourteenth Amendment to the Constitution of the United States. The court relied specifically on the decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson,* supra, and held that where facilities are equal, the mere fact of separation of races within a school system does not constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

Quoting with approval from the New York case of *People, ex rel., Cisco v. School Board,* 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 115, the Court said:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated; not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution

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> to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained."

And the court found merit in the quoted portion of the decision in the Massachusetts case of *Roberts v. City of Boston*, 5 Cush. 198:

> "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment."

Consistent with its finding that the statute did not violate the equal protection guarantee of the Fourteenth Amendment, the Court said on page 689:

> "The design of the common-school system of this state is to instruct the citizen, and where for this

> purpose they have placed within his reach equal means of acquiring an education with other persons, they have discharged their duty to him, and he has received all that he is entitled to ask of the government with respect to such privileges."

Finally on page 292 the court holds:

> "The act of the legislature of 1879 providing for the education of white and colored children in separate schools in cities of the first class except in the high school is, therefore, in all respects constitutional and valid."

At the same time the Kansas court has always insisted that facilities must be equal for all groups. Particularly significant is the case of *Williams v. Parsons,* 79 Kan. 202, decided in 1908. There objection was made that the school provided for colored children was located in such close proximity to the railroad tracks that such location produced an undue hazard to the children attending the school. The court stated, at page 209:

> "Having power to maintain separate schools in cities of the first class, the duty rests upon the board of education therein to give equal educational facilities to both white and colored children in such schools. This requirement must have a practical interpretation so that it may be reasonably applied to varying circumstances. . . . Where the location of a school is such as to substantially deprive some of the children of the district of any educational facilities, it is manifest that this equality is not maintained and the refusal to furnish such

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> privileges, where it is practicable to do so, is an abuse of discretion for which the courts will afford a remedy."

A later expression of the Supreme Court of Kansas is found in *Graham v. Board of Education,* 153 Kan. 840, decided in 1941. There the court said on page 842:

> "The authorities are clear that separate schools may be maintained for the white and colored races if the educational facilities provided for each are equal, unless such separation is in contravention of a specific state law."

Again on p. 846 the court comments with reference to the rule expressed in *Reynolds v. Board of Education,* supra:

> "The defendants cite the case of *Reynolds v. Board of Education,* 66 Kan. 672, 72 Pac. 274. The rules of law set out in that case are sound and are applied in this case."

These cases demonstrate that the Supreme Court of Kansas has never doubted that G. S. 1949, 72-1724, and its antecedent statutes is without the scope of the prohibitions imposed on the legislature by the Fourteenth Amendment to the Constitution of the United States.

THE CONTROLLING PRINCIPLES

The position taken by the Supreme Court of Kansas in the cases cited, *supra,* is sustained by the weight of the decisions of this Court in *Plessy v. Ferguson,* supra, and *Gong Lum v. Rice,* 275 U. S. 78; and in numerous decisions of the inferior federal courts and the appellate courts in other states.

Appellants suggest that the Plessy case is not applicable to the situation before us. Admittedly, the question presented in the Plessy case arose out of segregation of white and colored races in railroad cars and not segregation in the public schools. However, the decision of the Court rises above the specific facts in issue and announces a doctrine applicable to any social situation wherein the two races are brought into contact. In commenting upon the purpose and the limitations of the Fourteenth Amendment the Court makes the following statement:

> "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally,

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> if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced." (p. 554.)

Certainly this language refutes appellants' contention that the Plessy case has no application to these facts.

Appellants further state that *Gong Lum v. Rice* "is irrelevant to the issues in this case." This statement appears to justify a brief examination of the facts in the Gong case. Those facts may be summarized as follows:

The Constitution and statutes of the State of Mississippi provided for two school systems in each county. One system was for "white" children and the other system for "colored" children. Plaintiff sought to have his child who was a citizen of Chinese extraction admitted to the school maintained for white students in the county where she lived. She was refused admission by the school authorities. The Supreme Court of the United States unanimously affirmed the decision of the Supreme Court of Mississippi, refusing to grand a Writ of Mandamus to compel the school authorities to admit the Chinese-American citizen to the white school.

The opinion by Chief Justice Taft includes the following statement (pp. 85-86):

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question it would call for very full argument and consideration but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

To support this proposition the Court cites sixteen cases decided by federal courts and state courts of last resort, including *Plessy v. Ferguson,* supra.

We do not believe that appellants suggest that the rights of the Negro citizens differ from the rights of the Mongolian citizen, Martha Lum. If such an idea is advanced herein, this Court should have no more difficulty in disposing of that contention than it did of that phase of the Gong case where it seemed to be contended that a yellow child had different rights than a Negro child. The Court simply held that children of all races have equal rights but that those rights are not infringed upon when the state provides that the different races shall be educated in separate schools of equal facility.

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Appellants further contend that whatever force the Plessy and Gong-Lum cases may have had has been overcome by the recent decisions of *Sweatt v. Painter*, 339 U. S. 629, and *McLaurin v. Oklahoma*, 339 U. S. 637. Appellees concede that if there has been any change in the attitude of this Court as to the constitutionality of the separate but equal doctrines as it affects segregation, it must be found in these two cases. Thus, we have examined them carefully. But we find no statement therein that would cause us to believe the Court intended to reverse or modify its earlier decisions. In the Sweatt case, the Court held that a Negro prospective law student could not be denied admission to the renowned University of Texas Law School — "one of the nation's ranking law schools" (p. 663), and be compelled to accept instruction in a new school of perhaps questionable worth, inferior as to faculty, plant and student body. The McLaurin case only found that a Negro graduate student, who had successfully compelled his admission to the University of Oklahoma to do graduate work in education, was still being denied equal rights when he was segregated inside the university as to his seat in class, in the library and in the dining hall. Unquestionably, these cases sustain the position that equal facilities must be provided. However, that point is not at issue in this case.

We think the Sweatt case has no greater significance than the following expression of the Court's attitude indicates:

> "This case and *McLaurin v. Oklahoma State Regents* . . . present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the court." (p. 631.)

Squarely in point is the following statement:

> "We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson*, 1896, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, requires affirmance of the judgment below. Nor need we reach the petitioner's contention that *Plessy v. Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See, *supra*, pg. 631." (pp. 635-636.)

And in the McLaurin case the significance of the special situation is noted by the Court:

> "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of

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> that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.
>
> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think is irrelevant. There is a vast difference — a constitutional difference between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar . . . Appellant having been admitted to a state-supported graduate school, he must receive the same treatment at the hands of the state as students of other races." (pp. 641, 642.)

In the Sweatt and McLaurin cases the Court specifically refused to consider the issue of constitutionality of racial separation in schools of equal facility in view of contemporary knowledge and held only that where the State did not furnish equal facilities for one race, the students of that race were being denied equal protection of the laws. Appellees contend that this refusal by the Court to review the Plessy and Gong-Lum doctrines in its later decisions

can only be interpreted to support the view that those cases still stand as expressions of the rule established by the Supreme Court upon the question of racial segregation within the public schools.

Notable among decisions since the Sweatt and McLaurin cases are *Carr v. Corning*, 182 F. 2d 14; *Briggs v. Elliott*, 98 F. Supp. 529; and *Davis v. County School Board*, 103 F. Supp. 337, the latter two cases now pending before this Court on appeal. *Carr v. Corning* involved the public school system of the District of Columbia. There the Court noted a fact that we deem most significant with respect to the original meaning and intent of the Fourteenth Amendment. It was pointed out that in the same year that Congress proposed the amendment, federal legislation was enacted providing for segregation of the races in the public schools in the District of Columbia.

> "We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights Cases, and the fact that in 1862, 1864, 1866 and 1874 Congress, as we shall point out in a moment, enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect." (p. 17.)

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Here we note the parallel situation in the State of Kansas. There the State, through its Legislature, ratified the Fourteenth Amendment in 1867, and only one year later legislation providing for separation of the races in the public schools of first class cities was enacted. (L. 1868, ch. 18.)

An examination of all the cases in American jurisdictions supporting the appellants' position would become repetitious and tedious. Thus, we refrain from an exhaustive survey. We believe the comment of Circuit Judge Parker in *Briggs v. Elliott*, supra, aptly summarizes the law and its justification:

> "One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, *i.e.*, the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education." (P. 532.)

Justice Holmes has expressed the following view:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. (Holmes, J., dissenting opinion, *Truax v. Corrigan*, 257 U. S. 312, p. 344, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375.)"

It is undoubtedly true that the separate but equal doctrine is susceptible of abuse. In many instances it has resulted in a separate and unequal rule in practice. However, it is the impossibility of equality under such a doctrine, and not the difficulty of administering and applying the same with equality, that would make such a doctrine unconstitutional *per se*. The situation in Topeka is one where substantial equality has been reached. Such was the finding of the Court below (R. 245) and such is apparently conceded by the appellants (Appellants' Brief, p. 5). These facts, under authority of decisions heretofore reviewed, compel an inescapable conclusion: Neither the statute of Kansas nor the action of the appellee, Board of Education, offends the Fourteenth Amendment to the Federal Constitution.

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THE PROSPECT

At the outset we suggested that the Kansas statute is permissive and that any Board of Education included in the statute may adopt a policy consistent with local conditions and local attitudes. We believe it is significant that under this statute by a process of evolution the people in Kansas communities are arriving at their own solutions to this problem. Under the statute ~~fourteen~~ 12 cities are authorized to maintain separate schools for colored students. The files of the State Superintendent of Public Instruction indicate that at the present time, only nine cities exercise the power conferred by statute. Wichita, the largest city in the state, has abandoned segregation only recently. The city of Pittsburg abandoned the policy of segregation only two years ago. Lawrence, seat of the state university, is now in the process of ending the operation of segregated schools.

This account of events not in the record is related to illustrate the wisdom which underlies the Kansas statute. Only those cities where local conditions produce special problems making segregation desirable need adopt the expedient of segregation. In the orderly progress of the community, these special problems are either solved or vanish, and when the need for segregation disappears, its practice may be discontinued. This was the method pro-

vided by the legislature of the State of Kansas to achieve the goal of an integrated school system where segregation is not needed. We respectfully suggest to the court that this evolutionary process permitting an autonomous solution in the community is consistent with the purpose and intent of the Fourteenth Amendment.

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THE DISTRICT COURT'S FINDING OF FACT NO. VIII IS INSUFFICIENT TO ESTABLISH APPELLANTS' RIGHT TO INJUNCTIVE RELIEF AND TO REQUIRE REVERSAL OF THE JUDGMENT BELOW.

(*a*) *Counsel for Appellants have overstated their case.*

Appellant has raised and preserved this issue by its third Assignment of Error, to wit:

> "The District Court erred:
>
> "
>
> . . . . . .
>
> "3. In refusing to enter judgment in favor of plaintiffs, after the court found that plaintiffs suffered serious harm and detriment in being required to attend segregated elementary schools in the City of Topeka, and were deprived thereby of benefits they would have received in a racially integrated school system." (R. 250.)

And by adopting its Assignment of Errors in its Statement of Points to Be Relied Upon (R. 253).

The District Court's Findings of Fact and Conclusions of Law appear at pp. 244 to 247 of the Transcript of the Record.

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in Appellants' third Assignment of Error.

At page 2 of the Brief for Appellants under the heading *Questions Presented*, appellants state the second issue, as follows:

> "Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment."

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in appellants' statement of the second issue.

At page 10 of the Brief for Appellant, counsel state:

> "Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.
>
> "In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students.
>
> ". . . . . .
>
> "Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying: . . ."

There is no such finding of fact in the Record in this case.

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With all respect due to able counsel for appellants we believe that in their zeal for their cause, they have overstated their case. The only existing Finding of Fact which is relied upon by appellants and the only one quoted in their brief is the District Court's Finding of Fact No. VIII, which we quote accurately:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We call attention to the fact that the foregoing Finding is couched only in broad and general language; it makes no specific or particular reference to any of the appellants, nor to the grade schools in Topeka, nor to racial groups other than Negroes, nor to inequality of educational opportunities between Negroes and other racial groups. The substance of the finding can be summarized in the following statement: "Generally speaking, segregation is detrimental to colored children, and deprives them of some

benefits they would receive in a racial integrated school system."

The Finding of Fact No. VIII cannot be stretched, as counsel for appellants apparently would like to stretch it, into a finding that the appellants in this case have "suffered serious harm in being required to attend segregated elementary schools in Topeka" and that "appellants were placed at such a disadvantage (in relation to other racial groups in [their] pursuit of educational opportunities) and were denied educational opportunities equal to those available to white students."

(*b*) *Elements Necessary to Entitle Appellants to Injunctive Relief and to a Reversal of the Judgment in This Case.*

To establish appellants' right to injunctive relief and to reversal of the judgment in this case, the Findings of Fact No. VIII would have to show:

> (1) That the appellants have actually suffered personal harm as the result of attending segregated schools in Topeka; and,
>
> (2) Either that appellants are being deprived of benefits which other students in the Topeka school system enjoy, or that appellants are being subjected to detriments to which other students in the Topeka school system are not being subjected, by reason of maintenance of a segregated school system.

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The mere showing that appellants may be members of a class which is being discriminated against by reason of a statute is not sufficient to entitle them to injunctive relief, unless appellants can also show that they personally are suffering harm. The Fourteenth Amendment protects only personal and individual rights.

The mere showing that appellants can show that they are being deprived of benefits they would receive under a different system of schools is not sufficient to show that they are being deprived of equal protection of the law, unless appellants can also show that under the existing segregate school system there are others who are not deprived of such benefits.

And finally, the mere showing that segregation is detrimental to appellants is not sufficient to show that they are being deprived of equal protection of the laws, unless they also show that segregation is not similarly detrimental to others in the Topeka school system.

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 59 Law Ed. 149:

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect, and this

amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be 'A multiplicity of suits,' there being at least 'fifty thousand persons of the Negro race in the state of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention." (p. 162.)

Turpin v. Lemon, 187 U. S. 51, 47 Law Ed. 70:

"This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application, and, in this particular, the case falls without ruling in *Tyler v. Registration Court Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." (pp. 60, 61.)

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Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 Law Ed. 472:

> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." (p. 530.)

Mallinckrodt Chemical Works v. Missouri ex rel. Jones, 238 U. S. 41, 59 L. ed. 1192:

> "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him." (p. 54.)

(c) *Finding of Fact No. VIII Fails to Disclose That Any of the Appellants Have Been Actually and Personally Harmed by Segregation in the Topeka Schools.*

Finding of Fact No. VIII makes no specific reference to the individual appellants. It expresses only in broad generalities the effect of segregation in the public schools upon colored children as a class. There is no specific finding that segregation has had a personal detrimental effect upon any of the appellants. There is no specific finding that any of the appellants personally has interpreted segregation as denoting inferiority of the Negro group, or that the motivation to learn of any of the appellants has been affected

by a sense of inferiority. There is no finding that the educational and mental development of any of the appellants has actually been retained or retarded by reason of segregation in the Topeka schools. In short there is no finding that any of the appellants individually and actually has been harmed by segregation in the Topeka school system.

(*d*) *Finding of Fact No. VIII Fails to Disclose That Appellants Are Being Deprived of Equal Protection of the Laws, or That They Are Being Discriminated Against by Segregation in the Topeka Schools.*

Denial of equal protection of the laws, or discrimination, logically and necessarily involves at least two persons who are being treated differently. Denial of equal protection must mean denial of protection or opportunity equal to that afforded to someone else. There can be no such thing as "unilateral discrimination."

Since the Finding of Fact No. VIII is limited solely to a statement of the effect of segregation on colored children as a group, and nowhere mentions the effect of segregation upon any other race or group, it cannot reasonably or logically show discrimination or a denial of equal protection of the laws.

Nowhere in the finding has the court disclosed any facts upon which it can be claimed to show discrimination in

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favor of white children over colored in segregated schools.

It is idle on this appeal to speculate upon what the trial court might have found had it been requested to make additional findings. No request for additional findings was made in the trial court. We therefore refrain from speculating as to whether the court would also have found that segregation was detrimental to white children and impaired their educational and mental development.

(*e*) *The District Court Did Not Intend Nor Consider Its Finding of Fact No. VIII To Be a Finding of Discrimination Against Appellants.*

The last sentence in Finding of Fact No. VIII summarizes the entire finding. We quote:

> "Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We believe the court intended the finding to mean simply that colored children would be better off in integrated schools than they are in segregated schools. Conceding that that is the meaning of the finding, it does not amount to a finding of actual discrimination against colored children and in favor of white children upon the facts in this case. White children are not permitted to attend inte-

grated schools in Topeka. The mere fact, if it be a fact, that the Topeka school system could be improved so far as education of colored children is concerned, does not prove discrimination against them.

In the opinion of the District Court (R. 238 to 244), 98 F. Supp. 797, no mention is made of Finding of Fact No. VIII. It is clear the District Court did not consider or intend to attach to that finding the same significance which appellants seek to place upon it.

We do not question that if the Finding of Fact No. VIII means everything appellants claim it means, they would be entitled to an injunction and reversal of the judgment, if this court should overrule the "separate but equal doctrine." However, it is clear that the District Court did not intend or consider the finding to mean all the things appellants claim for it. As stated in the Decree of the District Court:

> "The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded."

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IX

CONCLUSION

In view of the authorities heretofore cited, appellees respectfully submit that the judgment of the court below should be affirmed.

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NOV 30 1953
HAROLD B. WILLEY, C

No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1953

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, et al., *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al., *Appellees*.

Appeal from the United States District Court for the District of Kansas

BRIEF FOR THE STATE OF KANSAS ON REARGUMENT

HAROLD R. FATZER, Attorney General,
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Attorneys for the State of Kansas.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, et al., *Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al., *Appellees.*

No. 1

Appeal from the United States District Court
for the District of Kansas

BRIEF FOR THE STATE OF KANSAS ON REARGUMENT

Statement

Appellants seek reversal of a judgment of the United States District Court for the District of Kansas whereby said court refused to enjoin the Appellee board of education from maintaining separate public elementary schools for negro children, pursuant to section 72-1724, General Statutes of Kansas, 1949, and to hold said statute violative of the Constitution of the United States. The State of Kansas, acting through its Attorney General, filed a separate answer in the court below for the sole and specific

purpose of defending the validity of the statute,[1] and appeared in this court for that purpose.

Briefs were submitted and the cause was argued before this court on December 10, 1952.[2] Citation to the opinion below, jurisdictional statement, statement of the case, the questions presented and statute involved are fully set out in appellees' original brief. Hence, they are not repeated here.

The Court's Order

On June 8, 1953, the Court ordered that the case be restored to the docket and assigned for reargument. Counsel were requested to give their special attention to the questions set out below insofar as they are germane to this case:

> "Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> "2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

1. R. 14.
2. October Term, 1952, No. 8.

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"(*a*) that future Congresses might, in the exercise of their power under Sec. 5 of the Amendment, abolish such segregation, or

"(*b*) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2 (*a*) and (*b*) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

> "(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Interest of the State of Kansas

On September 3, 1953, the appellee board of education adopted the following resolution:

> "Be it resolved that it is the policy of the Topeka Board of Education to terminate maintenance of segregation in the elementary schools as rapidly as practicable."

Two of the twenty-four elementary schools of the city are being operated on an integrated basis during the current school year. Segregation is presently practiced in the remaining schools.

Obviously, the State's relation to this litigation is not affected by the action of the Topeka Board of Education. The constitutionality of the statute is still under attack. The State intervened in the court below for the sole purpose of defending its validity. Counsel for the State have never advocated or defended the *policy* of racial segregation in the public schools or elsewhere. We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course. We believe that no other position is consistent with the meaning and purpose of the Constitution of the United States.

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SUMMARY OF ARGUMENT

1. All available evidence points to the conclusion that a majority of the Congress which submitted the Fourteenth Amendment, did not contemplate or understand that it would abolish segregation in the public schools. An analysis of the Congressional debates and the currents of Abolitionist thought during the period prior to and contemporaneous with the adoption of the Fourteenth Amendment indicates that the general concern was with the fundamental rights of life, liberty and property and that by Section 1 of the Fourteenth Amendment they sought to guarantee the negro equality of enjoyment of these rights. The right to mingle with other races in the public schools was not included in this concept of basic rights. The Congress further demonstrated by direct legislation that it did not consider segregation to be a violation of constitutional rights. By its own act it provided segregated schools for the District of Columbia, over which it has exclusive legislative power. Furthermore, subsequent to adoption of the Fourteenth Amendment, the Congress specifically refused to enact legislation prohibiting segregation in the public schools.

2. Neither was it the understanding of the states which ratified the Fourteenth Amendment that it would abolish segregation in the public schools. The laws of a majority of the states authorized segregation at the time the Fourteenth Amendment was ratified. There is no evidence that any state altered its policy in this respect by reason of the Fourteenth Amendment. On the other hand, it is a fact that in at least ten states the same legislatures that ratified the Fourteenth Amendment enacted legislation providing separate schools. This we deem evidence that the states did not contemplate that segregation was precluded by the Fourteenth Amendment.

3. Inasmuch as it was the understanding of the framers, the Congress which submitted, and the states which ratified the Fourteenth Amendment, that segregation in the public schools was not included within its purview, it could not have been contemplated at that time that any future federal authority, either legislative or judicial, might abolish segregation without further grant of constitutional authority. However, if, in spite of evidence to the contrary, it is conceived that segregation might be brought within the purview of federal authority, then, consistent with the intent of the framers, it is for the Congress and not the judiciary to act.

4. It is not within the judicial powers to construe the Fourteenth Amendment in a manner differently than the framers intended with reference to facts existing at the time the amendment was adopted, where no substantial change in conditions is shown. It was the intent of the framers of the Fourteenth Amendment that the management of the public schools should be left to the state legislatures. The federal judiciary may not now assume jurisdiction over this phase of state activity in disregard of the framers' intent.

5. The people of Kansas, through the normal processes of local government, are demonstrating their willingness and capacity to deal with local race problems in a manner most beneficial to all concerned. Federal interference is neither necessary nor justified.

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ARGUMENT

I

The Legislative Intent

A. The Evidence is Persuasive that the Majority of the Members of the Thirty-ninth Congress neither Contemplated nor Understood that the Fourteenth Amendment would Abolish Segregation in the Public Schools.

The Fourteenth Amendment was proposed and submitted to the legislatures of the several states by the first session of the 39th Congress. The record of debates in that session is barren of relevant comment on the impact of the Fourteenth Amendment upon segregation in the public schools. Logically, the record could not be otherwise. The Congress simply did not deem itself to be legislating with respect to segregation in the public schools or elsewhere.

The Republican congressmen who conceived and enacted the reconstruction legislation of 1866 were concerned with far graver forms of discrimination than that incident to segregation and the relatively refined concept of "separate but equal" facilities. They were mindful of the welfare of a people that had within the decade been forcibly wrested from slavery; who were still subject to the extraordinary burdens and disabilities imposed by the Black Codes enacted by their late masters. The Congress was seeking to confer upon the emancipated race the essential incidents of citizenship, theretofore denied them by decision of the Supreme Court of the United States.[1] These were the conditions that Congress sought to alleviate. To infer more is unwarranted conjecture. At the same time the dominant group sought to discipline the states of the conquered Confederacy, and to perpetuate its own ascendancy.

1. *Scott v. Sanford*, 19 How. 393.

> ". . . we must not suppose that the men who fashioned the Fourteenth Amendment were concentered upon our nice constitutional question. Whether the freedman should be given the suffrage, what should be the new basis of representation in Congress and what would be the consequences for the two parties, how could the Confederate leaders best be excluded from the councils of the nation—political questions such as these dominated the hour." [2]

An analysis of the currents of Abolitionist thought and the conditions that produced them reinforces this conclusion.

1. The Concept of Equality

There can be no doubt that certain of the Abolitionist leaders demonstrated no tolerance for segregation. At the same time, there can be no doubt that they failed to impress their views upon the majority of their colleagues and to incorporate their philosophy into the legislation of Congress. Charles Sumner of Massachusetts, the most brilliant of them all, had long protested segregation. In 1850 he had urged to the Supreme Judicial Court of Massachusetts that segregation in the public schools of Boston violated the constitutional principle of "equality before the law." He failed, however, to make his point.[3] In 1866, in a new forum, the United States Senate, he contended for a proposition that struck down "all laws and customs . . . establishing any oligarchical prejudices and any distinctions of rights on account of color or race." [4] Doubtless, Sumner's view precluded segregation. But again his view did not prevail. The Fourteenth Amendment, as

2. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights," 2 *Stanford Law Review* 5, 8.

3. *Roberts v. The City of Boston*, 5 Cush. 198 (Mass. 1850).

4. Cong. Globe, 39th Cong. First Session (1866) 91.

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adopted by the Congress, did not approach Sumner's broad concept of equal protection.

What then did the framers of the Fourteenth Amendment intend? It is suggested that the terms "full" and "equal" protection are synonymous. The central concern on the part of the proponents was with "the racial protection of persons or citizens in their natural rights. . . ." [5]

> "The language of the equal protection clause was held to be very little different from the command in the due process clause to protect men in the rights of life, liberty and property. . . ." [6]

In 1690, John Locke had argued that "all men are by nature equal . . . in that equal right that every man hath to his natural freedom, without being subject to the will or the authority of any other man; . . . being equal . . . no one ought to harm another in his life, health, liberty or possessions." [7]

In Locke's view, governments are instituted by compact which impose on the government the duty to preserve the life, liberty and fortunes of its citizens. The author of the Declaration of Independence may have been influenced by Locke's philosophy when he declared "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." However, it would be indeed speculative to suggest that Locke in the 17th century deemed freedom from segregation as part of the guarantee of life, health, liberty or possessions. And it would be equally untenable to suggest that Jefferson, a century later, regarded the Declaration of Independence as forbidding separate but equal facilities.

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5. Ten Broek, *The Anti-slavery Origins of the Fourteenth Amendment* (1951) 192.

6. ibid. 194.

7. Locke, *Second Treatise on Government* (1698) Chap. 2, Sec. 6.

Equal protection, due process, and the term "civil right" all represented to the abolitionists the protection of certain fundamental rights guaranteed by the basic law. Howard Jay Graham has suggested that as early as 1836 the abolitionist argument had crystallized around these major propositions.

> "The great natural and fundamental rights of life, liberty and property, long deemed inherent and inalienable, were now held to be secured . . . and . . . race and color . . . whenever and wherever employed as criterion and determinant of fundamental rights, violated both the letter and spirit of American institutions." [8]

Scholars disagree as to whether all the guaranties of the first eight amendments were incorporated into the 14th Amendment, but they agree unanimously that Section 1 was intended to place the Civil Rights Bill of 1866 in the constitution. Says Flack:

> "The very men who passed the Civil Rights Bill submitted the 14th Amendment, the first section of which practically incorporated that bill." [9]

Fairman points out that the Civil Rights Bill in turn rests on the concept of fundamental rights pronounced by Justice Washington in *Corfield v. Coryell.*[10] These were:

> ". . . the protection of government, enjoyment of life and liberty, the right to acquire and possess property of all kinds, pursue happiness and safety, the right to move from state to state for trade,

8. Graham, "Early Backgrounds of the Fourteenth Amendment," 1950, *Wisconsin Law Review* 479.

9. Flack, The Adoption of the Fourteenth Amendment (1908), 212.

10. 6 Fed. Cases 546.

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agricultural and professional pursuits, the right to the writ of habeas corpus, the right to institute and maintain suits in courts of law and not be subject to unfair taxes."

This, the Civil Rights Bill becomes especially significant. Its provisions were in part:

". . . That all persons born in the United States and not subject to any foreign Power, . . . are hereby declared to be citizens of the United States; and such citizens, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, . . ." [11]

However liberally we may construe these provisions, we find no evidence that they were intended to preclude segregation. The authors were concerned with protecting personal security and personal rights and were not proposing that every person should enjoy the privilege of exercising those rights at the same time and in the same place and manner as every other citizen. Only in those areas where the safety of the individual and his property were jeopardized was the law to operate.

11. 14 Stat. 27.

II

The Concept of Equality in Congress

Senator Trumbull opened in support of the Civil Rights Bill on January 29, 1866. He alluded to

> ". . . the rights of citizens. And what are they? The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman." [12]

Trumbull's concept seemed to include both the rights mentioned in the Declaration of Independence and those enumerated in *Corfield v. Coryell*, supra. In either case, however, only a most speculative mind can conceive these rights to include the abolition of segregation.

It is not merely because it was not argued that we believe the proponents did not intend to abolish segregation. It is because the rights which are emphasized throughout the debates belong to an entirely different class that we are persuaded that the Civil Rights Act did not limit the states' power to segregate.

In all the discussion preceding the adoption of the Civil Rights Bill Senator Trumbull's statement as to the scope of the act was not contraverted. It is true that Senator Johnson, an opponent, did suggest that the Civil Rights Bill would abolish state laws prohibiting mixed marriages, since all persons would have a right to contract equally. But Senator Fessenden, Chairman of the Joint Committee on Reconstruction, rejected the implication of this *argumentum in terrorem* and said that such would not be the

12. Cong. Globe, 39th Cong., 1st Sess. 1866, 475.

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result since the black "has the same right to make a contract of marriage with a white woman that a white man has with a black woman." [13]

The express terms of Civil Rights Bill may give some color to Senator Johnson's contention since the bill gave to all persons the same right to make and enforce contracts. Nevertheless, in the minds of the acknowledged pro civil rights leaders, it would not have that effect. How much more certain is it that the bill was not intended to abolish segregation in the schools, since none of its terms can even by implication be construed to have this effect. Senator Trumbull himself agreed that the rights enumerated in the bill did not give a person the right to vote nor does the mere act of making him a citizen give him such a right.[14] If the cherished privilege of suffrage is not included within the "rights of citizens," nor if it does not flow naturally from the fact of citizenship, is it not an untenable suggestion that freedom from segregation in schools is one of the rights embraced by the act.

James Wilson of Iowa, Chairman of the Committee on Judiciary, introduced the Civil Rights Bill in the House.[15] He mentioned "civil rights and immunities." "What," he asks, "do these terms mean? Do they mean that in all things, civil, social, political, all citizens without distinction of race or color, shall be equal?"

He answers:

> "By no means can they be so construed. Do they mean that all citizens shall vote in the several states? No. . . . Nor do they mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights or immunities."

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13. Ibid. 505.
14. Ibid. 599.
15. Ibid. 1117.

Wilson next inquires as to what the fundamental rights are and for his answer he turns to Blackstone. There he finds that they are three-fold:

1. The right of personal security, which consists in one's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

2. The right of personal liberty which consists in the power of locomotion, of changing situation or moving one's person to whatever place one's own inclination may direct without imprisonment or restraint unless by due course of law.

3. The right of personal property which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land.[16]

Wilson also mentions to Kent's declaration that the absolute rights of individuals may be resolved into "the right of personal security, the right of personal liberty, and the right to acquire and enjoy property." These are the rights that have been justly considered and frequently declared by the people of this country to be natural, inherent and inalienable.[17]

This would seem to indicate beyond doubt that the proponents of the Civil Rights Bill did not conceive that it went further than to guarantee those rights which were considered in the Declaration of Independence and which Justice Washington had enumerated in *Corfield v. Coryell*, supra. And we note specially that Wilson specifically contemplated that segregation in schools would not be abolished by the Civil Rights Bill.

We dwell at length upon the meaning and intent of the Civil Rights Bill. This we do for the reason that to understand its provisions is to understand the congressional concept of equality. As Professor ten Broek indicates:

16. Ibid. 1118.
17. Ibid. 1117.

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> "The one point upon which historians of the 14th Amendment agree, and, indeed, which the evidence places beyond cavil, is that the 14th Amendment was designed to place the constitutionality of the Freedmen's Bureau and Civil Rights Bills, particularly the latter, beyond doubt." [18]

Thaddeus Stevens, like Senator Sumner, may have hoped that the Fourteenth Amendment might be designed to abolish segregation. Stevens' first draft of the proposed amendment offered on December 5, 1865, read:

> "All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race or color."

If this draft had been retained, plaintiffs' contention might well be sustained. But by April 21, 1866, Stevens had submitted a new proposal the language of which is as follows:

> "No discrimination shall be made by any state, nor by the United States, as to the *civil rights* of persons because of race, color, or previous condition of servitude."

Thus Stevens, in some four months, had restricted his original proposal in order to limit the prohibition on discrimination to civil rights only, a term that clearly was not understood to include the right of racial amalgamation. Stevens apparently realized that his original proposition could not win the support of a majority of the Congress.

The same connection between the equal protection clause and the trilogy of life, liberty and property appears in Representative John A. Bingham's proposals which were

18. ten Broek, op. cit. 183.

finally adopted by Congress. His first draft suggested to the Joint Committee on Reconstruction was as follows:

> "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this union equal protection in their rights of life, liberty and property." [19]

On January 20, 1866, a clause was inserted in the above granting all "citizens of the United States in every State, the same political rights and privileges." This clause was later dropped and on February 13, 1866, the following draft by Bingham was submitted to Congress by the Committee on Reconstruction:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens of the several states and to all persons in the several states *equal protection in the rights of life, liberty and property.*"

This draft was tabled while the Civil Rights Bill was enacted.

When the Joint Committee on Reconstruction resumed consideration of the Fourteenth Amendment on April 21, Stevens submitted his proposal, *supra.* His understanding of the meaning of his draft may be indicated by his later statement on the floor of Congress.

> "Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in Court shall allow the man of color

19. Journal of Reconstruction Committee, p. 7.

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> to do the same. These are great advantages over their present codes." [20]

Here he refers specifically to the "Black Codes," which had been adopted in many southern states to keep the colored population in continued subjection.

Bingham immediately offered an alternate draft; his proposal provided:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

While Stevens' draft was limited to a protection of the recently emancipated negro, Bingham's language seems to extend the guarantee of fundamental rights to all persons regardless of color, an enlargement probably suggested by the pre-civil war treatment of the abolitionists in the south. However, there is no evidence that Bingham's notion of the rights to be secured differed greatly from that of Stevens. The content of the guarantees was substantially the same.

We do not deem it significant that in the final draft of the Amendment the terms "life, liberty or property" became coupled with the due process clause. The emphasis then, as always, was on the protection of fundamental rights and the requirement was that these safeguards be made equal. We have already pointed out that the guarantees of equal protection and due process had substantially the same meaning to the abolitionists.[21] This would explain why Bingham so readily changed the por-

20. Cong. Globe, 39th Cong. 1st Sess. (1866) 2459.
21. ten Broek, op. cit., 96-101.

tion of the phrase "life, liberty or property" from the equal protection to the due process clause. Bingham's draft in committee on February 3 further emphasizes this point It provided:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several states (Art. II, Sec. 2), and to all persons in the several states equal protection in the rights of life, liberty and property. (5th Amendment.)" [22]

The parenthesized notations are in Bingham's handwriting and indicate that he considered the term equal protection as used in his text to be equivalent to the term due process as it appears in the Fifth Amendment. Bingham's own explanation as to why he altered certain provisions of his draft is that he did so in order that the Fourteenth Amendment might as much as possible "conform to the original form of the Constitution." [23] Life, liberty and property are mentioned in conjunction with due process in the Fifth Amendment. Bingham felt, therefore, that they should be similarly connected in the Fourteenth Amendment. Rights protected are still the fundamental and basic rights already described, and nothing more.

In the somewhat incomplete debates in Congress as to the meaning of the guarantees of Section 1 of the proposed Fourteenth Amendment, there is nothing from which we can infer that the proponents intended to give it a broader meaning than to protect the basic and fundamental rights about which the abolitionists had spoken theretofore. Abolition of segregation was not one of these. It is significant, perhaps, that a majority of the members

22. Jnl. of Reconstruction Committee, 15.
23. Cong. Rec. 42d Congress, 1st sess., Appendix 83-85.

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of Congress represented states where segregation in the public schools was practiced with sanction of law. The same statement is true of a majority of the members of the Joint Committee on Reconstruction. Had there been an intent to disturb a social pattern so firmly established we believe that that intent would have been reflected in the Congressional debates. William Higby argued that the language of the proposed amendment was very little different from the privileges and immunities clause and the Fifth Amendment's guarantee of life, liberty and property.[24] Kelley of Pennsylvania said the amendment would give to the general government the right to defend the rights, liberties, privileges and immunities of the humblest citizen.[25]

Woodbridge of Vermont said:

> "It (the Fourteenth Amendment) is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever state he may be that protection to his property which is extended to the other citizens of the state." [26]

Hale of New York saw the amendment as a grant to Congress of the right to legislate for the protection of life, liberty and property, simply qualified with the condition that all such legislation should apply to all persons equally.[27] Bingham argued that the proposed amendment gave Congress the power to enforce the Bill of Rights. A consideration of Bingham's position throughout the session inclines us to the belief that the Bill of Rights to which Bingham referred was not the first eight amendments, but

24. Cong. Globe, 39th Cong. 1st sess. 1054.
25. Ibid. 1057.
26. Ibid. 1088.
27. Ibid. 1063, 1064.

rather the privileges and immunities clause in Article IV, and the guarantee that no person shall be deprived of life, liberty or property without due process of law. Again Bingham contended that the Bill of Rights provides that "all shall be protected alike in life, liberty, and property." [28] Notice how this argument telescopes equal protection and due process. "Bingham, in fact, . . . speaks of equal protection and due process as but a single expression." [29]

Senator Howard of Michigan presented the Fourteenth Amendment to the Senate. There he announced:

> "The great object of the first section of this amendment is, therefore, to restrain the powers of the States and compel them at all times to respect these great fundamental guarantees." [30]

Research suggests that the fundamental guarantees about which the Senator speaks are those that had been outlined when the Civil Rights Bill was being debated. Because of the extensive debates in connection with the Civil Rights Bill, it was apparently not deemed necessary to repeat what had been said concerning the scope of these fundamental rights. We think, however, the record is conclusive that the framers of the Fourteenth Amendment did not contemplate that it would have the effect of abolishing segregation in the schools. In every instance, where they describe the guarantee of equal protection, they related it to the protection of the fundamental rights of life, liberty and property. The abolition of segregation has never been included within the terms of this guarantee. The fact that after the Fourteenth Amendment was adopted some members of Congress may have felt that it abolished or authorized the abolishment of segregation in the schools is not decisive. Senator Carpenter's argument

28. Ibid. 1088.
29. ten Broeck, op. cit. 199, 200.
30. Cong. Globe, 39th Cong., First Sess. 2766.

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in the 42nd Congress that the Fourteenth Amendment gave Congress the right to abolish segregation in the schools does not prove that Congress had agreed that the Fourteenth Amendment would abolish segregation.[31] Nor does the Civil Rights Bill of March 1, 1875, giving to negroes full and equal privileges in hotels, streetcars, passenger trains, steamboats or other public conveyances, in theaters and other places of public amusement prove that Congress had intended to abolish segregation by the Fourteenth Amendment. Self-serving declarations after the event cannot be used to prove prior intent. To determine prior intent we must rely exclusively on those statements made public before the amendment was adopted. When these are investigated, there is a complete absence of evidence that the equal protection clause was calculated to abolish segregation. Furthermore, an enumeration of the guarantees which were included, expressly negatives the possibility that the framers of the Fourteenth Amendment contemplated such an effect.

III

Contemporaneous Congressional Policies in the District of Columbia

However persuasive may be the evidence thus far assembled, it is still circumstantial. It has been adduced by a process of analysis and inference. But there is other testimony that is positive and direct. We refer to the congressional acts establishing racial segregation in the public schools of the District of Columbia.

Congress has exclusive power to legislate for the District of Columbia. The 37th and 38th Congresses, in 1862 and 1864, established segregated public school systems in the District.[32] The 39th Congress, at the very

31. 42d Cong. 2d Sess. 763.
32. 12 Stat. 394 (1862); 13 Stat. 187 (1864).

time that the Fourteenth Amendment was being debated, enacted laws to implement and expedite the administration of the segregated system of public schools.[33] Measures specifically designed to end segregation in the District failed to pass in both the 41st and 42d Congresses.[34]

It is hardly credible that the Congress would have disregarded a limitation that it intended to impose on the states. It is equally incredible that the Congress would have denied negro citizens of the District of Columbia rights that it sought to assure elsewhere in the country.

B. There Is Conclusive Evidence that a Majority of the States in the Union, at the Time of the Adoption of the Fourteenth Amendment, Did Not Contemplate that Its Effect Would Be to Abolish Segregation in the Public Schools.

The Fourteenth Amendment was proposed to the legislatures of the several states by the 39th Congress on the 16th day of June, 1866. On the 21st day of June, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of . . . three-fourths and more of the several states of the Union have ratified the Fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress." It was therefore resolved, "that the said fourteenth article is hereby declared to be a part of the Constitution of the United States. . . ."

At the time of ratification there were thirty-seven component states in the Union. Of these thirty-seven, thirty had ratified at the time of the promulgation.[32] Three states, Mississippi, Texas and Virginia, later completed ratification. Delaware, Maryland and Kentucky had re-

32. See App. B.

33. 14 Stat. 342 (1866); 14 Stat. 216 (1866).

34. Cong. Globe, 41st Cong., 2d Sess., 3273; 3d Sess., 1053-1061; 42d Cong. 2d Sess., 68, 2484, 2539-42, 3057-8, 3099-3100, 3122-3125, 3174.

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ratification. Delaware, Maryland and Kentucky had rejected the amendment, although Delaware reconsidered and ratified it some thirty years later. Only the legislature of California had taken no action.

To develop a concensus of attitudes of the ratifying legislatures is a task that virtually defies accomplishment. On one hand we have Massachusetts, the home of Charles Sumner; on the other is South Carolina, the birthplace of secession. The group includes Minnesota, with a negro population of less than one-fifth of one percent, and Mississippi, where the negro population included more than fifty-three percent of the total. It is indeed futile to attempt to reconcile the intent and understanding of the legislative bodies in these divergent situations. Furthermore, in evaluating the legislative intent, we must be mindful of the attitudes of the states that had comprised the late Confederacy. Of these eleven, only Tennessee ratified the amendment when it was first submitted. All others rejected it in the first instance, and ratification was later accomplished by reconstruction legislatures which could hardly be described as representative bodies. For these states ratification was a condition precedent to readmission of their representatives to Congress.[33] Certainly, to regain their representation in the national Congress was the main if not the only objective of this group of states. In other states, particularly in the north, where the Republican party was in the ascendancy, ratification was accomplished summarily and without thorough consideration of its meaning. Kansas is typical of these states. In his message to the legislature on January 8, 1867, Governor Crawford commented upon the Fourteenth Amendment as follows:

> "Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I be-

33. 14 Stat. 428.

> lieve the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood. And as we are but their servants, to do their will, it is now our unquestionable duty to accept it, and give it our cheerful and hearty support. I, therefore, hope that Kansas, in the just legislative enactment of this session will give the unanimous vote of her Legislature in favor of this measure." [34]

Following the receipt of the amendment, without reference to committee, the Senate ratified the Fourteenth Amendment unanimously and the House vote was 76 to 7.

Under these circumstances it is most difficult to determine the effect that the ratifying states deemed the amendment to have upon public school segregation and other local policies. Our insight in part must come from an analysis of the currents of thought that were prevailing in those states. These have been analyzed in Part I-A of this argument. The other evidence of intent, and indeed the more positive and direct evidence, are the contemporaneous acts and policies of those legislative bodies. Our researches have disclosed that of the 37 states that comprised the Union at the time of adoption of the Fourteenth Amendment, 24 of them maintained legal segregation in the public schools at the time of adoption or subsequent thereto.[35] In 10 states legislation providing for segregated schools was enacted by the same legislatures at the same sessions at which ratification was accomplished. This we deem positive evidence that none of those 24 states considered that segregation was abolished by the Fourteenth

34. Kan. S. J. 43 (1867); Kan. H. J. 62 (1867).
35. See App. B.

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Amendment. A further analysis convinces us that in those states where segregation was never practiced or abolished prior to the ratification of the amendment, state and local policies were influenced by local conditions only and bore no relationship to national reconstruction policies. Thus, we conclude that the state legislatures ratifying the Fourteenth Amendment did not understand or contemplate that it would preclude segregation.

The Kansas Understanding

Of the states currently before the Bar of this Court, Kansas is unique in its Abolitionist tradition. Both Virginia and South Carolina were members of the Confederacy. Delaware remained in the Union, but did so reluctantly.[36] Appellants' denunciation of the local customs and statutes in those states as "custom, usage and tradition rooted in the slave tradition" may be apt.[37] Such an accusation, however, cannot be leveled at Kansas. The issues produced by the clash between the Abolitionist and proslavery ideologies had been drawn in Kansas for a decade prior to the civil war, and the abolitionist victory was decisive. Throughout the entire period of reconstruction the Republican party was dominant. Kansas was the home of John Brown, leader of the abortive insurrection at Harper's Ferry. Kansas, in proportion to its population, contributed a larger number of troops to the Union armies than any other loyal state.[38] At the same time it is perhaps significant that Kansas had a substantial negro population—only a little less than ten percent of the total in 1866.[39] Therefore, we proceed to analyze the Kansas experience and attitudes in some detail.

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36. *Gebhart, et al., v. Belton, et al.*, No. 10, Oct. 1953 Term, Supreme Court of the U. S., Brief for Petitioners on Reargument, p. 7.

37. Appellants' Brief, p. 42.

38. Blackmar, *History of Kansas* (1912) p. 875.

39. (127,270 white; 12,527 negro.)

The early history of Kansas is the record of a struggle to assure freedom to the negro. Kansans bitterly opposed the degrading of the negro race by the institution of slavery. They championed negro rights as they conceived them. However, it does not appear that their concept of equality included racial integration in any sphere.

The first territorial legislature of Kansas assembled in 1855. It enacted laws providing for a system of public education.[40] The benefits thereof were restricted to "every class of *white* citizens between the ages of 5 and 21 years."[41] This perhaps follows from the fact that the territorial legislature of 1855, commonly called the "Bogus Legislature," was elected largely by the votes of Missourians, whose pro-slavery sympathies were accepted. However, at the convention of the Free State party at Big Springs, September 5, 1855, James H. Lane, as chairman of the committee on platform, introduced resolutions declaring in favor of excluding all negroes, both bond and free, from the territory. These resolutions were adopted and incorporated into the "Big Springs Platform," which marked the formal beginning of the Free State party.[42]

The Topeka Constitutional Convention, which met about two months later, gave long discussion on the question of excluding negroes from the full rights of citizenship, resulting in a vote of 45 to 17 in favor of such exclusion. The proposition to exclude all negroes from the state was submitted to the people along with the constitution on December 15, 1855, and was approved by a vote of 1287 to 458.[43]

While a law enacted in 1858 seemed to make the com-

40. Chap. 144, Sec. 1, Statutes of Kansas Territory (1855).
41. See App. C-1.
42. Andreas, A. T., *History of the State of Kansas* (1883) pp. 1, 94.
43. Ibid., 112.

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mon schools accessible to all,[44] the negroes of the territory were largely without educational opportunity. During this period cities were incorporated by special acts of the legislature. These acts defined the cities powers with respect to schools. Illustrative is the act incorporating the city of Marysville.[45] Although the corporation was specifically authorized to maintain a system of public schools, the act provided that nothing therein "shall be so construed as to permit black or mulatto persons to attend said schools or either of them or to receive instruction therein."[46] Provision was made for the appropriation of school taxes paid by negroes to the exclusive purpose of education of the members of the negro race.

Kansas became a state under the Wyandotte constitution, written in 1859. The attitude of that convention was similar to that expressed by earlier assemblies. A resolution to exclude free negroes from the state was laid on the table by a vote of only 26 to 21. The committee on suffrage limited the vote to "every white male citizen." Efforts were made to strike out the word "white." A resolution to that effect was defeated by a vote of 37 to 3.[47] Also in the Wyandotte constitutional convention, numerous attempts were made to restrict all educational privileges to whites. Resolutions were introduced to prohibit colored people from attending the common schools, to exclude them from the universities and to forbid appropriation of any kind for their education. While these measures were defeated, their defeat was not the result of lack of sympathy with such policies. The dominant group apparently did not believe that constitutional restrictions were necessary, their attitude being that such determinations should be left to the legislature and to the

44. Laws of K. T., 1858, Chap. 8, Sec. 71.
45. Private Laws of K. T., 1861, Chap. 43, Sec. 5.
46. App. C-3.
47. Wyandotte Constitution, Proceedings and Debates, 1859, 301.

people of the several communities within the state. S. A. Kingman, delegate from Brown County and one of the acknowledged Free State leaders, addressed the convention thusly: "I have no hesitancy in saying that if ever a negro family should come into my neighborhood, I should immediately object to their attending school with the children of my neighbors—and I believe that the neighborhood could protect itself. The law does not say they shall ever go to school. It leaves it for the people from time to time to regulate. But more than all, and beyond all, and above all, it does not say that those who choose to go to school with negroes shall not to do so." [48] Blunt, a former resident of Maine, added this:

> "We don't know what will be the peculiar views of the people of Kansas upon this subject before there will be a change of the organic law. There may be a progress made by which the prejudices which involve and surround this question of the admission of negroes or mulattoes to our common schools may be laid aside; and then the Legislature could provide for the education of persons of color." [49]

The state legislature of 1861 enacted a comprehensive system of statutes relating to common schools. Among other powers conferred upon the electors at the annual district meeting was the following: "To make such order as they deem proper for the separate education of white and colored children, securing to them equal educational advantages." [50] This act remained effective until 1876. In 1862, an act relating to cities of the first class (over 7,000) provided for the appropriation of taxes collected from black or mulatto persons to maintain separate schools

48. Ibid., 176.
49. Ibid., 177.
50. Laws of Kansas 1861, Chap. 76, Art. III, Sec. 1.

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for negroes.[51] This act was amended in 1865 to provide for equal distribution of the tax burden for public school purposes over all citizens, and, at the same time, to authorize boards of education in such cities to organize and maintain separate schools for the education of white and colored children whenever the educational interests demanded.[52]

It is difficult to determine how many colored children were enrolled in the common schools of Kansas prior to 1867. The reports to the state superintendent were meager and inadequate with no separate statistics for the different races. But, it seems likely that little attention was given to the education of colored children. On February 7, 1863, the editor of the *Leavenworth Conservative* was remonstrating that there were no free schools for the large colored population in Leavenworth. He advocated a law to compel district trustees to provide for the instruction of colored children in either separate or mixed schools.[53] In 1864, Leavenworth city made provisions for a special school for her colored population—two grades, one primary and one intermediate, were provided with one teacher for each.[54]

In 1866 a move to counteract prejudice against negro education was initiated by the teachers in the public schools. At the meeting of the state teachers association in July it was resolved "that we as teachers use our best endeavors to overcome unreasonable prejudice existing in certain localities against the admission of colored children upon equal terms with the white children as guaranteed by the spirit of the law of our state." [55]

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51. Compiled Laws of 1862, Chap. 46, Art. IV, Sec. 19.

52. Laws of 1865, Chap. 46, Sec. 1.

53. *Leavenworth Conservative Daily*, February 7, 1863.

54. David J. Brewer, later associate justice of the supreme court of the United States, was president of the Leavenworth Board of Education in 1864. Later, 1865-68, he was superintendent of Leavenworth schools.

55. Kansas Educational Journal, Aug., 1866, 69.

On January 18, 1867, the Kansas legislature ratified the Fourteenth Amendment.[56] Within six weeks thereafter the same legislature specifically empowered boards of education in cities of the second class (between 1,000 and 15,000) "to provide separate schools for the education of colored and white children."[57] Thus, in that year segregation became legally possible in all areas of the state. By its earlier acts the legislature had authorized separate schools in cities of the first class and in rural districts. The 1867 act extended this authorization to cities of the second class. With minor amendments these statutes remained effective until 1876.

The 1867 legislature also took definite action to assure educational opportunity to negro children. It provided that when any children are denied admittance to the schools by a board of directors the members of the board would be subject to fine of $100 "for every school month so offending." Those refusing or neglecting to pay the fine might be imprisoned in the county jail.[58] However, this provision was never construed to preclude the maintenance of separate schools of equal facility. Evidence of that fact is found in the almost simultaneous action of the legislature in enacting other legislation, supra, providing for separate schools in cities of the second class.

In 1870, an effort was made to amend the bill to require separate schools for members of different races.[59] The committee to whom the bill was referred recommended its rejection. The following appears in the report of the majority of the committee:

> "According to the provisions of law now in force in this State, the district boards of the several school districts of the State, the trustees and other officers

56. See App. B.
57. Laws of 1867, Chap. 49, Sec. 7.
58. Laws of 1867, Chap. 125, Sec. 1.
59. H. B. 219 (1870).

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of the boards of education in our cities and villages, having authority in the premises, are authorized to provide separate schools for the education of white and colored children, whenever in their opinion the educational interests intrusted to their care demand the same.

"By the provisions of the bill under consideration, the board of education having authority in the premises are required to establish separate schools for the education of white and colored children.

"We deem the law as it now stands preferable to the bill in this, and also in other particulars, and therefore recommend the rejection of the bill." [60]

This would appear to refute any contention that Chapter 125, Section 1, Laws of 1867, was designed to prohibit segregation. Note, also, the minority report with reference to H. B. 219. In part it states:

"It is a notorious fact that in many districts of the State, the public schools have been broken up and discontinued the moment that an attempt was made to force colored children into such schools with white children, and that in such districts the schools have been discontinued entirely, or replaced by subscription schools. In the former cases both classes of children are deprived of educational advantages; in the latter cases the poorer portion of the white children, and all the colored children are excluded in consequence of their poverty or color, from school, and placed beyond the reach of the liberal provisions of the constitution and laws of the State, which were designed to be equally free to all classes."

60. Proceedings of the Legislative Assembly of the State of Kansas (1870), 661.

Also significant is the view of the chief school administrator for Kansas in the year 1867. In that year the state superintendent reports:

> "The law of the State provides, that the legal voters of a school district 'shall have power to make such order as they may deem proper, for the education of the white and colored children separately, or otherwise, securing to them equal educational advantages.' According to the fair and obvious construction of this law, the schools maintained for colored children must afford equal advantages as to quality of instruction and gradation, as well as in other respects. It will not do to establish a graded school for white children and keep the colored children always in a primary department. It will not do to build fine edifices for the one class and crowd the other into poorly lighted and ill-ventilated rooms. The law secures to each class equal educational advantages.
>
> "If a colored child is in the primary department, he must be allowed to enter with white children, or have provided a separate school equally as good. If a colored pupil is prepared to enter a higher grade, he must either be admitted with white children into that particular grade, or a separate grade equal in all respects must be maintained for his benefit. *Such is the law.*" [61]

Obviously, Superintendent McVicar did not deem separate schools precluded by the action of the legislature in ratifying the Fourteenth Amendment. This, despite the fact that Mr. McVicar did not sympathize with separate schools. Elsewhere in his report he states:

61. 7th Annual Report State Supt. of Pub. Instr., P. McVicar (1867), 50.

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> "Why should a small district struggle to maintain separate schools, when the thing is impracticable, and cannot be done without injury to all classes. Why not permit all the children of the community, without distinction of condition or color, to enter our public schools together. . . . And I submit, that the course which I have indicated, is the only course worthy a citizen of Kansas." [62]

In 1876, the school laws of Kansas were codified. For reasons not apparent in the record, all the provisions relating to separation of schools were omitted.[63] It may be significant that at the end of the same year, the superintendent of public instruction in Wyandotte County reported to the state department: "There are a large number of colored pupils in this county, and where they predominate, or attend schools in considerable numbers, these mixed schools are not a success." [64]

In 1878, there occurred a mass migration of former negro slaves from Mississippi and Louisiana to Kansas. Local historians refer to this movement as the "Exodus." In that year the negro population of Kansas substantially increased.[65] Many of these persons settled in the urban communities. In 1879, the legislature enacted new legislation applying to elementary schools in first class cities of the state and authorizing the boards of education to maintain separate schools on that level.[66] This act was amended in 1905 to provide for the maintenance of separate high schools in the city of Kansas City.

The message of Governor Hoch on February 22, 1905, announcing his approval of the 1905 act expresses an attitude then and now characteristic of Kansas officials, and is set out at length:

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62. Ibid., 51.
63. Laws of 1876, Chap. 122.
64. Annual Report State Supt. of Pub. Instr. (1876), 72.
65. See Files, Kansas State Historical Society.
66. Laws of 1879, Chap. 81, Sec. 1.

"No question that has yet come to me in my official capacity has given me so much concern as House bill No. 890, providing for the separation of the whites and blacks in the high school of Kansas City, Kan., and no problem has been more difficult for me to solve satisfactorily to myself than this one. It has seemed to me to be a question vastly more than local, and to involve great moral, educational and racial principles, and incidentally some legal and financial considerations also. My father, though living in the South before the war of the rebellion, was an original and intense abolitionist, and I have believed from boyhood that the black people should have all the rights and privileges under the law enjoyed by the whites. I have watched with increasing admiration and pride the wonderful progress made by this people since the immortal Lincoln made them free. I am in hearty sympathy with them in their great struggle for higher and better things, and in perfect accord with the Roosevelt idea that every man should have a square deal, regardless of race or color. This Kansas City proposition has seemed to me in its general aspects to be a step backward, a concession to the Southern ideas in such matters, with which I have no sympathy whatever; but the local conditions are peculiar, and I have all along believed that it were better for both races in Kansas City, Kan., that the separation proposed in this bill should be made. Under the law in this state in cities of the first class such separation is optional with the boards of education in all grades up to the high school, and the whites and blacks have been separated in all the lower grades in Kansas City, Kan., for years. Without yielding an iota of my conviction in reference to the race problem, with all my sympathies going out to-

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> ward these struggling people, and without sympathy or patience with those who would put a straw in the way of their progress, I have simply come to the conclusion that, under present unfortunate local conditions, the permanent and best interests of whites and blacks alike, in Kansas City, Kan., will be best subserved by permitting this bill to become a law, and in this opinion I seem to be sustained by an overwhelming majority of the people on the ground, as well as by a very large majority of the many able and conservative men with whom I have counseled from other parts of the state."

We dare say that Governor Hoch would have been distressed by the suggestion that his act violated the constitutional rights of the negro citizen.

In 1937, the Kansas legislature again demonstrated its special concern for negro education. An act of that year permitted Kansas City to construct a new high school for colored children, and to issue bonds to finance such construction, "without the necessity of an election" as is required under the general laws of Kansas relating to issuance of bonds of indebtedness by municipal corporations.[67] A sponsor of that bill was a respected negro lawyer of Kansas City who was long a member of the Kansas House of Representatives.

The foregoing suggests two obvious conclusions. Kansas legislators and public officials have repeatedly shown a determination to assure to negro citizens the same educational opportunity that other citizens enjoy. At the same time, they have recognized circumstances where this objective can best be accomplished in separate schools. They have not viewed the Fourteenth Amendment as a deterrent to this effort. This, emphatically, was the attitude of the legislature that ratified the amendment.

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67. Laws of 1937, Chap. 309.

II

The Intended Future Effect of the Amendment

A. The Evidence Sustains the Position That Neither the Congress Nor the States Understood That the Fourteenth Amendment Would Empower the Congress, Acting Pursuant to Section 5 Thereof, or the Judiciary in the Light of Future Conditions to Abolish Segregation in the Public Schools.

There is a complete absence of evidence of a contemporary understanding that either the Congress or the Judiciary might at some future date, acting within the powers granted by the Fourteenth Amendment, abolish segregation in the public schools of the state. That the amendment did enlarge the federal power is self-evident. Congress was specifically empowered "to enforce, by appropriate legislation, the provisions of this Article." The power of the federal courts to give effect to constitutional guarantees, to interpret constitutional provisions, and to apply such provisions to new situations brought within their purview by changed conditions, was firmly embedded in our Constitution long prior to 1866. That these conditions were understood and accepted by the Congress that submitted and the states that ratified the Fourteenth Amendment is apparent.

At the same time, other concepts, equally basic, and equally well understood, both then and now, compel our attention. These principles necessarily were within the understanding of the framers of the Fourteenth Amendment.

> "Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. *The federal union is a government of delegated powers.*" (*U. S. v. Butler*, 297 U. S. 1 [63].)

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"It (the national government) can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction." (*U. S. v. Cruikshank*, 92 U. S. 542 [550].)

"The Fourteenth Amendment did not alter the basic relations between the States and the national government." (*Screws v. U. S.*, 325 U. S. 91 [109].)

"The words of the Constitution should be given the meaning they were intended to bear, when that instrument was framed and adopted." (*Scott v. Sanford*, 19 How. 393.)

"Where the intention of a constitutional provision is clear, there is no room for construction, and no excuse for interpolation or addition." (*U. S. v. Sprague*, 282 U. S. 716.)

The foregoing statements, illustrative of principles too elementary and too familiar to require comment, undoubtedly were understood to condition the powers delegated to the national government by the Fourteenth Amendment.

In Part I of this argument we sought to demonstrate that neither the framers, the Congress which submitted, nor the states that ratified the Fourteenth Amendment deemed public school segregation to be within the purview of Section 1 thereof. A necessary corollary to this conclusion is that those who were concerned with the adoption of the amendment intended that the education of the people in schools maintained by state taxation should remain within the sphere of state authority. This manifest understanding that the Fourteenth Amendment did not abolish segregation in the public schools and did not bring the schools within the scope of national authority precludes any possibility of an understanding that at some undetermined future time Congress or the Judiciary might without further grant of constitutional authority

take from the states this power not intended to be granted. Such a suggestion is repugnant to the basic theory of written constitutions.

> "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. . . . Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . ." (Cooley, *Constitutional Limitations,* 8th ed. [1927], pp. 123, 124.)

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B. The Emphasis on Congressional Power

If, in spite of evidence to the contrary, it be conceived that the equal protection clause does provide for the abolition of segregation in the public schools, then Congress must so indicate by an exercise of its power under section 5. It is apparent that in the understanding of the framers the emphasis was on congressional action. Ten Broeck notes that "equality, protection, due process, *congressional power* are the constitutional elements recurrently emphasized . . . in the abolitionist platforms." [1] Fairman also notes this trend. He points out that "the current of thought in 1866 . . . ran strongly in the direction of *congressional* action. . . . Congress was going to preside over reconstruction." [2] He also mentions the fact that direct application of the several clauses of the Fourteenth Amendment by the Judiciary received no mention. Flack agrees that Congress intended that it would have the right to enact affirmative legislation to implement the policy of the Fourteenth Amendment.[3]

The debates which preceded the adoption of the Fourteenth Amendment emphasize this theme. Says Stevens, ". . . The Constitution limits only the action of Congress and is not a limitation on the states. This amendment supplies that defect, and allows Congress to correct the injust legislation of the states." [4] Senator Howard in presenting the amendment said, "The great object of the first section of this amendment is, therefore, to restrain the powers of the states. . . . How will it be done under the present amendment? . . . (It) is done by the fifth section of this amendment which declares that, 'The Congress shall have power to enforce by appropriate

1. ten Broeck, op. cit., 118.
2. Fairman, op. cit., 23.
3. Flack, op. cit., 225, 245, 249.
4. Cong. Globe, 39th Congress, First Sess., 2459.

legislation. . . .'" [5] Representative Bingham, in his last major speech before the House voted on the Amendment, and said "There was a want hereto and there remains a want now, in the Constitution of our Country, which the proposed Amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by Congressional *enactment* which hitherto they have not had the power to do. . . ." [6]

These statements are only illustrative of the many expressions of the same sentiment. They clearly indicate that the framers intended that the Congress should actively participate in administering the guarantees of the Fourteenth Amendment. This attitude may not have had due consideration in the *Slaughterhouse Cases,* 16 Wall. 36, and the *Civil Rights Cases,* 109 U. S. 3.

We do not suggest that it was intended that the judiciary have no function in the interpretation and enforcement of the amendment. Certainly, the courts have a duty in any case to declare those guarantees that are generally recognized and accepted as being within the scope of the amendment. However, when it is sought to extend the federal jurisdiction into those undefined areas on the periphery of equal protection, we believe the framers intended that the Congress and not the courts should supply the impetus.

The fact that it was the intent of the framers that Congress should be the prime mover in this area, suggests that this court might adopt a rule of construction with regard to the Fourteenth Amendment similar to that which it has applied in the commerce cases. In these, a harmonious arrangement has been reached as between national and state power. The states, in the absence of

5. Ibid. 2766.
6. Ibid. 2542.

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federal action, may enact laws regulating interstate commerce as to matters of local concern, not requiring uniform national control.[7]

The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise.

By this latter argument, we do not presume to retreat from our initial position that the Fourteenth Amendment does not bring segregation in the public schools within the national power. However, should the court disagree with our initial position, we then respectfully suggest that the field is one for Congress and not the courts. And until Congress acts, state legislative policy should prevail.

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7. *Cooley v. Board of Port Wardens of Philadelphia*, 12 How. 299; *So. Car. State Highway Dept. v. Barnwell*, 303 U. S. 177; *California v. Thompson*, 313 U. S. 109. See, also, a similar result in the Tax cases. *Graves v. O'Keefe*, 306 U. S. 466; *Helvering v. Gerhardt*, 304 U. S. 405; *Pittman v. H. O. L. C.*, 308 U. S. 21; *Alabama v. King and Boozer*, 314 U. S. 1.

III

To Abolish Segregation in the Public Schools Is Not Within the Judicial Power

The arguments heretofore advanced effectively dispose of this problem. Heretofore we have established the proposition that clearly it was not the contemporary understanding of those in responsible places that the Fourteenth Amendment would of its own force abolish segregation, or that it would otherwise bring the policy of segregation within the purview of the federal power. It was the current understanding and intent that control of the public schools should remain in the states that maintained them. The judicial power can be applied to factual situations existing at the time of the adoption of the Fourteenth Amendment only to the extent and in the manner that the framers contemplated.

It is not our intent to disregard the concept of a "living constitution," nor do we deny that changed conditions produce new factual situations and require new interpretations of constitutional provisions. However, it is our view that the present case presents neither a factual situation that did not exist at the time the amendment was adopted, nor a record that reveals a substantial change in the conditions surrounding the situation. It is a fact of history that racial segregation in the public schools was an established pattern in a majority of the states when the amendment was adopted. (See appendix B.) It is equally well established that there were repeated efforts in the Congress, contemporaneous with the adoption of the amendment, to enact legislation prohibiting segregation in the public schools. We deem it significant that most of the arguments here advanced by our adversaries were then urged upon Congress by certain of the abolitionists. The arguments today are basically the same as those offered in support of the Civil Rights Bill of 1875.[1]

1. Cong. Rec., 43d Cong. 1st Sess. 4115-4116 (1874).

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Thus, the record discloses neither new facts nor changed conditions. We have the same problem, the same arguments. To be sure, there is a variation in the language employed, and to the record has been added the somewhat speculative conclusions of a few individuals whose own assertion is that their theses are "admittedly on the frontiers of scientific knowledge." [2] We feel that this court would be going far beyond the limits of the judicial power if, on the basis of such a record, it should reverse the trend of nearly ninety years and strike down a state statute that during all those years has been universally deemed a proper exercise of legislative power. It is not within the province of the federal judiciary to legislate, particularly beyond the limits of the federal constitution.

One more consideration militates against the judicial power. In Part II-B of this Argument we pointed out the framers' emphasis on congressional rather than judicial action to implement the amendment. The Congress and not the courts was intended to define the guarantees of section 1 and give them meaning. Thus, we suggest that in the light of that original understanding the re-definition of equal protection must be a legislative rather than a judicial function.

Appellants appear to seek to re-argue *Plessy v. Ferguson*, 163 U. S. 537, and the questions presented to the Court in the original briefs. We do not deem it necessary to again go over that ground. For us, the Plessy case and *Gong Lum v. Rice*, 275 U. S. 78, are "directly in point, and absolutely controlling." *Briggs v. Elliott*, 98 Fed. Supp. 529.

> "Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of

2. Appendix to Appellants' Brief, No. 8, October Term, 1952, p. 18.

> the state legislatures to settle, without intervention of the federal courts under the federal constitution." (*Gong Lum v. Rice*, supra.)

Appellants urge that the inescapable conclusion of *Sweatt v. Painter*, 339 U. S. 629, and *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, is that the separate but equal doctrine be overthrown. Such has not been the view of this Court.

In the Sweatt case the Court specifically announced:

> "Nor need we reach the petitioner's contention that *Plessy v. Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." (p. 636.)

Finally, in disposing of this question, we are constrained again to refer to the statement of Chief Judge Parker in *Briggs v. Elliott*, supra. We know of no comment more apt:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance

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of the meaning of its provisions. *The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.*"

IV

Kansas Communities, Through the Normal Processes of Local Government, Are Effectually Accomplishing Desegregation of Their Public Schools

The justification for the exercise of federal jurisdiction to determine local policy in local affairs is that the states fail or refuse to effect the proper policy. The appellants argue that the purpose of segregation is to perpetuate the inferior status of negroes and to organize the community upon the basis of a white supremacy.[1] We suggest that the experience in Kansas indicates another conclusion.

We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal. Those considerations vary from time to time and from place to place. In recognition of these facts, the Kansas legislature provided for an exercise of local autonomy. The statute merely authorizes, but does not require, boards of education in cities of over 15,000 population, to maintain separate schools for the elementary grades.[2]

Twelve cities of the state come within its provisions. Of those twelve, only one, Hutchinson, has never maintained segregated schools. As recently as 1950 separate elementary schools were maintained in eleven cities of the state, with aggregate enrollments in excess of 70,000 students. In September, 1952, the city of Pittsburg abandoned a policy of segregation that had existed since 1913. At the same time the city of Wichita concluded a process of desegregation that had extended over a period of two years, affecting some 25,000 children, approximately 8% of whom were colored. The city of Lawrence presently maintains a school system less than one-

1. Appellants' Brief on Reargument, p. 50.

2. The present extent of segregated schools in Kansas is shown in Appendix D.

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third segregated. At the outset of this brief we called attention to the resolution of the Board of Education of the City of Topeka, dated September 3, 1953, stating its intention to abandon segregation at the earliest practicable date, and to its first affirmative step in that direction. On September 12, 1953, the Board of Education of the City of Atchison adopted a resolution with a similar effect.

Thus, in step with the changing inter-racial attitudes and the growing spirit of inter-racial co-operation, the people of Kansas, pursuant to our statute and through the normal process of local government, are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible. We submit that this is a more wholesome process than to accomplish the same result by the coercive decrees of federal courts. We submit that, more than any other, this process is consistent with the historic intent and purpose of our Constitution.

V

The Appropriate Decree

Finally, we are requested to discuss the characteristics of the decree that should be entered in event the Court should reach the improbable conclusion that racial segregation in the public schools per se is violative of constitutional rights. With respect to these questions, the Appellee Board of Education has filed its separate brief herein, setting out its views in detail and calling attention to certain local conditions that would be affected by such a decree.

Inasmuch as the abolishment of the policy of segregation would require no change in state policy, and in view of the fact that Appellee Board of Education has discussed these questions fully in its separate brief, detailed comment by us is not necessary. We recognize, however, that other communities of Kansas would necessarily be affected by the consequences of a decree abolishing segregation, and for that reason we offer the following general views, based on our knowledge of conditions prevailing in Kansas:

We do not believe that the reversal of the judgment of the court below would necessarily require admission of Negro children forthwith to the schools of their choice. On the contrary, we believe that the Court in the exercise of its equity powers may permit an effective gradual adjustment. We think that the necessity for safeguarding the integrity of the school system at large must be reconciled with the necessity of effecting constitutional guaranties. We feel that any order that might currently disrupt the orderly conduct of the public school system would not be consistent with a proper exercise of equity jurisdiction.

It is our further view that this Court should not undertake to formulate a detailed decree in this case. Should it deem the judgment of the court below to be improper,

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we suggest that that judgment should simply be reversed and the cause remanded to that court with directions to frame an appropriate decree. In the preparation of such a decree the District Court might properly conduct such investigations and hearings as are necessary to apprise itself of the various interests to be reconciled. However, that is a problem that should be determined on the local level by the court of original jurisdiction. We can assure this Court that the State of Kansas and its local boards of education will act in complete good faith to comply with the letter and the spirit of any decree that may be entered.

Conclusion

For the reasons heretofore set forth, Appellee, the State of Kansas, again respectfully submits that the judgment of the court below should be affirmed.

HAROLD R. FATZER, Attorney General,
PAUL E. WILSON, Asst. Attorney General,
Attorneys for the State of Kansas.

APPENDIX

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APPENDIX A

Antecedents and Chronology of the Fourteenth Amendment—Thirty-ninth Congress

1. Freedmen's Bureau Bill

January 5, 1866

Senate Bill No. 60 entitled "An Act to amend an act entitled 'An act to establish a Bureau for the relief of Freedmen and Refugees' and for other purposes" introduced by Senator Trumbull of Illinois and referred to Judiciary Committee. (p. 129.) *

January 11, 1866

Reported by Judiciary Committee with amendments. (p. 184.)

January 25, 1866

Passed Senate by vote of 37 to 10. (p. 421.)

February 6, 1866

Passed House by vote of 136 to 33. (p. 688.) On final passage the texts of sections 7 and 8 were as follows (Sen. Doc. 39th Cong., 1st Ses. Ex. Doc., No. 24, p. 9):

> "Sec. 7. And be it further enacted, That whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees,

* References are to Cong. Globe, 39th Cong. 1st Sess. (1866) unless otherwise stated.

or any other persons, on account of race, color or any previous condition of slavery or involuntary servitude, or wherein they or any of them are subjected to any other or different punishment, pains or penalties, for the commission of any act or offence, than are prescribed for white persons committing like acts or offences, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.

"Sec. 8. *And be it further enacted,* That any person who, under color of any State or local law, ordinance, police, or other regulation or custom, shall, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, subject, or cause to be subjected, any negro, mulatto, freedman, refugee, or other person, on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause, to the deprivation of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offences, shall be deemed guilty of a misdemeanor, . . ."

February 19, 1866

Vetoed by President Johnson. (p. 915.)

February 20, 1866

Veto sustained. (p. 943.)

2. Civil Rights Act

January 5, 1866

Senate Bill No. 61 entitled "An Act to protect all Persons in the United States in their civil Rights, and to furnish the Means of their Vindication," introduced in Senate by Senator Trumbull of Illinois and referred to the Committee on Judiciary. (p. 129.)

January 11, 1866

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Reported with amendments by Judiciary Committee. (p. 184.)

February 2, 1866

Passed Senate, 33 to 12. (p. 607.)

March 13, 1866

Passed House with amendments, 111 to 38. (p. 1367.)

March 15, 1866

Senate concurred in House amendments. On final passage sections 1 and 2 appeared in the following form (14 Stat. 27):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
>
> "Sec. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude,

except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

March 27, 1866

Vetoed by President Johnson. (p. 1679.)

April 6, 1866

Veto overridden in Senate, 33 to 15. (p. 1809.)

April 9, 1866

Veto overridden in House, 122 to 41. (p. 1861.)

3. The Resolution to Amend the Constitution

December 4, 1865

Resolution by Stevens of Pennsylvania to create the Joint Committee on Reconstruction introduced and passed in House of Representatives. (p. 6.)

December 5, 1865

Joint resolution to amend the constitution introduced by Stevens and referred to the Committee on Judiciary. Text of proposed amendment as follows:

"All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."

December 6, 1865

Bingham of Ohio introduced a joint resolution to amend the constitution of the United States so as to empower congress to pass all necessary and proper laws to secure to all persons in every state of the Union equal protection in their rights, life, liberty and property. Referred to Judiciary Committee. (p. 14.)

December 12, 1865

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Resolution to create Joint Committee on Reconstruction, as amended, concurred in by Senate. (p. 30.)

December 13, 1865

Senate amendments agreed to in House. On final passage the Resolution was as follows (p. 47):

> "Resolution by the House of Representatives, (the Senate concurring,) That a joint committee of 15 members be appointed, 9 of whom shall be members of the House and 6 members of the Senate, who shall inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress, with leave to report at any time by bill or otherwise."

MEMBERS OF JOINT COMMITTEE ON RECONSTRUCTION

HOUSE

Stevens of Pennsylvania (R)	Bingham of Ohio (R)
Washburne of Illinois (R)	Conkling of New York (R)
Morrill of Vermont (R)	Boutwell of Massachusetts (R)
Grider of Kentucky (D)	Blow of Missouri (R)
Rogers of New Jersey (D)	

SENATE

Fressenden of Maine (R)	Williams of Oregon (R)
Grimes of Iowa (R)	Howard of Michigan (R)
Harris of New York (R)	Johnson of Maryland (D)

January 12, 1866

Bingham's proposal submitted to Joint Committee on Reconstruction (Journal of Reconstruction Committee, p. 7):

> "The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property."

Steven's Proposal (Journal, p. 9):

> "All laws, State or National, shall operate impartially and equally on all persons without regard to race or color."

February 3, 1866

Committee on Reconstruction approved Bingham's substitute draft, as follows:

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State the privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)."

February 13, 1866

Committee proposed Amendment as above stated, to Congress. No further action. (p. 813.)

April 21, 1866

New Stevens proposal submitted to Joint Committee on Reconstruction. Text as follows (Journal, pp. 24-26):

> "No discrimination shall be made by any state, nor by the United States, as to civil rights of persons, because of race, color or previous condition of servitude."

Bingham's proposal to add following amendment rejected:

> "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without compensation."

Bingham proposed a new Section 5 as follows; approved:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any law deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

April 25, 1866

Motion to strike out Bingham's Section 5 carried. (Journal, p. 31.)

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April 28, 1866

Motion to approve Bingham's amendment carried. (Journal, p. 35.)

April 30, 1866

Senate Resolution No. 78 proposing to amend the Constitution of the United States introduced in Senate by Fessenden, and House Resolution No. 127 being an identical proposition, introduced into House of Representatives by Stevens. Section 1 read (pp. 2265, 2286):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

May 10, 1866

H. R. No. 127 passed House—128 to 37. (p. 2545.)

May 30, 1866

Section 1 amended in Senate by inserting at the beginning the following (p. 2897):

> "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

June 8, 1866

Passed in Senate, 33 to 11. (p. 3042.)

June 13

Senate amendments concurred in by House, 120 to 32. (p. 3149.)

APPENDIX B

The States, the Fourteenth Amendment and Segregation

1. Introduction

On the 16th day of July, 1866, the Fourteenth Amendment was proposed by the Thirty-ninth Congress to the legislatures of the several states. Thirty-seven states comprised the Union at the time ratification was proclaimed on July 28, 1867. Of those thirty-seven the legislatures of thirty had adopted resolutions ratifying the amendment by the date of proclamation. Three states were to complete ratification within the next two years.[1] Three other states had finally rejected the amendment and were not again to consider it during the period of reconstruction.[2] Only the legislature of California had neither ratified nor rejected the amendment. Of the thirty-three states ratifying the amendment, ten had initially rejected it,[3] while subsequent to ratification the legislatures of three states adopted resolutions withdrawing their assent.[4]

Few records of legislative debates on propositions to ratify the Fourteenth Amendment are available. Those documents that do exist contain no evidence that any of the ratifying legislatures contemplated or understood that the Fourteenth Amendment would abolish segregation in the public schools. Indeed, statements relating to the public schools are rare and the few comments that appear in the legislative journals are general and inconclusive. We believe that the best evidence (perhaps the only competent evidence) of the attitudes of state legislatures toward the relationship of the Fourteenth Amendment to racial segre-

1. Mississippi, Texas and Virginia.
2. Delaware, Maryland and Kentucky.
3. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Caroline, South Carolina, Texas and Virginia.
4. New Jersey, Ohio and Oregon.

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gation in the public schools may be found in their contemporaneous acts. Thus we examine specifically the provisions of the laws relating to segregation in the public schools found in the constitutions and statute books of the component states of the Union at the time the Fourteenth Amendment was proposed and ratified.

2. Analysis

ALABAMA. On December 6, 1866, the Governor of Alabama recommended that the legislature ratify the Fourteenth Amendment in order that Alabama congressmen might be seated in the federal Congress. Nevertheless, on the next day the House and Senate of Alabama jointly refused to ratify the amendment.[1] The amendment was again submitted to the reconstruction legislature of Alabama and was ratified by it on July 13, 1868.[2]

Prior to the civil war the problem of segregation in public schools did not exist in Alabama, for the reason that statutory penalties were provided for persons who undertook to teach negroes.[3] It is significant that the legislature of 1868, which ratified the Fourteenth Amendment, also enacted legislation providing for segregation in the public schools.[4] This statute required segregated schools unless all parents in the district consented to integration. The constitution of Alabama, adopted in 1875, provides for separate but equal facilities for children of citizens of African descent.[5] Since that date, legal segregation has been maintained in Alabama. The present constitution provides for separate schools for white and colored races and specifically requires that "no child of either race shall be permitted to attend the school of the other race."[6]

1. Ala. H. J. (1866) 210, 213; Ala. S. J. (1866) 183.
2. Ala. H. J. (1868) 10; Ala. S. J. (1868) 10.
3. Acts of Ala. (1830-1833) 12.
4. Acts of Ala. 1868 148.
5. Art. 13, Sec. 1.
6. Art. 14, Sec. 256, Constitution of Ala. of 1901.

ARKANSAS. The legislature of Arkansas rejected the Fourteenth Amendment on December 17, 1866.[1] The amendment was again submitted to the reconstruction military legislature of Arkansas and was ratified on April 6, 1868.[2] Arkansas was the only state which ratified an amendment by a unanimous vote of both its legislative bodies.[3] The legislature that ratified the amendment on July 23, 1868, enacted laws to establish a public school system which directed the state agency responsible for schools to "make the necessary provisions for establishing separate schools for white and colored children."[4] Arkansas maintains segregated schools at the present time.[5]

CALIFORNIA. California neither ratified nor rejected the Fourteenth Amendment. However, both prior and subsequent to incorporation of the Amendment into the Constitution of the United States, racially segregated public schools were permitted in California.[1] Statutes providing especially for racially segregated schools were enacted by the California legislature of 1863, 1864, 1866 and 1870.[2]

CONNECTICUT. Connecticut was the first state to ratify the Fourteenth Amendment. The ratification was completed on June 30, 1866.[1] Prior to 1866, segregated schools may have been maintained in Connecticut. However, the same legislature that ratified the Fourteenth Amendment prohibited segregation in public schools on account of race or color.[2] There is no record of legal segregation in Connecticut during or subsequent to the reconstruction period.

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1. Ark. S. J. (1866-1867) 262; Ark. H. J. (1866-1867) 268.
2. Ark. S. J. (1868-1869) 24; Ark. H. J. (1868) 22.
3. See Flack, The Adoption of the 14th Amendment, 190.
4. Ark. Stat. 1868, No. LII, Sec. 107.
5. Ark. Stat. 1947, 80-509.

1. Constitution of California of 1849, Art. IX, Sec. 3.
2. Calif. Stat. 1863, No. CLIX, Sec. 68; 1864, No. CCIX, Sec. 13; 1866, No. CCCXLII, Sec. 57-59; 1870, No. DLVI, Sec. 56-57.

1. Conn. S. J. (1866) 135; Conn. H. J. (1866) 410.
2. Conn. Pub. Acts (1866) No. CVIII.

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However, negroes were not permitted to vote until the Fifteenth Amendment to the federal constitution made the Connecticut constitutional provision unoperative.[3]

DELAWARE. The Fourteenth Amendment was rejected by the legislature of Delaware in 1867.[1] The amendment was not ratified by the state of Delaware until more than thirty years thereafter. Public schools for negro children were not provided in Delaware until after the civil war. In 1881 the first direct appropriation from the state treasury was made for the maintenance of negro schools.[2] The constitution of 1897, which is presently effective, provides for the maintenance of separate but equal school facilities in Delaware for children of different races.[3] This provision was effective when the legislature of 1901 finally ratified the Fourteenth Amendment.

FLORIDA. Pursuant to the recommendation of its Governor, the legislature of Florida unanimously rejected the Fourteenth Amendment in December, 1866.[1] Eighteen months later under pressure of the reconstruction act, Florida adopted a new constitution and the Fourteenth Amendment was ratified on June 9, 1868.[2] At the time of reconstruction, Florida apparently did not maintain a free public school system for white students although public funds had been appropriated for the education of negroes.[3] Research indicates that segregation in the public schools was not established by law in Florida until the constitution of 1887 became effective.[4] Although specific provision was not made, segregation was in fact practiced widely

3. Conn. Pub. Acts (1871) No. CXXXVI.
1. Del. H. J. (1866) 226; Del. S. J. (1867) 176.
2. Del. Laws 1901, Ch. 235.
3. Art. 10, Sec. 2.
1. Fla. S. J. (1866) 101; Fla. H. J. (1866) 149.
2. Fla. S. J. (1868) 9; Fla. H. J. (1868) 9.
3. Laws of Fla., 1866, Chap. 1475.
4. Art. XII, Sec. 12.

prior to 1887. Since that time there has always been segregation of races in the public schools of Florida.[5]

GEORGIA. The Fourteenth Amendment was presented to the legislature of Georgia on November 1, 1866, and was subsequently rejected by both houses of the legislature.[1] The amendment was submitted to the provisional legislature of Georgia and was ratified in July, 1868.[2] This ratification was not accepted by Congress, inasmuch as negroes had been excluded from their seats in the 1868 legislature. Therefore, the amendment was again submitted to the 1879 session and was ratified.[3] It is significant that the session of 1870, which effectively ratified the Fourteenth Amendment, also enacted a law providing a system of public schools for Georgia.[4] This act specifically provided ". . . the children of the white and colored races shall not be taught together in any sub-district of the State." An effort to eliminate this provision in the House of Representatives failed.[5] The present constitution and laws of Georgia provide for segregation in the public schools.[6]

ILLINOIS. The Fourteenth Amendment was ratified by the Illinois legislature in January, 1867.[1] Prior to the civil war, no system of public education was maintained for students of other than the white race. However, segregation was not specifically forbidden by the laws of Illinois prior to 1874.[2] The report of the state superintendent of public instruction of Illinois for the year 1865-66 indicates that while there were at that time about 6,000 negroes of

5. See Fla. Stat. Ann., Sec. 228.09; 228.10; 230.23 (6a); 242.25 and 242.26.
1. Ga. H. J. (1866) 68; Ga. S. J. (1866) 72.
2. Ga. H. J. (1868) 50; Ga. S. J. (1868) 46.
3. Ga. H. J. (1879) 74; Ga. S. J. (1879) 74.
4. Ga. Pub. Laws (1870) 49.
5. Ga. H. J. (1870) 449.
6. Art. VII, Sec. I, par. 1, Ga. Const. of 1945 and Ga. Code of 1933, Sec. 32-909.
1. Ill. S. J. (1867) 76; Ill. H. J. (1867) 134.
2. Ill. Rev. Stat. 1874, Chap. 122, Sec. 100.

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school age in Illinois, the statutes then effective excluded them from participation in the benefits of the free school system.[3] The report of the same officer for the next biennium recommends the repeal of the provision limiting public school facilities to pupils of the white race. However, with respect to segregation the same report says:

> "The question of co-attendance, or of separate schools, is an entire and distinct one and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of little importance, and one which need not and cannot be regulated by the legislature." [4]

INDIANA. Indiana is one of the two states wherein a full record of legislative debates on the Fourteenth Amendment is available. Governor Morton in delivering his message to the legislature of Jan. 11, 1867, pointed out that the laws of Indiana then excluded colored children from the common schools and made no provision for their education. He suggested that an enumeration of the colored children of the state be made and that a portion of the school fund in proportion to their number be set apart and applied to their education by the establishment of separate schools. He further stated,

> "I would not recommend that white children and colored children be placed together in the same schools, believing, as I do, that in the present state of public opinion, that to do so would create dissatisfaction and conflict and impair the usefulness of the schools . . ." [1]

In the same message, Governor Morton recommended passage of the Fourteenth Amendment. The amendment

3. Report of Superintendent of Public Instruction of Ill. (1865-6) 28.
4. Report of Superintendent of Public Instruction of Ill. (1867-8) 18-21.
1. Message of the Governor of Indiana to the Legislature, Jan. 11, 1867, 21.

was ratified on January 29, 1867, by substantial majorities in each of the houses.[2] As had been pointed out in the Governor's message, the Indiana school laws then made no provision for education of negroes. However, pursuant to legislation enacted in 1865, negroes and mulattoes were excused from payment of the school tax.[3] There were no amendments to the school laws in the 1867 session. In 1869, taxation for common school purposes was extended to all persons otherwise liable, and the education of negro children was provided for in separate schools.[4] Debates on this measure do not indicate that any of the legislators considered the Fourteenth Amendment an impediment to the establishment of separate schools.[5] Further legislation providing for separate schools was enacted by the legislature of 1877.[6] This act continued in effect until it was specifically repealed in 1949.[7]

Iowa. Iowa ratified the Fourteenth Amendment on April 3, 1868.[1] Ten years before the legislature had authorized district boards to provide separate schools for the education of colored children "except in cases where by the unanimous consent of the persons sending to the school in the sub-district, they may be permitted to attend with the white youth."[2] This statute was held by the Supreme Court of Iowa to violate the constitution of that state.[3] But that opinion reveals no objections made with reference to the Fourteenth Amendment or any part of the Constitution of the United States. Iowa has not maintained segregated schools since that time.

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2. Brevier, Legislative Reports 1867, 58, 90.
3. Ind. Laws 1865, 31.
4. Ind. Laws 1869, 41.
5. Brevier, Legislative Reports 1869, 34, 341-2, 491-6, 506-12, 533.
6. Ind. Laws 1877, 124.
7. Acts of 1949, Sec. 10, Chap. 168.
1. Iowa S. J. (1868) 264; Iowa H. J. (1868) 132.
2. Iowa Laws, 1858, Chap. 52, Sec. 30.
3. *Clark vs. Independent School District of Muscatine* (1868) 24 Iowa 266.

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KANSAS. The Fourteenth Amendment was recommended for passage by Governor Samuel J. Crawford on January 8, 1867, on the ground that while the amendment was not fully what the Governor might desire, it had received the approval of the electors at the preceding general election.[1] Without reference to committee and apparently without debate the resolution for ratification of the amendment was adopted by both houses of the legislature, said ratification being completed on January 18, 1867.[2] It is significant that at the time the amendment was ratified segregation was authorized by the statutes of Kansas.[3] Indeed, the legislature which ratified the Fourteenth Amendment almost simultaneously enacted legislation specifically authorizing segregation in cities of the second class.[4] In 1876 the statutes authorizing separate schools were repealed but three years later an act was passed specifically empowering boards of education in cities of the first class to maintain separate schools. This section remains substantially unchanged.[5]

KENTUCKY. The Kentucky legislature, pursuant to recommendation of its Governor, rejected the Fourteenth Amendment in January, 1867.[1] There is no indication in the legislative journals that the amendment was ever again considered in the state of Kentucky. The same year the legislature enacted laws permitting the establishment of schools for negroes to be supported by taxes collected from negroes.[2] The fact appears, however, that no effective system of negro education existed prior to 1882, in which year the legislature merged white and negro schools into a seg-

1. Kan. S. J. (1867) 43.
2. Kan. S. J. (1867) 76, 128; Kan. H. J. (1867) 79.
3. Ch. 76, Art. III, Sec. 1, Laws of Kansas, 1861; Ch. 46, Sec. 1, Laws of Kansas, 1865.
4. Ch. 49, Sec. 7, Laws of Kansas, 1867.
5. Gen. Stat. of Kan. 1949, 72-1724.

1. Ky. H. J. (1867) 63; Ky. S. J. (1867) 64.
2. Ky. Acts 1867, 94.

regated system with one tax levy applicable to all taxpayers alike.[3] This principle of equal tax and tax support was written into the present Kentucky constitution in 1890-91.[4]

LOUISIANA. The Governor of Louisiana recommended ratification of the Fourteenth Amendment in his message to the legislature of 1867. He also recommended separate schools for negro children in the same message.[1] However, the Fourteenth Amendment was unanimously rejected by both houses.[2] Reconstruction brought a new provisional governor and a new legislature, composed principally of negroes. Upon recommendation of the Governor, the resolution to ratify the amendment was overwhelmingly adopted in both houses of the legislature and ratification completed on July 9, 1868.[3] The same year a new constitution of Louisiana provided that there should be no segregation in the public schools.[4] It appears that no effective school system was established while this constitution was in effect.[5] In 1879 the constitutional requirement for mixed schools was eliminated, but since that time, segregated schools have been mandatory in Louisiana.[6]

MAINE. The Fourteenth Amendment was ratified by the legislature of Maine upon recommendation of the Governor, and with only two dissenting votes in the entire legislature, on January 19, 1867.[1] There is no evidence that segregation was ever practiced in the public schools of Maine or in the other public facilities of the state. How-

3. Trout, *Negro Education in Kentucky*, Courier Journal, May, 1953.
4. Section 187.
1. La. S. J. (1867) 4, 5.
2. La. S. J. (1867) 20; La. H. J. (1867) 23.
3. La. H. J. (1868) 8; La. S. J. (1868) 21.
4. Const. 1868, Art. 135.
5. Ann. Rep. of the La. State Supt. Pub. Instr. 1867, IV.
6. Art. 224.
1. Me. H. J. (1867) 20, 78; Me. S. J. (1867) 101.

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ever, miscegenation was prohibited by the statutes of Maine as late as 1875.[2]

MARYLAND. The legislature of Maryland considered and rejected the Fourteenth Amendment in March, 1867.[1] There is no record that any further action on the amendment was ever taken by Maryland. Public facilities for negro education were non-existent in that state prior to the submission of the Fourteenth Amendment. The first general public school system was established in Maryland by a law effective April 1, 1868. That statute provided for free schools open to all white children between the ages of 6 and 18 years. Further provision was made that taxes paid for school purposes by colored taxpayers should be set aside for the purpose of maintaining schools for colored children.[2] Segregation has continued in the public schools of Maryland until the present day.[3]

MASSACHUSETTS. The Governor of Massachusetts addressed the legislature on January 4, 1867, and recommended ratification of the Fourteenth Amendment.[1] A review of that message does not reflect any expression of attitude on the part of the Governor relative to separate schools. Segregated education, although formerly practiced in the city of Boston, had been prohibited by statute in Massachusetts since 1855.[2] Pursuant to the recommendation of the Governor, the amendment was ratified by both houses of the Massachusetts legislature on March 20, 1867.[3] There is no evidence in the record to indicate whether Massachusetts did or did not consider the relationship of the Fourteenth Amendment to a segregated system of public schools.

2. Me. Rev. Stat. Supp. 1885-95, Chap. 59, Sec. 2.
1. Md. S. J. (1867) 808; Md. H. J. (1867) 1141.
2. Md. Laws 1868, Chap. 407.
3. Ann. Code of Md. 1951, Art. 77, Chap. 9, Sec. 124.
1. Message to the Gen. Court, Jan. 4, 1867, 67 *et seq.*
2. Mass. Acts and Resolves, 1855, Chap. 256.
3. Mass. Gen. Court Doc. 1867, House No. 149, 3-4, 16, 25-6.

MICHIGAN. The Fourteenth Amendment was somewhat summarily ratified by the Michigan legislature on February 15, 1867.[1] Separate schools for negroes existed in the city of Detroit as early as 1839 and continued until after the ratification of the Fourteenth Amendment. In 1867, the legislature provided that "All residents of any district shall have an equal right to attend any school therein . . ."[2] This statute was found to preclude segregation when placed in issue before the Supreme Court of Michigan.[3] However, the Court was apparently oblivious to any possible relationship of the Fourteenth Amendment to segregation. Miscegenation was prohibited in Michigan as early as 1846 and continued until 1883.[4]

MINNESOTA. The Governor recommended ratification of the Fourteenth Amendment and both houses of the legislature approved ratification by overwhelming majorities in January, 1867.[1] Ratification was completed on February 1. At that time Minnesota had fewer than one thousand negro residents; therefore, there is little reason to believe that the matter of negro segregation was considered by the Governor and the legislature at the time of ratification. There is no history of segregation in Minnesota.

MISSISSIPPI. The Fourteenth Amendment was first presented to the legislature of Mississippi in 1867. Disapproval was recommended by the Governor and both houses of the legislature unanimously voted for rejection.[1] The amendment was again submitted to the reconstruction legislature of 1870, along with the Fifteenth Amendment. Both were ratified.[2] Constitutional and statutory provi-

1. Mich. S. J. (1867) 125; Mich. H. J. (1867) 180-2.
2. 1 Mich. Laws (1867) 43.
3. *People, ex rel. Workman, vs. Board of Education of Detroit* (1869), 18 Mich. 400.
4. Pub. Acts of 1883, 23.
1. Minn. S. J. (1867) 23; Minn. H. J. (1867) 26.
1. Miss. H. J. (1867) 201-202, App. 77; Miss. S. J. (1867) 195-6.
2. Miss. S. J. (1870) 19; Miss. H. J. (1870) 26.

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sions of Mississippi at the time of ratification did not specifically require or permit segregation by races. However, the evidence is abundant that segregation was almost universally practiced in Mississippi during this period.[3] School segregation has been specifically required by the laws of Mississippi since 1878.

MISSOURI. Missouri ratified the Fourteenth Amendment on January 26, 1867. Its ratification was recommended by the Governor and adopted by substantial majorities of both houses in that month.[1] No reference to the schools is found in these proceedings. At the time of ratification Missouri permitted establishment of separate schools for negroes under its constitution of 1865.[2] In 1875 the constitution required separate schools for children of African descent.[3] Statutory provisions relative to segregation in the public schools were enacted in Missouri in 1865, 1868, 1869, 1874, 1879, 1887 and 1895.

NEBRASKA. Nebraska was admitted to the Union in 1867 and on June 15 of that year ratified the Fourteenth Amendment.[1] Apparently there has never been legal authority for the maintenance of a segregated school system in Nebraska, nor is segregation authorized by law in other areas of life. However, the statutes of Nebraska prohibit the marriage of white persons with persons of one-eighth or more of negro, Japanese or Chinese blood.[2]

NEVADA. The legislature of Nevada ratified the Fourteenth Amendment on January 22, 1867.[1] Ratification had been urged by the Governor in his message. At the same time he had mentioned the failure of the state of Nevada

3. Ann. Rep. of Supt. of Pub. Instr. of Miss. (1871) 66, 124-7; App. 4-5, 11.
1. Mo. S. J. (1867) 30; Mo. H. J. (1867) 50.
2. Art. IX, Sec. 2.
3. Art. XI, Sec. 3.
1. Neb. H. J. (1867) 15; Neb. S. J. (1867) 174.
2. Rev. Stat. Neb. 1943, Sec. 42-103.
1. Nev. S. J. (1867) 47; Nev. Ass. J. (1867) 25.

to provide education for negro students and suggested that such failure violated the constitution of the state of Nevada.[2] In 1867 the legislature that ratified the Fourteenth Amendment enacted legislation providing

> "Negroes, Mongolians, and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate fund for their education and use the public school funds for the support of the amendment."[3]

In 1872 the Supreme Court of Nevada held that the school trustees could not legally deny to any resident person of proper age an equal participation in the benefits of the common schools.[4] However, the holding is based entirely on provisions of the Nevada constitution and not upon the Fourteenth Amendment. Furthermore, the opinion apparently permits the school trustees to make any appropriate classification of students with reference to existing conditions including separation of races. The fact that the Nevada Supreme Court did not consider the Fourteenth Amendment applicable to school segregation is indicated by the following excerpt in the dissenting opinion in the Duffey case:

> "The case of relator was sought to be maintained on the ground that the statute was in violation of the Fourteenth Amendment to the constitution of the U. S. I fully agree with my associates that this proposal of counsel is utterly untenable."

NEW HAMPSHIRE. The Fourteenth Amendment was ratified by the legislature of New Hampshire on July 7, 1866, it being the second state to approve the amendment.[1] New

2. Nev. S. J. (1867) App. 9.
3. Rev. Stat. (1867) 95.
4. *State vs. Duffey*, 7 Nev. 342, 8 Am. Rep. 713.
1. New Hamp. H. J. (1866) 231; New Hamp. S. J. (1866) 94.

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Hampshire did not then, and does not now, maintain segregation in the public schools or elsewhere. However, in 1870 there were fewer than five hundred negroes in the entire state.

NEW JERSEY. The Fourteenth Amendment was ratified in New Jersey at an extra session of the legislature on September 11, 1866. The amendment was presented and ratification accomplished in two days.[1] However, in 1868 the legislature of New Jersey adopted a resolution rescinding ratification of the Fourteenth Amendment.[2]

It appears that at no time has segregation by race been established by law in the public schools of New Jersey, although segregation has been practiced in fact in a few New Jersey communities. In 1881 the New Jersey legislature specifically prohibited exclusion from the public schools on the ground of color.[3] However, a separate state manual training school for negro children, established in 1894, existed as late as 1910.[4]

NEW YORK. The Fourteenth Amendment as proposed by Congress was ratified in New York on January 10, 1867.[1] Separate schools had long existed in the state of New York. In 1864 a statute authorizing local authorities to establish separate schools for negroes was enacted as part of the general school law.[2] There is evidence that in 1867 separate schools for negroes were actually maintained in New York City and in Brooklyn. Various statutes of New York, upholding the establishment of separate schools for negroes, have been upheld against objections on constitutional grounds in numerous cases before the Supreme

1. N. J. S. J. Extra Session (1866) 14; Minutes of Assembly (1866) 8 and 17.
2. N. J. Acts (1868) 1225.
3. Laws 1881, Chap. CXLIX.
4. N. J. Laws (1894) 536; N. J. Comp. Stat. 1709-1010 Schools, Art. XXI.
1. N. Y. S. J. (1867) 34; N. Y. H. J. (1867) 77.
2. N. Y. Laws 1864, Chap. 555, Title X, Sec. 1.

Court of New York.[3] This record of litigation indicates that segregation was widely practiced in New York during the period subsequent to the ratification of the Fourteenth Amendment until as recently as 1900.

North Carolina. North Carolina, like the other states of the confederacy, rejected the Fourteenth Amendment when it was first submitted to the legislature of that state on November 19, 1866.[1] The provisional governor recommended ratification to the reconstruction legislature of 1868 and such ratification was accomplished on July 4 of that year.[2] Simultaneously, North Carolina adopted a new constitution. This constitution of 1868 provided for segregated education.[3] Two days after the Fourteenth Amendment was ratified, the Governor of North Carolina in his inaugural address stated: "It is believed to be better for both races and more satisfactory to both, that the schools should be distinct and separate." Less than two weeks after the amendment was ratified the House and Senate adopted a joint resolution stating that it was the duty of the joint assembly to adopt a system of free schools but that the races should be segregated.[4] The same year the legislature, pursuant to a recommendation by the Governor, enacted Chapter 184 of the North Carolina Laws of 1868-9, which provides: "The school authorities of each and every township shall establish a separate school or separate schools for the instruction of children and youth of each race. . . ."

Ohio. Ohio ratified the Fourteenth Amendment in 1867. The Governor's message recommending ratification

3. *Dallas vs. Fosdick*, 40 How. Prac. 249 (1869) (Buffalo); *People, ex rel. Dietz, vs. Easton*, 13 Abb. Prac. (N. S.) 159 (1872) (Albany); *People, ex rel. King, vs. Gallagher*, 93 N. Y. 438, 45 Am. R. 232 (1883) (Brooklyn); *People, ex rel. Cisco, vs. School Board*, 161 N. Y. 598, 56 N. E. 81 (1900) (Queens Co.).

1. No. Car. S. J. (1866) 7, 138; No. Car. H. J. (1866) 7, 182.
2. No. Car. Laws (1868) 89.
3. Art. IX, Sec. 2.
4. No. Car. H. J. (1868) 54; No. Car. S. J. (1868) 237.

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did not refer to the relationship of the Fourteenth Amendment to segregation in the public schools, a policy maintained by Ohio at that time. Ratification was accomplished on January 11, 1867.[1] However, in the following year a resolution rescinding ratification was passed by both houses of the legislature.[2] Ohio had long maintained separate schools for negroes under various constitutional and statutory provisions. A statute establishing common schools for negroes was enacted as early as 1831.[3] By 1860 separate schools for negro children were required when there were more than thirty children in the school districts.[4] Segregation was not prohibited by statute until 1887.[5] Pursuant to the authority conferred by statute, separate schools were maintained for negro children in more than half of the counties of Ohio.[6] Such schools were attacked as contrary to the Fourteenth Amendment in 1871 but the Supreme Court of Ohio found that such separate systems did not contravene the provisions of that amendment.[7]

OREGON. Ratification of the Fourteenth Amendment was accomplished in Oregon on September 19, 1866.[1] However, on October 15, 1868, the legislature adopted a resolution to rescind its ratification of the amendment.[2] In view of the fact that there were few negroes in Oregon at this time (346 in 1870) it is doubtful if the legislature entertained any concept of the relationship of the Fourteenth Amendment to segregation in the public schools. We note, however, that in 1866 Oregon enacted a statute

1. Ohio S. J. (1867) 7; Ohio H. J. (1867) 12.
2. Ohio H. J. (1868) 33; Ohio S. J. (1868) 39.
3. Ohio Laws (1831) 414.
4. 2 Ohio Rev. Stat. (1860) 1357.
5. Ohio Laws (1887) 34.
6. Rep. Comm. of Common Schools (1867) 477 Table B.
7. *State, ex rel. Garnes, vs. McCann*, 21 Ohio Stat. 198.
1. Ore. S. J. (1866) 34; Ore. H. J. (1866) 74.
2. Ore. S. J. (1868) 32, 12; Ore. H. J. (1868) 271.

forbidding miscegenation and voiding such marriages.[3] This statute was not repealed until 1951.

PENNSYLVANIA. Pennsylvania ratified the Fourteenth Amendment on February 13, 1867.[1] While debates on the amendment were preserved in Pennsylvania, there appears to have been no reference to the relationship between the Fourteenth Amendment and segregation in the public schools. At that time, legislation in Pennsylvania required separate schools to be established for negroes in those districts when twenty or more pupils were available.[2] Such segregation was actually practiced in Pennsylvania and was upheld when attacked on constitutional grounds in 1873.[3] The practice continued until 1881 when it was abolished by statute.[4] There is no other evidence of legal segregation in Pennsylvania, subsequent to the enactment of the Fourteenth Amendment.

RHODE ISLAND. On February 7, 1867, the legislature of Rhode Island ratified the Fourteenth Amendment.[1] Although school segregation had existed prior to 1865 in certain communities in Rhode Island, there is no evidence that it was practiced in Rhode Island with sanction of law at the time of ratification of the Fourteenth Amendment or at any time subsequent thereto.

SOUTH CAROLINA. South Carolina considered the Fourteenth Amendment in November, 1866. The Governor in his message to the legislature transmitting the amendment recommended rejection.[1] In the legislature only one member voted in favor of ratification.[2] The reconstruction government of South Carolina adopted a new constitution in

3. Sec. 23-1010 O. C. L. A.
1. Pa. S. J. (1867) 125; Pa. H. J. (1867) 278.
2. Pa. Laws (1854) 623.
3. *Commonwealth vs. Williamson*, 30 Legal Int. 406.
4. Pa. Pub. Laws 76.
1. R. I. Acts and Res. (1867) 161.
1. Charleston *Courier*, Nov. 28, 1866.
2. id. Dec. 20, 1866, Dec. 22, 1866.

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1868. That constitution required the legislature, immediately after its organization, to ratify the Fourteenth Amendment.[3] Apparently the move was prompted by a consciousness that the ratification of the amendment was a prerequisite to readmission to the Union.[4] The constitution further required that the general assembly establish a system of free schools "free and open to all the children and youths in the state, without regard to race or color."[5] The Fourteenth Amendment was ratified in July, 1868.[6] Despite ratification and despite the provision in the new constitution of South Carolina, requiring a system of amalgamated schools, a recommendation against this practice was made by Governor Orr in his message to the legislature on July 8, 1868. Two days later the new Governor, Robert K. Scott, formerly of Maine and formerly Brigadier General in the Union Army, expressed his views on segregation. Governor Scott said:

> "I respectfully recommend that the General Assembly will provide by law for the establishment of at least two schools in each school district when necessary and that one of said schools shall be set apart and designated as a school for colored children and the other for white children, the school fund to be distributed equally to each class, proportionate to the number of children between the ages of six and sixteen years. I deem this separation of the two races in the public schools as a matter of greatest importance to all classes of our people. . . . It is the declared design of the constitution that all classes of our people shall be educated, but not to provide for this separation of the two races will be to repel the masses of whites from the educational training they so much need, and virtually to give to our colored population the exclusive benefit of our public schools."[7]

3. Art. 5, Sec. 33.
4. Proceedings of Constitutional Convention of So. Car. (1868) 904-6.
5. Art. 10, Sec. 3.
6. Charleston *Daily Courier*, July 10, 1868.
7. id.

The record further indicates that the legislature of 1870 passed a statute providing a general system of public education. A negro was appointed the first superintendent of public instruction. Despite this fact, there was no real effort made on the part of the reconstruction government of South Carolina to require amalgamated schools in that state. A review of legislative debates and discussions and other assemblies during this period does not reveal any evidence that the persons and leadership in South Carolina deemed the Fourteenth Amendment to prohibit the principle of segregated schools.

TENNESSEE. Ratification of the Fourteenth Amendment was accomplished in Tennessee on July 19, 1866.[1] We note that the legislature that ratified the Fourteenth Amendment amended the school law on March 5, 1867, to require segregated education in Tennessee.[2] This act was described by the Republican Governor as a wise and desirable school law. A requirement for segregated schools was written into the Tennessee Constitution in 1870.[3] Schools remain segregated in Tennessee at the present time.[4]

TEXAS. The legislature of Texas rejected the Fourteenth Amendment on November 1, 1866.[1] The reconstruction legislature of Texas ratified the amendment February 18, 1870.[2] There is no record that schools were discussed in connection with either of these proceedings. The Texas constitution of 1866 provided that school taxes levied on negroes should be appropriated for use of negro schools.[3] However, this constitution was not acceptable to Congress and, therefore, another constitution was drafted in 1869.

1. Tenn. S. J. (1866) 41; Tenn. H. J. (1866) 25.
2. Tenn. Stat. 1866-1867, Chap. XXVII, Sec. 17.
3. Art. XI, Sec. 12.
4. Williams Tenn. Code, 1932, Sec. 2377, 2393-9.
1. Tex. H. J. (1866) 584; Tex. S. J. (1866) 471.
2. Tex. H. J. (1866) 584; Tex. S. J. (1866) 471.
3. Art. 10, Sec. 7.

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This later constitution provided for a free school system but did not mention segregation. Texas was re-admitted to representation in Congress by an act dated March 30, 1870. This statute stated that the Texas constitution should not be amended: "To deprive any citizen or class of citizens in the United States of school rights or privileges secured by the constitution of said state." [4] The same legislature enacted laws empowering boards of directors of public school districts "when, in their opinion, the harmony and success of the school require it," to "make any separation of the students or school necessary to assure success, so as not to deprive any student or students of scholastic benefits . . ." [5] A committee report made in connection with such legislation makes it clear that the purpose of this provision was to authorize segregation to be maintained on a local basis.[6] Segregated schools were required by the constitution of 1876 and schools have remained segregated in Texas ever since.[7]

VERMONT. Pursuant to recommendation of Governor Dillingham, the Vermont legislature ratified the Fourteenth Amendment on October 23, 1866.[1] The proceedings in connection with ratification revealed no evidence of the attitude of legislators toward the question of segregation. Vermont apparently had never had segregated schools.

VIRGINIA. In spite of Governor Pierpont's recommendation, the legislature of Virginia refused to ratify the Fourteenth Amendment when it was initially submitted in 1867.[1] The government of Virginia was then reorganized pursuant to the reconstruction acts of Congress and a new constitution was adopted in 1869. The reconstruction gov-

4. Tex. H. J. (1870) 5.
5. Tex. Gen. Laws (1870) 113.
6. Tex. S. J. (1870) 482.
7. Art. VII, Sec. 7.
1. Vt. S. J. (1866) 28; Vt. H. J. (1866) 140.
1. Va. H. J. (1866) 7, 108; Va. S. J. (1866) 7, 103.

ernor urged ratification, saying that there was no satisfactory alternative.[2] The constitution of 1869 had directed the legislature at its first session to establish a system of free schools. The legislature, which was the same legislature that ratified the Fourteenth Amendment, promptly proceeded to do so and specifically required "White and colored persons shall not be taught in the same schools but in separate schools." [3] While this bill was under consideration, efforts were made to strike out the provision requiring segregation and to substitute permissive segregation for the mandatory provision contained in the bill. Both of these propositions were decisively defeated.[4]

WEST VIRGINIA. West Virginia completed ratification of the Fourteenth Amendment after a summary consideration on January 16, 1867.[1] On February 27, 1867, six weeks later, the same legislature adopted a statute providing that: "White and colored persons shall not be taught in the same schools." [2] Segregation had existed by law in West Virginia many years prior to the civil war.

WISCONSIN. Wisconsin ratified the Fourteenth Amendment on February 7, 1867.[1] The proceedings in connection with the ratification of the amendment contain no mention of public schools. Wisconsin has apparently never had racial segregation in this area of public activity.

The foregoing detailed analysis, summarized and classified, shows the following:

2. Va. H. J. (1869) 70, 26.
3. Va. Acts (1869) 70, Chap. 259, Sec. 47.
4. Va. S. J. (1869) 70, 489; Va. H. J. (1869) 70, 606-7.
1. W. Va. S. J. (1867) 24; W. Va. H. J. (1867) 10.
2. W. Va. Acts (1867) Chap. 98.
1. Wis. S. J. (1867) 96; Wis. H. J. (1867) 223.

BLEED THROUGH

3. Summary and Conclusion

A. States where segregation existed with legislative or constitutional sanction contemporaneous with and/or subsequent to adoption of the Fourteenth Amendment:

Alabama	Mississippi
Arkansas	Missouri
California	Nevada
Delaware	New York
Florida	North Carolina
Georgia	Ohio
Illinois	Pennsylvania
Indiana	South Carolina
Kansas	Tennessee
Kentucky	Texas
Louisiana	Virginia
Maryland	West Virginia

B. States in which laws authorizing or requiring segregation were passed by the same legislatures that ratified the Fourteenth Amendment:

Alabama	North Carolina
Arkansas	Tennessee
Georgia	Texas
Kansas	Virginia
Nevada	West Virginia

C. States where segregation has not been authorized by state law since the adoption of the Fourteenth Amendment:

Connecticut	New Hampshire
Iowa	New Jersey
Maine	Oregon
Massachusetts	Rhode Island
Michigan	Vermont
Minnesota	Wisconsin
Nebraska	

We deem the foregoing positive evidence that the legislatures of twenty-four states neither understood nor contemplated that the Fourteenth Amendment would abolish segregation in the public schools. On the other hand, we challenge the appellants to demonstrate by competent evidence that the legislatures of any of the thirteen remaining states contemplated or understood that the amendment would preclude racial segregation in the public schools. Our analysis of the public documents of those states indicates that the impact of the Fourteenth Amendment upon the policy of segregation was simply never considered, for the reason that such a policy had never existed or had been abandoned for reasons of local policy. The absence of such policies in those states is readily explained by reference to the federal census of 1870 which shows their average negro population to be less than one percent of the total.

APPENDIX C

Evolution of Kansas Statutes Relating to Racial Segregation in the Public Schools

Pertinent portions of the texts of the several Kansas statutes mentioned in the argument, *supra*, are set out hereafter.

1. Chapter 144, Section 1, Statutes of Kansas Territory, 1855: [1]

   "That there shall be established a common school, or schools, in each of the counties of this territory, which shall be open and free for every class of white citizens between the ages of five and twenty-one years . . ."

1. Repealed by Ch. 8, Sec. 132, Laws of K. T., 1858.

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2. Chapter 8, Section 71, Laws of Kansas Territory, 1858: [2]

"That all district schools established under the authority of this Act, shall be free and without charge for tuition to all children between the ages of five and twenty-one years . . ."

3. Chapter 43, Section 5, Private Laws of Kansas Territory, 1861: [3]

"That said schools, in the several districts of said city, shall, at all times, be equally free and accessible to the children not less than five nor more than twenty-one years of age, who may reside therein, . . .: *Provided*, That nothing in this Act contained, shall be so construed as to permit black or mulatto persons to attend said schools, or either of them or to receive instruction therein; but all taxes assessed on the property of black or mulatto persons, in said city, for school purposes, shall be appropriated, as the trustees hereinafter mentioned may direct, for the education of black or mulatto persons in said city, and for no other purpose whatever."

4. Chapter 76, Laws of Kansas, 1861: [4]

"The inhabitants, qualified to vote at a school district meeting, lawfully assembled, shall have power: . . . Tenth, To make such order as they deem proper for the separate education of white and colored children, securing to them equal education advantages; . . ." (Art. III, Sec. 1.)

. . . . . .

"The district schools established under the provisions of this act shall, at all times, be equally free and accessible to all the children resident therein, over

2. Remained in effect until statehood—1861—with minor amendments in 1859 (Ch. 116, Sec. 70, Laws of K. T., 1859).

3. Act incorporating the city of Marysville.

4. Relates to Common School Districts. Repealed by Ch. 122, Laws of 1876.

five and under the age of twenty-one years, subject to such regulations as the district board in each may prescribe." (Art. IV, Sec. 6.)

5. Chapter 46, Article 4, Section 18, Compiled Laws of 1862: [5]

"The city council of any city under this act shall make provision for the appropriation of all taxes for school purposes collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons."

6. Chapter 46, Section 1, Laws of 1865: [6]

"The board of education shall have power to select their own officers, make their rules and regulations, subject to the provisions of this act, to organize and maintain separate schools for the education of white and colored children, . . ."

7. Chapter 49, Section 7, Laws of 1867: [7]

"The Board of Education shall have power to elect their own officers, make their own rules and regulations, subject to the provisions of this Act, to organize and maintain a system of graded schools, to provide separate schools for the education of colored and white children, . . ."

8. Chapter 125, Section 1, Laws of 1867:

"That any district board refusing the admission of any children into the common schools, shall forfeit to the county the sum of one hundred dollars each

5. Applies to cities of more than 7,000 population. Repealed by Ch. 46, Laws of 1865.

6. Applied to cities of more than 15,000 population. Repealed by Ch. 18, Laws of 1868.

7. Applied to cities of less than 15,000 and more than 1,000 inhabitants. Identical provision enacted in 1868 with reference to cities over 15,000. Ch. 18, Sec. 75, Laws of 1868. Both repealed by Ch. 122, Laws of 1876.

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for every month so offending, during which such schools are taught, and all moneys forfeited to the common school fund of the county under this Act, shall be expended by the County Superintendent for the education of such children in the school district thus denied equal educational advantages; Provided, That any member of said district board who shall protest against the action of his said board in excluding any children from equal educational advantages shall not be subject to the penalty herein named."

9. Chapter 81, Section 1, Laws of 1879:

"The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of said city under its charge and control, and of the said board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, except in the high school, where no discrimination shall be made on account of color; . . ."

10. Chapter 414, Section 1, Laws of 1905: [8]

"The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kan.; no discrimination on account of color shall be made in high schools, except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city."

8. Now Section 72-1724, General Statutes of Kansas, 1949.

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APPENDIX D

Segregated School Systems in Kansas

1953-1954

City	Number of students			Number of teachers			Number of schools		
	Negro	White	Total	Negro	White	Total	Negro	White	Total
Atchison	138	1,016	1,154	6	48	54	1	4	5
Coffeyville	341	2,075	2,416	11	66	77	2	5	7
Fort Scott	74	1,069	1,143	5	46	51	1	3	4
Kansas City[1]	6,004	17,223	23,227	169	535	704	9	35	44
Lawrence[2]	159	2,221	2,380	2	83	85	1	5	6
Leavenworth	367	2,125	2,492	13	72	85	2	7	9
Parsons	250	2,020	2,270	9	64	73	1	4	5
Salina	101	3,694	3,795	5	129	134	1	13	14
Topeka[3]	836	7,418	8,254	28	245	273	4	18	22
Totals	8,270	38,861	47,131	248	1,288	1,536	22	94	116

1. Segregation authorized and practiced in both elementary and high schools.
2. Partially segregated—includes one negro school, one white, and four integrated but substantially white.
3. Two integrated schools, with aggregate negro enrollment of 9, classified as white.

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Appeal from the United States District Court for the District of Kansas.

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I.

STATEMENT

This brief is filed in response to the order of the Court, entered June 8, 1953, propounding five questions on which briefs were requested. Since the date of that order the Topeka Board of Education on September 3, 1953, duly adopted the following resolution:

> "Be it resolved that it is the policy of the Topeka Board of Education to terminate maintenance of segregation in the elementary schools as rapidly as is practicable.";

and on September 8, 1953, it passed a motion, ". . . that segregation be terminate in the Southwest and Randolph Schools

this year . . .". Prior to the adoption of said resolution the Board of Education maintained twenty separate elementary schools for white children, each of which schools was attended by white children residing within a limited geographic area or boundaries near the school, and it also maintained four separate schools for negro children with large area or district boundaries. Negro students living some distance from school were furnished transportation to and from school if they requested it.

Since September 8, 1953, negro children living within the area boundaries of the Southwest School and the Randolph School are assigned to and are attending those schools along with and equally with white children. The Board is still maintaining the four separate negro schools and eighteen separate white schools.

By reason of its having resolved to terminate segregation in the elementary schools of Topeka "as rapidly as is practicable," the Topeka Board of Education no longer has an actual interest in the controversy over the constitutionality of segregation in such schools, and it therefore prefers to refrain from arguing and briefing Questions 1, 2, and 3 as propounded by the Court, which are directed to the constitutional questions involved.

The Board of Education of Topeka is, however, actually and directly interested in Questions 4 and 5 as propounded by the Court. Briefly summarized, we contend;

First, That termination of segregation in the elementary schools of Topeka will involve difficult and far reaching administrative decisions, affecting nearly all school children, nearly all teachers, and nearly all school buildings, so that to attempt to accomplish it in a hurried or summary manner will be both impossible and impractical.

Second, The public interest, including the interest of negro children in Topeka, equity, and practical consider-

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ations require that termination of segregation in the elementary schools of Topeka shall be permitted to be accomplished in a gradual and orderly manner.

II.

QUESTION 4(a) SHOULD BE ANSWERED IN THE NEGATIVE: AND QUESTION 4(b) IN THE AFFIRMATIVE.

Both Questions 4 (a) and 4 (b) contemplate the possibility that this Court might issue a broad, general order requiring abolition of segregation in the elementary schools of Topeka, rather than a limited order relating to the rights of the few particular negro children who are parties to this suit.

Such a general order would necessitate almost a complete readjustment of the elementary school system as now maintained in Topeka, so far as fixing attendance areas and boundaries for all the elementary school buildings in Topeka; it would require the transfer of many white and negro children from the schools they now attend to other buildings, as well as the transfer and assignment of many teachers to serve the resulting new classes in the various buildings.

Many of the grade schools now used for white children in the city are already full, and some are badly overcrowded. A school building program has been carried on and is being carried on now. The Southwest School was completed and opened in 1952; two other new schools are under construction now, and the Board is deciding on new sites for still two more schools to be constructed as quickly as possible. All five of these new buildings are, or will be, in areas where there have been new housing projects, and where the school population is now and probably will remain predominantly white children. These schools will probably not serve many negro children even when segregation is finally abolished.

The majority of the negro school population resides in a few scattered areas throughout the older parts of the city, and is not evenly distributed throughout the entire city. Many negro children live nearest to white schools which are already overcrowded. To transfer and admit these negro children to the schools nearest their residences will require either that many white children now attending such schools will have to be transferred to other schools, or that annexes will have to be provided. In short we have little doubt that the area boundaries of the existing white and negro schools will have to be redefined. This will necessarily require reassigning students, both white and negro, to schools which they do not now attend, and this in turn will require changing the classes to fit the new children in, and may involve transferring teachers from building to building as well.

It is the plan of the Board of Education of Topeka to make the transition from segregated to integrated elementary schools gradually and in an orderly manner on a school by school basis, but as rapidly as is practically possible. Such changes will be made at convenient times between semesters, and in such a manner that the administrative decisions and changes can be conveniently and efficiently handled without interrupting the continuity of the regular school program. The Board has discussed its policy and plans in open, public meetings attended by members of both white and negro races. It has invited and secured cooperation and suggestions, and the public generally in the community is assisting the Board in achieving its objective of terminating segregation "as rapidly as is practicable."

If this Court should enter an order to abolish segregation in the public schools of Topeka "forthwith," as suggested in Question 4 (a), the Topeka Board would, of course, do its best to comply with the order. We believe, however, that it would probably require that the regular classes be suspended, while the many administrative changes and adjustments are being

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made, and while the necessary transfers of and reassignment of students and teachers are being made. Important decisions would have to be hurriedly made, without time for careful investigation of the facts nor for careful thought and reflection. Most decisions would have to be made on a temporary or an emergency basis. We believe the attendant confusion and interruption of the regular school program would be against the public interest, and would be damaging to the children, both negro and white alike.

We respectfully urge that in making and issuing its decree this Court has equitable power and discretion to shape the decree and to control its execution in such a manner as to protect the public interest:

United States v. Morgan, 307 U. S. 183, 81 L. Ed. 1211, 59 S. Ct. 795:

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." (p. 1219, L. Ed.)

Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789, 52 S. Ct. 512:

> "6. The extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule, but rests rather in the sound discretion of the court.
>
> "7. Courts of equity may, and frequently do, go much further to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." (Syll. 6. and 7.)

Securities Exch. Comm. v. U. S. R. and Imp. Co., 310 U. S. 434, 84 L. Ed. 1293, 60 S. Ct. 1044:

> "7. A court of equity has discretion, in the exercise of jurisdiction committed to it, to grant or deny relief upon performance of conditions which will safeguard the public interest." (Syll. 7.)

Because the Board of Education believes that a "forthwith" order to abolish segregation in the Topeka school system would seriously damage and interrupt the operation and administration of the schools and would be plainly against public interest, and because it believes that an order to abolish segregation, in the public interest, should permit "an effective gradual adjustment"; we respectfully submit that Question 4 (a) propounded by the Court should be answered in the negative, and that Question 4 (b) should be answered in the affirmative.

III.

QUESTIONS 5(a), (b) and (c) SHOULD BE ANSWERED IN THE NEGATIVE

If segregation in the public schools of Topeka is to be abolished by decree of the Court permitting an "effective gradual adjustment" as suggested in Question 4 (b), then the Board of Education should be permitted to manage the readjustment, subject only to the usual and normal jurisdiction always retained by a court of equity for the enforcement of its decree or judgment.

We have heretofore pointed out the many intricate administrative decisions which will be involved in the transition to an integrated system of grade schools in Topeka. These are the problems and decisions which the Board of Education is organized to handle. Clearly there will be considerable administrative expense involved in making the adjustment. In Kansas the Board of Education is required to comply with cash basis and budget laws in connection with such expenditures, and taxes must be levied for such expenses within the levy limitation laws. Thus the necessary adjustments for a transition from segregated to integrated schools will affect nearly all the other administrative actions of the Board of Education. For this Court or a special master to undertake to con-

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trol the necessary readjustments or to draw detailed orders and decrees will involve them in the control and direction of the administration of the entire school program either directly or indirectly.

We believe such detailed control by this Court or a special master is unnecessary and undesirable. We therefore submit that Questions 5 (a), (b) and (c) should be answered in the negative.

IV.

QUESTION 5(d) SHOULD ALSO BE ANSWERED IN THE NEGATIVE

If this Court should enter an order or decree as suggested in Question 4 (b), there is no need for a more specific or detailed decree in this case.

The Board of Education of Topeka has already on its own initiative resolved to terminate segregation in the elementary schools "as rapidly as is practicable" and has already taken its first step toward that end by providing for an integrated system in two schools which were formerly used only for white children. Certainly at this time there is no need for a more detailed decree than the decree suggested in Question 4 (b). The District Court will always have jurisdiction to enforce the decree. If the need for a more specific decree should arise in the future, the District Court will have ample power to make such a decree under its general power to enforce the judgment and decree of the court.

We respectfully submit that Question 5 (d) should be answered in the negative.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE BOARD OF EDUCATION, TOPEKA, KANSAS, ON QUESTIONS 4 AND 5 PROPOUNDED BY THE COURT

This supplemental brief is filed in response to the order of this Court directing and requesting further briefs and argument on questions 4 and 5 heretofore propounded by the Court.

In its brief, heretofore filed herein in December, 1953, The Board of Education of Topeka urged that in the event segregation in its elementary schools were held to be unconstitutional, this case should simply be remanded to the lower court with instructions to reverse its judgment and to enter a decree requiring that segregation be terminated "as rapidly as is practicable" by the defendant Board of Education. It was suggested that by such a decree the lower court could retain jurisdiction for enforcement of the decree, and that if a need for

a more specific decree should arise in the future, the lower court would have power to amplify its decree under the general power of an equity court to enforce its decree.

As was pointed out in its brief filed in December, 1953, The Board of Education of Topeka in September, 1953, adopted a resolution to terminate segregation in its elementary schools "as rapidly as is practicable"; and on September 8, 1953, terminated segregation at two of its elementary schools, to wit: Southwest and Randolph Schools.

Since that time, the Board of Education of Topeka has already taken its second far-reaching step or stride toward termination of segregation by adopting the recommendations of its superintendent of schools as set out in the following report which was made on January 20, 1954, and was approved and adopted by the Board of Education on the same date:

SECOND STEP IN TERMINATION OF SEGREGATION
IN TOPEKA ELEMENTARY SCHOOLS

I. In implementation of the Board's policy to terminate segregation in elementary schools as soon as practicable, I propose that the second step be taken at the opening of school in September, 1954. The step should be acted upon by the Board at this time in order to enable everybody concerned to make necessary plans for next year.

II. In the second step, I propose that segregation be terminated in the following school districts and that transportation not be provided for Negro children who are affected, but that such child be given the privilege of attending the nearest Negro School if his parents want him to do so. (All pupil accounting is based on the number belonging on October 16, 1953.)

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	Negro Children to Integrated Schools	Negro Children to Come from following Schools			
		McKINLEY	BUCHANAN	MONROE	WASHINGTON
1. Central Park	21		16	5	
2. Clay	13		12	1	
3. Crestview	0				
4. Gage	1				
5. Grant (Limited)*	3	3	1		
6. Oakland	0				
7. Polk (Limited)**	3			3	
8. Potwin	0				
9. Quincy	34	34			
10. Quinton Heights	10		5	5	
11. State Street	21			9	12
12. Sumner	7	1	5	1	
	113	38	39	24	12
Randolph	2				
Southwest	8				
	123				

*The limitation suggested at Grant is that three Negro children isolated in the extreme northern part of Grant School district be permitted to attend Grant, while the remainder of the Negro children continue at McKinley.

**The limitation suggested at Polk School is as follows: Several Negro children in this district live very close to Buchanan School. They should continue at this school. There would not be room for them at Polk and there is plenty of room at Buchanan. However, there are three Negro children now attending Monroe School but residing in the Polk district. I suggest that they be allowed to attend Polk School.

III. The effects of taking this step would be as follows:

1. It would reduce the enrollments of Negro Schools as indicated.

	From	To
McKinley	127	89
Buchanan	160	121
Monroe	245	221
Washington	292	280
	824	711

2. It would place 123 Negro children in integrated schools.
3. It would leave, in addition to the four schools for Negro children, 12 schools integrated, 2 schools (Grant and Polk) on a basis of partial integration, and 5 schools continuing on a segregated basis (Lafayette, Lincoln, Lowman Hill, Parkdale and Van Buren.)

Thus, by announcing the changes in the spring of 1954, all parties affected had ample opportunity to adjust themselves to the changes before they became effective the following September.

Segregation has been completely terminated in 12 elementary school districts, and partially terminated in two others; and, as of September, 1954, there will remain only four negro schools and five white schools in which segregation is being continued.

The Board of Education has requested the superintendent, and he plans, to make recommendations for the third step toward termination of segregation early in 1955 to become effective in September, 1955. In the meantime, of course, he will have had an opportunity to observe the results and the operation of the second step which became effective in September, 1954. Thus before taking the third step, the board of education will have the benefit of its experiences with the first and second steps.

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It is gratifying to be able to report to the Court that The Board of Education has been carrying out its policy of termination of segregation "as rapidly as is practicable" with full public cooperation and acceptance by both white and negro pupils, teachers and parents.

The administrative problems, which were discussed in the brief filed in December, 1953, are the chief problems with which The Board of Education is confronted; but with practical experience, they are being satisfactorily solved. Their solution, however, cannot be effected "forthwith," but require time for a gradual adjustment.

It is respectfully submitted that The Board of Education of Topeka is in good faith carrying out its adopted policy to terminate segregation "as rapidly as is practicable," and that there is no need at this time for the appointment of a special master or for the Court to undertake to formulate specific decrees directing the particular steps to be taken to terminate segregation in the schools of Topeka.

Respectfully submitted,

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NOV 16 1954
HAROLD B. WILLEY, Cle

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STATEMENT.

On May 17, 1954, this Court announced its opinion that racial segregation in public education *per se* is a denial of the equal protection of the laws guaranteed by the

Fourteenth Amendment to the Constitution of the United States. At the same time the Court sought an expression of the views of the parties relative to the specific decrees to be entered in this case and other cases now pending. More particularly, the Court's request is as follows:

> "In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the court for reargument this term." (*Brown v. Board of Education of Topeka, et al.*, 347 U. S. 483, 495)

The following is respectfully submitted in an effort to comply with that request.

THE QUESTIONS.

Questions 4 and 5 mentioned above, were set forth in the Court's order of June 8, 1953, and are quoted hereafter:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregation systems to a system not based on color distinctions?
>
> "5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court

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will exercise its equity powers to the end described in question 4(b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?" (*Brown v. Board of Education of Topeka, et al.*, 345 U. S. 972.)

GENERAL CONSIDERATIONS.

We pause at the outset of these comments to emphasize that we do not approach the present questions as an adversary. Heretofore in the arguments of December, 1952, and upon reargument in December, 1953, we presented as fully as we could the arguments in justification of the statute authorizing certain boards of education in Kansas to provide for the education of Negro children in separate schools of equal facility. The arguments then advanced appeared consistent with the reported decisions of this Court, the Supreme Court of Kansas, and Appellate Courts elsewhere. However, the issue in this case has now been determined *contra* to the position we then urged. We accept without reservation

or equivocation the Court's declaration that "in the field of public education, the doctrine of 'separate but equal' has no place." We assure the Court that the resources of state government will be employed to effectuate the decision in the public schools of Kansas. Hence, the sole purpose of this brief is to supply such information as may assist the Court in finally disposing of the Kansas case.

Of the several cases at bar we suspect that the Kansas case may be least complex. Several considerations point to this conclusion. In earlier arguments we have pointed out that the practice of segregation in public education has never been widespread among the communities of the state. Traditionally, Kansans abhor inequality. Except in the case of the elementary schools in cities of the first class, the statutes of Kansas specifically prohibit school authorities from making distinctions based on race, color or previous condition of servitude. (G. S. 1949, 21-2424) Moreover, we think it is significant that quite apart from the Courts decision of May 17, 1954, and through the normal exercise of local autonomy, an accelerated adjustment from existing segregated systems to a system not based on color distinction has been in progress throughout the state. Indeed, it might well be argued that the instant case is moot by reason of the action of the Topeka Board of Education more fully described in its separate brief filed herein.

Segregation has never existed in Kansas as a matter of state policy. Section 72-1724, General Statutes of Kan-

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sas of 1949, which has been declared unconstitutional in the present litigation, purported to permit rather than to require segregated elementary schools in the areas to which it applied. Those segregated systems that have been maintained, have existed by virtue of action of local boards of education. Hence we do not contemplate that the termination of segregation in Kansas will be the occasion for any policy adjustment on a state level. No provision of the Constitution of Kansas is affected by the Court's decision of May 17, 1954. There is no occasion for state legislation to provide for or implement the process of de-segregation. The abandonment of segregated school systems will not require the alteration of any policy established by the State Department of Public Instruction or any other state administrative agency. Emphatically, de-segregation will produce no cultural problem nor will it disrupt an established way of life. In fact, there has been no significant amount of protest on the part of any group of Kansas citizens to the elimination of separate schools. Indeed, the prevailing attitude has been one of approval. Presumably, political party platforms reflect attitudes accepted by their members. Note the statement quoted hereafter from the 1954 platform of the Republican Party of Kansas:

> "We hail the recent historic decision of the Supreme Court of the United States as upholding the traditional position of the Republican Party that there can be no second class citizens under our American form of government." (***)

In view of the foregoing, we cannot, in candor, suggest that *at state level* there are any barriers, legal or

otherwise, to the immediate termination of such segregated public school systems as may exist in Kansas. The problems incident to the de-segregation process will be encountered on the local level only, and will be procedural rather than substantial pragmatic rather than essential. At the same time, they are problems that obviously cannot be resolved forthwith by resolutions of boards of education or even by decrees of this Court. Time will be required for deliberation, for decision and for adjustment. How much time? We do not presume to say. We suggest only that in those cases where, as in Kansas, responsible state and local officials are proceeding in diligence and good faith to effect the adjustment required by the Court's opinion herein, such efforts should be recognized by this Court and be permitted to proceed with a minimum of judicial direction.

ARGUMENT ON QUESTIONS PROPOUNDED.

The briefs submitted by the several parties and *amici curiae* prior to the December 1953 arguments, reveal little significant divergence of view relative to the principles applicable to Questions 4 and 5. Hence, we discuss the questions somewhat summarily.

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geopraphic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to

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be brought about from existing segregated systems to a system not based on color distinctions?"

The assumption stated has now become the established principle of law. The questions go to the power of a court of equity.

We think that a decree providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, does not necessarily follow the opinion of May 17. On the other hand, we believe that this Court, in the exercise of its equity powers, may permit an effective gradual adjudgment from existing segregated systems to a system not based on color distinctions. The very fact that these questions are now being argued, some seven months after the decision that segregation violates constitutional rights, suggests that the power to postpone compliance does exist.

The decree must seek to reconcile the personal and present interest of the Negro citizen, whose constitutional rights have been violated, with the public interest in safeguarding the integrity of the school system. To illustrate, we call attention specifically to a statement contained in the separate brief of the Board of Education of Topeka submitted prior to the December, 1953, arguments:

> "If this Court should enter an order to abolish segregation in the public schools of Topeka 'forthwith', as suggested in Question 4(a), the Topeka Board would, of course, do its best to comply with the order. *We believe, however, that it would probably require that the regular classes be suspended,*

while the many administrative changes and adjustments are being made, and while the necessary transfers of and reassignment of students and teachers are being made. Important decisions would have to be hurriedly made, without time for careful investigation of the facts nor for careful thought and reflection. Most decisions would have to be made on a temporary or an emergency basis. We believe the attendant confusion and interruption of the regular school program would be against the public interest, and would be damaging to the children, both negro and white alike." (pp. 4-5) (Italics supplied)

We think it cannot be disputed that a court of equity has power to avoid such a consequence.

The reports abound with authority for the proposition that it is the duty of a court of equity "to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." (*Eccles v. Peoples Bank*, 333 U. S. 426, 431.)

" . . . equity will administer such relief as the exigencies of the case demand at the close of the trial." (*Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621, 630.)

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." (*Hecht Co. v. Bowles*, 321 U. S. 321, 329-330.)

"It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and

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the manner of moulding its remedies, may be affected by the public interest involved." *(U. S. v. Morgan,* 307 U. S. 183.)

"A court of equity has discretion, in the exercise of jurisdiction committed to it, to grant or deny relief upon performance of conditions which will safeguard the public interest." (*Securities Exch. Comm. v. U S R & Imp. Co.,* 310 U. S. 434, Syl. 7.)

"In short, the judicial process is not without the resources of flexibility in shaping its remedies . . . " (*Addison v. Holly Hill Co.,* 322 U. S. 607, 622.)

We presume that no principle of equity jurisprudence is more familiar than that illustrated by the foregoing statements. It would seem that the authorities cited would preclude further argument on Question 4. However, this proposition has been discussed at some length in the supplemental brief for the United States on reargument filed herein prior to the arguments in December, 1953. We call the Court's attention specifically to the discussion and authorities contained in that brief on pages 152 to 167, inclusive, and suggest that we are in substantial agreement with the views expressed therein.

Question 5 assumes that 4(b) has been answered in the affirmative. The Court then inquires:

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

> "(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

This question compels our attention to the inherent limitations on the judicial power. We doubt that the Court contemplates the judicial development of a plan for the de-segregation of the schools of Kansas or any other state. If such action is contemplated, we doubt that it is legally or practically feasible. The Court may determine, as it has determined, that the segregated school system heretofore maintained in Topeka, Kansas, violates the Constitution of the United States. It may determine whether a gradual adjustment to a system not based on color distinctions is authorized. However, it cannot tell the Topeka Board of Education what non-segregated school system will be substituted for the one heretofore maintained, nor can it prescribe the course to be followed in effecting the substitution. These are determinations that must necessarily be made with reference to local conditions—conditions that were not germane to the question of whether segregation *per se* is unconstitutional and hence are not reflected by the record now before the Court. They are determinations that must be made by local officials who are familiar with local conditions and who are responsible for local educational policy and for the general administration of the school system. We urge that those officials be given the

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maximum latitude consistent with the rights of appellants.

We emphasize that in the exercise of appellate jurisdiction, the Court's considerations are limited by the record forwarded from the court of original jurisdiction. The present questions have appeared in the case since the trial in the court below. Hence, before any detailed decree could be framed, additional evidence would probably be required. We suggest that the District Court is the proper forum to hear evidence and determine facts.

> "The framing of decrees should take place in the district courts rather than in the appellate courts." (*International Salt Co. v. United States,* 332 U. S. 392.)

A review of the precedents would indicate that this Court, as a matter of policy, has heretofore refused to frame detailed decrees in cases involving segregation in education. In those cases where school facilities have been held unequal and where administrative action has been required to secure equality, the Court has not attempted to determine precise standards to be observed by the parties in order to finally dispose of the case. Rather, the Court has been content to remand the case to the lower court for further proceedings consistent with and in conformity with its opinion. (*Sipuel v. Board of Regents,* 332 U. S. 631; *Missouri ex rel. Gaines v. Canada, Registrar,* 305 U. S. 337, and *Henderson v. United States,* 339 U. S. 816.)

Thus, we answer part (a) of Question 5 in the negative. This answer obviously precludes comment on part

(b). Similarly, we answer part (c) in the negative. We believe that the only order necessary in the present case, indeed, the only one justified by the circumstances, is one reversing the judgment of District Court, and remanding the cause to said court with directions to enter an appropriate decree. We suggest further that the District Court be directed to retain jurisdiction of the cause until such time as the maintenance of segregated schools by Appellee Board of Education is finally terminated. Implicit in such an order would be the power of the District Court upon appropriate motion by any of the parties to deal with special problems arising during the transition period.

Finally, we suggest that the decrees of both this Court and the District Court should provide for a minimum of judicial control.

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states . . . " *(Alabama Pub. Serv. Comm. v. Southern Ry. Co.,* 341 U. S. 341, 351.)

Wherever responsible state and local officials are proceeding in good faith to make the adjustments required by the Court's opinion of May 17, 1954, we suggest that their efforts be recognized and that they not be hedged by detailed judicial orders.

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CURRENT DE-SEGREGATION TRENDS.

In its separate brief, the Topeka Board of Education has advised the Court of its action to terminate its segregated schools. Hence, we comment on that situation only briefly. Since September, 1953, Topeka has moved from universal segregation in its elementary schools, to a system consisting of 12 integrated schools, two partially integrated, five schools maintained exclusively for white students and four attended only by Negroes. One hundred and twenty-three Negro students now attend mixed elementary schools. We deem this significant progress.

In other communities of Kansas, boards of education not parties to this suit are initiating similar policies. Since these arguments have apparently come to transcend the original parties and issues, we trust it is not improper to comment on the experience of Kansas in areas other than Topeka.

Section 72-1724, General Statutes of Kansas, 1949, authorizing segregated elementary schools, applied to twelve cities of the state. One city, Hutchinson, never exercised the power the statute purported to confer. Two cities, Wichita and Pittsburg, maintained separate elementary schools for many years, but for reasons of local policy, terminated the practice in 1952. The recent action of Topeka is mentioned above and is detailed in the separate brief of its Board of Education. Six other cities of the state have, during the past year, commenced or completed the process of de-segregating their public schools.

Atchison. Atchison, a city of 13,000 persons, is located on the boundary between Kansas and Missouri. Its population is about 10% Negro. Segregation has been maintained in the public elementary schools of Atchison since the establishment of the system. It may be significant that the city was founded in 1854 by persons of pro-slavery sympathies and for years the southern tradition was manifest in the community. Prior to the present school year four elementary schools, each serving a fixed geographical area, have been maintained exclusively for white students and one elementary school has been maintained for Negroes. On September 12, 1953, the Board of Education adopted the following resolution:

> "That the plan of abolition of segregation in the public schools of Atchison heretofore established by the Board of Education and which has been effected in grades seven through twelve be intensified so as to complete the plan throughout grades one through six as soon as practicable."

Subsequent thereto, on June 9, 1954, the policy was implemented by the adoption of a further resolution, the text of which is set forth hereafter:

> "Motion was made by Mr. Thorning that segregation of negro pupils be discontinued as of this date in all Atchison city school districts with the exception of the Martin-Lincoln district; thereby eliminating the necessity for operation of the school bus transporting pupils to Lincoln school; also, that beginning with the school term of September 1955, all segregation be ended in the Martin-Lincoln district under such a plan as will promote the best interests of the students in our school system."

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At the present time in excess of 25% of the Negro students of the city are attending mixed schools. The Board of Education anticipates that the process of desegregation will be completed by September 1, 1955. In addition to the integration of students as above set forth, a Negro has been employed as an elementary class-room teacher, teaching predominately white 6th grade classes. School administrators anticipate that all Negro teachers presently employed, will be assimilated into the integrated system.

Lawrence. Seat of the State University, Lawrence is a city of 24,000 population. About 7% of the people are Negro. Segregated schools had been maintained since prior to 1869. The process of assimilating the Negroes into white schools was apparently begun about 1916, with the result that during the past few years only one school had been maintained exclusively for Negroes. Subsequent to the decision of the Supreme Court of May 17, 1954, the Lawrence Board of Education ordered the immediate termination of segregation in all its public schools. In addition a Negro teacher was employed in the school system to teach special classes in junior high school and to teach physical education in the elementary schools, all of which classes are attended by predominately white students. The seriousness with which this community approaches the problem is indicated by the following comment of a school official in a communication addressed to the Attorney General of Kansas:

> "We recognize that some Kansas communities have problems more grave than ours—and we have some hurdles certainly.

"Does integration mean the mixing of white and colored pupils only? What is the status of the colored teacher? This year we employed one colored teacher on the basis of qualification for the job—but we recognize the possibility of unfavorable reaction when a colored person is employed as a teacher of a self contained room. Such adaptations must come slowly but must be achieved if integration is to be more than a term referring to mixing of colored and white pupils."

Leavenworth. Leavenworth, a city in excess of 20,000 inhabitants, has a Negro population of about 10%. The segregated system of elementary schools was established in 1858 and has been maintained consistently since that time. At present two elementary schools are maintained exclusively for Negro students, whereas nine are attended only by white. The policy announced by the Leavenworth Board of Education of August 2, 1954, indicates the reaction of the people of this community to the decision of May 17. The statement of policy is set forth hereafter:

"Pupils who enter the kindergarten or the first grade in the fall of 1954 will be permitted to enroll in the school of the district in which they reside regardless of race. Such negro pupils regardless of residence may continue to attend Lincoln and Sumner schools which will be adequately staffed with capable Negro teachers. It will be necessary for a time to establish attendance districts for the Lincoln and Sumner schools in order to carry out this policy. It is the belief of the Board of Education that the negro people in the Leavenworth community may desire to continue their schools as presently operated for a term of years during the transition period.

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"The Board of Education in this statement of policy believes it to be consistent with the Supreme Court decision in that it is starting in an orderly way to move away from compulsory segregation.

"It is believed that integration, when desired by the parents, can best be initiated at the lower grade levels. Those colored pupils who enroll in non-negro-staffed schools at the kindergarten or first grade level may continue in the school through subsequent grades.

"It is believed that it will be best for the individual if integration begins at the primary level. Also, the existing school system has been established in a certain pattern, and because of limited facilities, the pattern of enrollment cannot be suddenly changed. The Board of Education is required to provide school facilities and to frame policies for the welfare of all pupils.

"The Board will continue to study the problem and restate its policies consistent with the expressed desires of the people within the framework of the Supreme Court decision.

"The Board solicits the cooperation of all citizens in making an orderly transition from a segregated to a non-segregated school system. It looks to the State Legislature, the State Department of Public Instruction and the Attorney General for counsel in the continuous reframing of its policies consistent with the Supreme Court's interpretation regarding the constitutionality of the Kansas statute under which Leavenworth schools have operated since 1879.

"The Board will make an effort to follow the suggestions and recommendations of the Supreme Court as promised to be made by that body subsequent to October, 1954."

The first positive step taken by the Leavenworth school system consistent with its declared policy has been the admission during the 1954-55 school year of kindergarten and first-grade pupils to the school nearest their residence regardless of race. Presumably next year the Board intends to extend this policy to the second or higher grades, although a positive statement to this effect has not been announced. The following comment of a public school official of Leavenworth suggests one of the problems incident to de-segregation, and the community's approach thereto:

> "It is the intention of the Leavenworth Board of Education to be completely fair in the treatment of its faithful and competent negro teachers. It has been in the cities maintaining segregated schools where the opportunity for employment has existed for negro teachers. There will be questions raised as to why we cannot suddenly integrate our teachers in these cities, and there will be a few sporadic cases for publicity purposes to illustrate that negro teachers can be used indiscriminately. There are frequent cleavages between teachers and pupils at best. Some pupils resist authority and for various reasons have to be disciplined, restrained, or corrected. This often puts parents on the defensive and causes them to question or resist the teacher's authority. Now, if that teacher of a white child should be a negro, the cleavage would be magnified fifty to a hundredfold. I am sure you are well aware of this.
>
> "The Leavenworth Board believes that for a considerable length of time, negro teachers will be used in schools attended almost entirely by negro pupils. It is perfectly logical to ask, why cannot we integrate them in one magnanimous action? What about

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communities like Hutchinson who has never had segregation? Have they ever employed a negro teacher or are they likely to start employing them now? In my judgment, the solution will have to be carefully and slowly introduced. You and I and most board members will readily agree to the righteousness of complete integration from the standpoint of our established principles of decency, christianity and democracy. However, there is a sufficient number of biased and prejudiced persons who will make life miserable for those in authority who attempt to move in that direction too rapidly. As a consequence, many of us will be accused of 'dragging our feet' in the matter, not because of our personal feelings or inclinations, but because in dealing with the public, its general approval and acceptance is indispensable. One cannot force it, he can only coax and nurture it along."

Kansas City. Kansas City has a total population of about 130,000, 20.5 percent of which belong to the Negro race. It is adjacent to Kansas City, Missouri. It is perhaps significant that the proportion of Negroes in Kansas City, Kansas, is greater than in such southern cities as Dallas, Louisville, Saint Louis, Tulsa, Miami and Oklahoma City, and only slightly less than that of Baltimore. Kansas City is the only community in Kansas where by virtue of law segregated high schools have been maintained. Prior to the present school year the City of Kansas City has maintained seven elementary schools, one junior high-school and one high school exclusively for its 6000 Negro students, while twenty-two schools were attended by more than 23,000 white students. On August 2, 1954, the following statement of

policy was adopted by the Board of Education of Kansas City:

> "The members of the Board of Education, meeting as a committee of the whole, propose the adoption of the following statement of policy with reference to the Supreme Court decision on segregation:
>
> "The Board of Education of the City of Kansas City of the State of Kansas hereby declares its intent to abide by the spirit as well as the letter of the Supreme Court's decision on segregation. Specifically, the Board of Education proposes:
>
> "1. To begin integration in all the public schools at the opening of school on September 13, 1954.
>
> "2. To complete the integration as rapidly as class room space can be provided.
>
> "3. To accomplish the transition from segregation to integration in a natural and orderly manner designed to protect the interests of all the pupils and to insure the support of the whole community.
>
> "4. To avoid any disruption of the professional life of career teachers.
>
> "With these objectives in mind, the Board of Education directs the Superintendent of Schools within the framework of this policy declaration to be responsible for developing and applying the plan of integration."

The plan subsequently adopted permitted Negro students in kindergarten and grades 1, 6, 7, 10, 11 and 12 to enter the school of their choice within normal geographic limitations. Because the bulk of the Negro population is concentrated in one area of the city, the termination of compulsory segregation will not elimi-

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nate schools attended exclusively by Negroes. However, a total of 233 Negro students are now attending mixed schools, and approximately 1000 more live in areas where the process of amalgamation is now in progress. A report to the Attorney General's Office, dated October 12, 1954, from a school administrator indicates:

> "The announced program by the Board of Education was well received by whites and negroes alike and it is felt that integration in our schools is accepted and will be completed when classroom space permits. We are now engaged in the completion of a 6½ million dollar building program which includes the immediate problem before us."

School officials anticipate that subsequent to the completion of the amalgamation program all Negro teachers presently employed in the system will be retained.

Parsons. Parsons is located in southeastern Kansas some twenty miles from the Oklahoma border. It is a city of about 15,000 population, less than 10% of whom are Negroes. Prior to the current school year four elementary schools were maintained for white students and one for Negroes. Commencing with the current year, the Board of Education announced a policy to the effect that whenever possible and practical, restrictions on school attendance are to be immediately removed and segregation eliminated. In line with this policy, segregation was eliminated in three of four ward elementary school areas at the beginning of the 1954-55 school year. The remaining school area is being operated on a segregated basis because of crowded conditions. The separate Negro school is located in this ward. Consequently

every child may attend an elementary school in the ward in which he resides.

It is the present policy of the Board to delay integration of the schools of the fourth ward until additional school facilities will be completed. At the present time twenty-six Negro students in Parsons are attending mixed elementary schools, while one hundred and forty-three are required to attend the school maintained exclusively for Negroes.

Salina. Segregation was terminated in the City of Salina prior to the opening of the current school term. In view of the fact that less than 3% of the city's 27,000 people are Negroes, the problems incident to assimilation were slight. Prior to the present school term, one school was attended by all Negroes of the city. The present policy of the Board of Education permits all students to attend the school located nearest their homes.

Cities Reporting no Action. Only two cities, Coffeyville and Fort Scott, report that action by their Boards of Education has been delayed, pending final determination of this case. In these cities an aggregate of about 400 Negro students attend three segregated schools. Both cities are located in Southern Kansas, and school officials indicate that there has been no local sentiment in favor of the termination of the policy of segregation. In one city, it is reported that the only protest against the prospect of de-segregation has come from the Negro citizens. However, in each of these communities local school officials stand ready to take such action as may be consistent with the policies to be announced by this Court and the best interests of their people.

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CONCLUSION.

We respectfully submit that all considerations germane to the present issues require that the decree of this Court do no more than reverse the judgment of the District Court and remand the cause to said court with directions to enter judgment consistent with the opinion herein and to retain jurisdiction thereof until said judgment be complied with.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1952

No. 8 /

OLIVER BROWN, *et al.*, *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*, *Appellees*.

Appeal from the United States District Court for the District of Kansas

---

BRIEF OF
AMERICAN VETERANS COMMITTEE, INC. (AVC)
Amicus Curiae

PHINEAS INDRITZ
National Counsel
American Veterans Committee

October 9, 1952
Washington, D. C.

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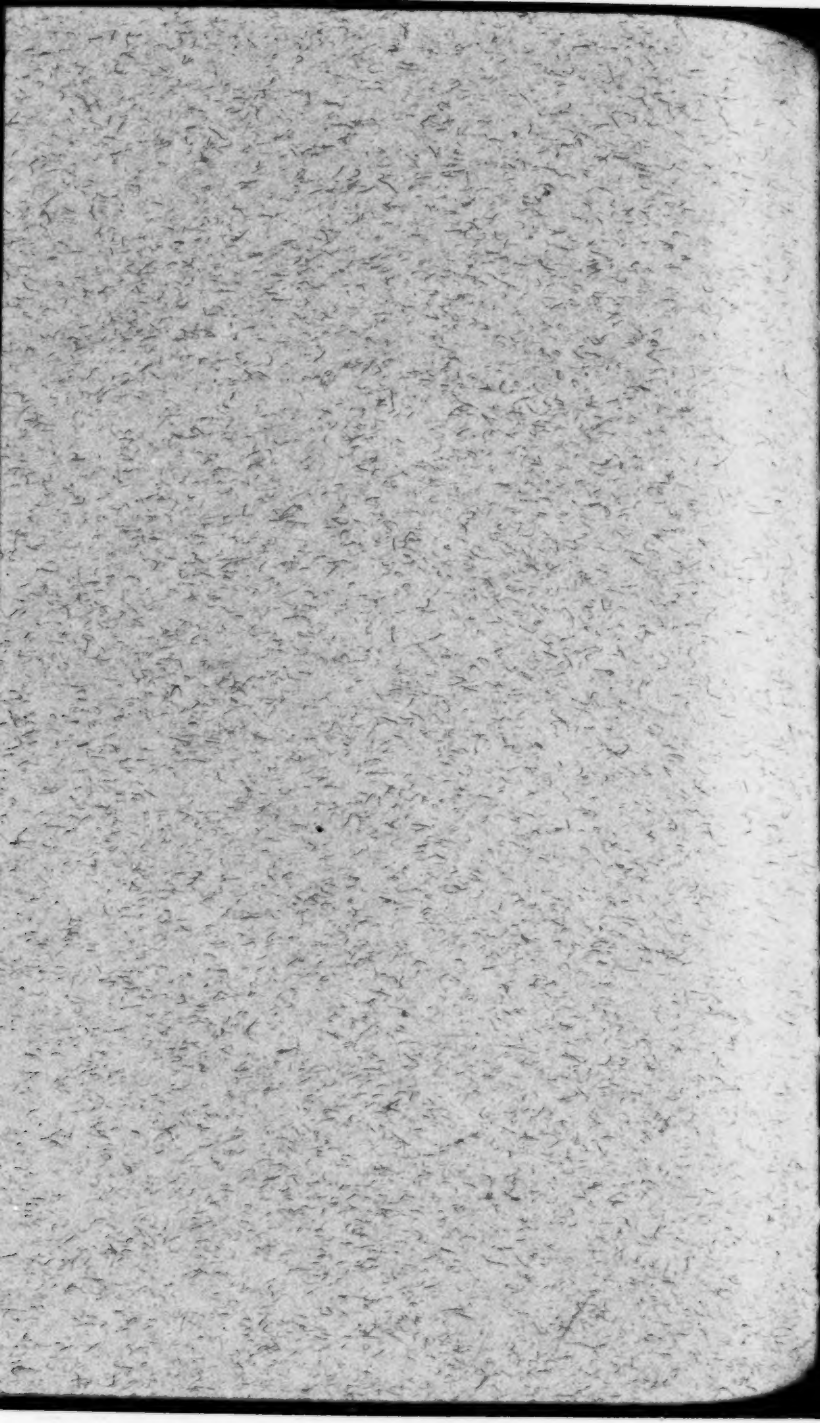

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 8

OLIVER BROWN, *et al., Appellants,*

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al., Appellees.*

BRIEF OF
AMERICAN VETERANS COMMITTEE, INC. (AVC)
Amicus Curiae

The issue in this case. This case raises the issue whether a State may require the separation, by race or color, of pupils in the public elementary schools, where such separation retards the educational and mental development of the Negro pupils and admittedly deprives them of educational benefits available to the white pupils, even though the physical facilities provided "are comparable."

The Interest of the American Veterans Committee.

The American Veterans Committee (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World Wars I and II, and the Korean conflict. We are associated to promote the democratic principles for which we fought, including the elimination of racial discrimination. Most

of us served overseas. There was no "community pattern" of racial discrimination and segregation when the chips were down and there was only the mud, the foxholes, and the dangers of the ocean and of mortal battle in the fight to preserve our Nation's democratic ideals. We believe that the segregation here involved is of the same cloth as the racism against which we fought in World War II, and that its continuance is detrimental to our national welfare, both at home and abroad.

The Facts in This Case.

Chapter 72-1724, General Statutes of Kansas, Ann. (1949), authorizes the maintenance of "separate schools for the education of white and colored children, including the high schools in Kansas City, Kan.; no discrimination on account of color shall be made in high schools, except as provided herein..." Pursuant to this statute, the City of Topeka, Kansas, provides public elementary education through the sixth grade in 18 schools for white children and 4 schools for colored children. The City does not segregate white and colored children in the junior high schools (beginning with the 7th grade) or in the high schools (R. 12). The appellants, Negro parents and pupils, seek to enjoin the appellees from denying to Negro pupils the privilege of attending public schools within the school territory where they live, without racial segregation (R. 7, 11).

The court below "found as a fact" that the white and colored elementary schools "are comparable" insofar as concerns "the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools" and that "in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools" (R. 239, 240). But the court further found (Finding VII; R. 245-246) that:

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> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

Notwithstanding the latter finding, however, the court below refused to enjoin the segregation of white and colored children in the public elementary schools, solely because the court felt that the decisions of this Court in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) and in *Gong Lum* v. *Rice*, 275 U. S. 78 (1927) support the constitutionality of a segregated school system in the lower grades, and that this Court's decisions in *Sweatt* v. *Painter*, 339 U. S. 629 (1950) and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950), which dealt with racial distinctions in professional and graduate education, have not affected the authority of *Plessy* and *Gong Lum* insofar as elementary school education is concerned. *Brown* v. *Board of Education of Topeka*, 98 F. Supp. 797 (D. C., D. Kans. 1951).

ARGUMENT

I. Psychological Discrimination Imposed By Government On Account of Race Violates the Constitutional Guarantee of Equal Protection of the Laws.

Although the court below recognized that compulsory racial segregation in public elementary schools is unconstitutional where the physical facilities (such as school buildings, teachers, books, courses of study, etc.) are provided unequally for white and colored pupils, it held, in effect, that the government may constitutionally retard

"the educational and mental development of Negro children and . . . deprive them of educational benefits available to white children" by imposing psychological feelings of inferiority. The finding by the court below that compulsory separation by race denotes the colored child as of an inferior group and that a "sense of inferiority affects the motivation of a child to learn" is supported by the uncontradicted evidence in this case (R. 118, 155-156, 165, 169-172, 176-177), and is in accord with the scientific findings of many eminent psychologists and sociologists. Deutcher and Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion,* 26 Journ. of Psych. 259 (1948); Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do to the Individual and to His Relationships With Other People?,* 29 Mental Hygiene 189 (1945); McLean, *Psychodynamic Factors in Racial Relations,* 244 Annals of the Amer. Acad. of Pol. and Soc. Sci 159, 161 (Mar. 1946); Goff, *Problems and Emotional Difficulties of Negro Children Due to Race,* 19 Journ. of Negro Ed. 152 (1950); see also authorities cited in *Appendix to Appellants' Brief* in this case. A person, whether adult or child, who is beset by such psychological tension "simply cannot function efficiently" (Deutcher and Chein, *supra,* 272), and where it is imposed simply because of his race he is not being treated equally, no matter how "equal" may be the physical facilities afforded to him. Even such experts in physical discrimination as Hitler's Nazis did not disdain ostentatious ostracism as a device to impose psychological discrimination.

Under our Constitution and the decisions of this Court, racism is no justification for any governmentally imposed discrimination. This Court has consistently held that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" [*Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943)]; that "discriminations based on race alone are

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obviously irrelevant and invidious" [*Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203 (1944)]; and that "racial discrimination .... is at war with our basic concepts of a democratic society" [*Smith* v. *Texas*, 311 U. S. 128, 130 (1940)].

The fact that the discrimination here imposed on colored elementary school children of Topeka, Kansas, is partially psychological and relates to community attitudes and individual feelings does not make it any less cognizable in law. Anglo-American law has long granted judicial protection against defamations which tend to "disgrace" a person or "lower him in or exclude him from society or bring him into contempt or ridicule."[1] The essence of the injury is psychological—the imposition of public obloquy and odium, whether done with or without writing or words, *e.g.*, "riding skimmington" to ridicule a henpecked husband publicly;[2] portraying a person as the Beast in a painting of Beauty and the Beast;[3] painting a man "playing at cudgels with his wife";[4] making a drawing of a person in a pillory;[5] or setting a lamp in front of a person's dwelling where the popular significance, in the social setting and circumstances of the place and time, was to impute reproach, odium and ignominy.[6]

Moreover, the numerous decisions of Southern courts awarding damages for "humiliation" to a white person who has been compelled to ride in the Negro section of a train,[7] or who is excluded from an office-building elevator set

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1 Newell, *The Law of Slander and Libel*, p. 2 (4th ed. 1924); Odgers, *Libel and Slander*, p. 16 (4th ed. 1905); *Cropp* v. *Tilney*, 3 Salk. 225, 226, 91 Eng. Repr. 791 (1699); *Beauharnais* v. *Illinois*, 343 U. S. 250, 254-257 (1952).

2 *Mason* v. *Jennings*, Sir T. Raym. 401, 83 Eng. Repr. 209 (1680); *Sir William Bolton* v. *Deane*, cited in *Austin* v. *Culpepper*, 2 Show. K. B. 313, 89 Eng. Repr. 960 (1682).

3 *Du Bost* v. *Beresford*, 2 Camp. 511, 170 Eng. Repr. 1235 (1810).

4 *Anon.*, 11 Mod. 99, 88 Eng. Repr. 921, 922 (1707).

5 *Austin* v. *Culpepper*, *supra*, ftnt. 2; Skin. 123, 90 Eng. Repr. 57 (1682).

6 *Jefferies* v. *Duncombe*, 11 East 226, 103 Eng. Repr. 991; 2 Camp. 3, 170 Eng. Repr. 1061 (1809).

7 *Louisville & N. R. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri, K. & T. Ry. Co.* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago, R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

apart for whites and is compelled to ride in an elevator set apart for Negroes,[8] or who has been called "colored" or "mulatto",[9] are all based on the proposition that strong feelings of contempt and scorn are directly associated with the view that Negroes have an inferior caste status and that the compulsory segregation of Negroes is intended to reflect such inferior caste status.

The Fourteenth Amendment was adopted precisely to abrogate the disadvantages resulting from an inferior caste status imposed by law. Chief Justice Taney, in the historic decision in *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393, 407 (1857), had described Negroes as having "for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect." The Fourteenth Amendment was particularly intended to repudiate that view, and therefore reached beyond the Thirteenth Amendment (which abolished slavery and involuntary servitude) to elevate the Negro to full citizenship and complete equality before the law. It did not provide for "second-class citizenship" or prescribe "separate but equal" treatment; instead, it "made the rights and responsibilities, civil and criminal, of the two races *exactly the same.*" *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880) (emphasis supplied).

The contemporaneous decisions of this Court fully reflected this understanding. In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), this Court pointed out that the Four-

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[8] *O'Connor* v. *Dallas Cotton Exch.*, 153 S. W. (2d) 266 (Civ. App. Tex. 1941).

[9] *Flood* v. *News & Courier Co.*, 71 S. Car. 112, 50 S. E. 637 (1905); *Wolfe* v. *Georgia Ry. & Elec. Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907); *Collins* v. *Okla. State Hosp.*, 76 Okla. 229, 184 Pac. 946 (1919); *Upton* v. *Times-Demo. Publ. Co.*, 104 La. 141, 28 So. 970 (1900) ("outrageous wrong"); *Spotorno* v. *Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888); *Spencer* v. *Looney*, 116 Va. 767, 82 S. E. 745 (1914); *Hargrove* v. *Okla. Press Publ. Co.*, 130 Okla. 76, 265 Pac. 635 (1928); *Jones* v. *R. L. Polk & Co.*, 190 Ala. 243, 67 So. 577 (1915). *Cf. King* v. *Wood*, 1 Nott. & McC. 184 (S. Car. 1818); *Atkinson* v. *Hartley*, 1 McCord 203 (S. Car. 1821); *Eden* v. *Legare*, 1 Bay 171 (S. Car. 1791).

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teenth Amendment was framed and adopted to protect the colored people, who "had long been regarded as an *inferior* and subject race", against State action designed "to perpetuate the *distinctions* that had before existed" (at p. 306). The Fourteenth Amendment granted "a positive immunity, or right, most valuable to the colored race,—*the right to exemption from unfriendly legislation against them distinctively as colored*,—exemption from legal discriminations, *implying inferiority in civil society*, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.... The very fact that colored people are *singled out* ... is practically *a brand upon them*, affixed by the law, *an assertion of their inferiority*, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." (pp. 307-308) (emphasis supplied).

In *Ex Parte Virginia*, 100 U. S. 339, 344-345 (1880), this Court said: "One great purpose of these amendments was to raise the colored race from that *condition of inferiority* and servitude in which most of them had previously stood, *into perfect equality of civil rights* with all other persons within the jurisdiction of the States. They were intended to take away *all possibility of oppression by law because of race or color.*" (Emphasis supplied).

Equally perceptive of the true meaning of the Fourteenth Amendment was the contemporaneous decision by this Court in *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445 (1873). There, a railroad company which furnished a car for colored people "equal in comfort to the cars reserved for white people" contended that it was not discriminating against colored people by refusing them admittance to the cars reserved for white people. This Court unanimously rejected that early manifestation of the "separate but equal" theory as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement

... this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality." (at pp. 452-453).

Even *Plessy* v. *Ferguson, supra,* relied on by the court below, recognized the impact of the Constitution against a State-imposed inferior caste status. By asserting, as an assumed fact, that segregation laws "do not necessarily imply the inferiority of either race to the other" (163 U. S. 537, 544, 551), *Plessy* indicated that segregation laws would be unconstitutional where they in fact implied that one race is inferior to another race. And in this case, on the basis of full and uncontradicted evidence, the court below expressly found that segregation in the Topeka elementary schools denotes the inferiority of the Negro pupils and thereby tends to retard their educational and mental development.

Mr. Justice Harlan's prophetic dissent in *Plessy* against "state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit" with white people (at p. 560), has been underscored by more than 56 years of experience. Every survey of racial segregation and every scientific study of its effects have confirmed "this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group." *To Secure These Rights,* Report of the President's Committee on Civil Rights, p. 82 (Oct. 29, 1947). See also Gunnar Myrdal, *An American Dilemma, The Negro Problem and Modern Democracy,* p. 581 (1944); *Higher Education for American Democracy,* Report of the President's Commission on Higher Education, Vol. II, p. 31 (Dec. 11, 1947); *Segregation in Washington,* Report of the National Committee on Segregation in the Nation's Capital (Dec. 10, 1948).

By segregating colored children from other children in its elementary public schools, the City of Topeka, Kansas,

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is using governmental power to impose an inferior caste status on the colored children. The Fourteenth Amendment to the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525-527 (1926); *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410, 420 (1948); *Henderson* v. *United States*, 339 U. S. 816, 825 (1950).

II. This Case is Governed by This Court's Decisions in the SWEATT and McLAURIN Cases, Not the PLESSY and GONG LUM Cases.

In *Sweatt* v. *Painter*, 339 U. S. 629 (1950), this Court ruled that the refusal to admit a qualified Negro to the University of Texas Law School was unconstitutional even though the State provided law school education for him at a separate school for Negroes. This Court did not simply compare the physical facilities of the two schools. "What is more important," said this Court, are "qualities which are incapable of objective measurement," including, among others, "standing in the community, traditions and prestige," and factors of "isolation" from, and "academic vacuum, removed from the interplay of ideas and the exchange of views" with, the dominant majority (p. 634).

In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950) there was no question as to the equality of the physical facilities provided for white and colored students. McLaurin used "the same classroom, library and cafeteria as students of other races," but was assigned to a seat or table designated for colored students (p. 640). This Court ruled that restrictions setting the colored student "apart from the other students .... impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and" (p. 641) ".... under these circum-

stances the Fourteenth Amendment precludes differences in treatment by the state based upon race" (p. 642).

The logic and thrust of the *Sweatt* and *McLaurin* decisions cannot justifiably be restricted to professional and graduate schools or to any other level of public education. Any restriction in public institutions of learning, based on race, which retards educational and mental development of a student is as unconstitutional in an elementary school as at any other level of public education. Indeed, the constitutional right to freedom from such restrictions is even more important at the elementary level where the growing twig is being shaped. If racial restrictions are permitted to deform the student's mind and personality in his early stages of education, he cannot in later life hope to compete on an equal basis, either at the unrestricted graduate level or elsewhere, with those not so retarded. (*Cf.* R. 172). The *Sweatt* and *McLaurin* decisions therefore require the elimination in this case of that factor—racial segregation—which produces educational handicaps for the colored pupil *vis-a-vis* the white pupil.

This case is not governed by *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) or *Gong Lum* v. *Rice*, 275 U. S. 78 (1927). If, as held by the court below, the decisions in *Sweatt* and *McLaurin* are not applicable to racial segregation at the elementary school level (as here), simply because the racial segregation in those cases was in professional and graduate education, then *Plessy* is wholly irrelevant to this case. *First*, the "only issue made" in that case was as to segregation in transportation, not in schools (p. 549). *Second*, *Plessy* did not sanction a general standard of racial segregation as such. The *Plessy* standard was that only *reasonable* distinctions based on race are constitutional. It regarded as unreasonable, and therefore unconstitutional, any law "requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs

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to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color" (pp. 549-550). *Third*, the dicta as to schools were intended only to show that segregation in transportation was less "obnoxious" than segregated schools "the constitutionality of which does not seem to have been questioned" (p. 551) and that segregated schools had not then been outlawed by State court action (pp. 544, 545). The insubstantiality of that dicta is emphasized by the absence of any evidence in that case as to either (a) the reasonableness of the distinction or (b) the inequalities resulting therefrom. In this case, however, the evidence shows both the unreasonableness of the distinction and the resultant inequalities.

Gong Lum involved only the question whether the word "colored" in the Mississippi constitution requiring separate schools for "white and colored" children applied to children of Chinese ancestry as well as to Negro children. The plaintiff there expressly agreed with the desirability and legality of segregating Negro and white children, and claimed only that a Chinese child should be classified as "white" in order to protect the Chinese child from the "risks and dangers" of association with Negro children (pp. 10, 14, 16, Brief of Plaintiff in Error, No. 29, Oct. Term, 1927; 275 U.S. 78-79). The Court assumed that the schools for Negro children were equal to those for white children and ruled only that the question of classification of a person was not one meriting "full argument and consideration" (pp. 85-86). *Gong Lum* did not involve the constitutionality of separating children by race in the public schools where such separation is shown, as here, to retard the educational and mental development of children of the minority group.

III. The Segregation in This Case Cannot Be Supported Under Any Proper Test. And Even if the PLESSY Rule of "Reasonable" Segregation Has Any Vitality, the Segregation Here is Unreasonable and Should Be Enjoined.

This Court has consistently ruled that the "ultimate test of validity" of most statutes is whether they are pertinent and have a rational relationship to a legitimate legislative objective. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 214 (1945); *Sage Stores Co.* v. *Kansas ex rel. Mitchell,* 323 U. S. 32 (1944); *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 583 (1935). Where the statute restricts personal rights and liberties, more is required—this Court will "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the" restriction. *Schneider* v. *State,* 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama,* 310 U. S. 88, 96 (1940); *cf. Minnesota* v. *Barber,* 136 U. S. 313, 320 (1890); *Nectow* v. *Cambridge,* 277 U. S. 183, 188 (1928). The requirements become even greater with respect to "legal restrictions which curtail the civil rights of a single racial group;" such restrictions "are immediately suspect" and are subjected to "the most rigid scrutiny." *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Takahashi* v. *Fish & Game Comm.,* 334 U. S. 410, 420 (1948). Indeed, this Court has said: "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis for a statutory classification affecting the right set up in this case." *Nixon* v. *Herndon,* 273 U. S. 536, 541 (1927). And at the last Term, this Court emphasized that "a requirement of color, as we have pointed out before, is not reasonably related to any legitimate legislative objective." *Ray* v. *Blair,* 343 U. S. 214, 226, ftnt. 14 (1952).

Under none of these tests can the racial restriction in this case be sustained. There is no evidence that segregation in the first six grades is pertinent to or has a rational

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relationship to any legitimate legislative objective. Nor are there substantial reasons shown to support this segregation as a necessary measure to prevent any important and substantial harm, either to the community, to efficient public education, to the white children, or to anyone else.

Prejudice and private social views are obviously insufficient legal justification for the racial restriction. No one has the right to demand that the government discriminate, by exclusion or segregation or otherwise, against other citizens in the use of a public facility, simply on account of their race or color, merely because he does not wish to associate with them. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 641 (1950); *Ferguson* v. *Gies*, 82 Mich. 358, 367-368, 46 N. W. 718, 721 (1890); *Shelley* v. *Kraemer*, 334 U. S. 1, 19 (1948).

There is not even a serious assertion of possible race conflict if integration occurs, an assertion which usually accompanies the "convenient apologetics of the police power" evoked in race litigation. *Morgan* v. *Virginia*, 328 U. S. 373, 380 (1946); *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948). The fear of race conflict is, of course, an insufficient legal basis for depriving a person of his constitutional rights by racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917); *City of Birmingham* v. *Monk*, 185 F. (2d) 859 (C.A. 5th, 1950), *cert. den.* 341 U. S. 940 (1951); *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941). The problem of potential race conflict, if any, should instead be solved by education and by enforcing without racial discrimination the laws against violence and disorderly conduct. But any uneasiness on this score is wholly dissipated when we observe the success of integration in the Topeka public schools beyond the sixth grade, the happy experience of the integrated elementary schools on Federal areas throughout the South,[10] and the current experience in many

[10] See *Washington Post*, p. 3-B (Oct. 14, 1951); *cf.* President Truman's pocket veto of Enrolled Bill H. R. 5411, 82nd Cong. because it would have required segregation in these now integrated public elementary schools in the South. Message to Congress, Nov. 2, 1951, 97 Cong. Rec. 13787-13788.

other fields of human relations.[11]

Even if the segregation in this case is measured, not by any of these tests, but by that touchstone of racism, the outmoded doctrine of *Plessy* v. *Ferguson*,[12] the segregation in this case can not be sustained. *Plessy* did not say that all segregation is valid. It required that a legislative racial distinction "must be reasonable," and asserted that that question could be determined "with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (163 U. S. at 550). But what might have been "reasonable", even on that basis, in the Deep South in 1896 when Jim Crow and the Ku Klux Klan were in their hey-day is certainly not reasonable in the law-abiding and enlightened City of Topeka, Kansas, in 1952. Furthermore, as already shown, segregation in the Topeka schools does not promote the "comfort" of its citizenry, and is totally irrelevant to the "preservation of the public peace and good order." It rests only on prejudice, a factor plainly unreasonable under the Constitution. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886).

On the other hand, the enforced segregation in this case admittedly retards the educational and mental development of the Negro children and deprives them of equal educational opportunity. It is a discrimination with far-reaching effects. Educational qualifications are often the basis for exercising citizenship rights and participating in civil government and military affairs. One's educational level also generally affects his opportunity to secure better employment and housing, to enjoy improved recreation, to create in literature and science, to achieve success in busi-

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11 See Comment, *Racial Violence and Civil Rights Law Enforcement*, 18 Univ. Chi. L. Rev. 769 (1951); Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 Yale L. J. 730, 738-744 (1952); Frank, *Can Courts Erase the Color Line?*, 21 Journ. of Negro Educ. 304, 309-310 (1952).

12 The unsound foundations of *Plessy* v. *Ferguson* were analyzed in the Brief of the American Veterans Committee, pp. 21-30, in *Henderson* v. *United States*, 339 U. S. 816 (1950), No. 25, Oct. Term, 1949. See also Brief of the United States in that case.

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ness and industry, and to obtain the decencies and amenities of social relations in a democracy. Moreover, segregation in schools stimulates and deepens divisiveness in our population, obstructs efforts to dissolve prejudices through the process of education and voluntary adjustments, and, by providing propaganda for our enemies abroad, adversely affects our relations with other countries. These ill effects, not only on the Negro children but also on the community and the Nation, should be weighed against the insubstantial reasons of "usages, customs and traditions" which are based wholly on prejudice. On such weighing, it is clear that the segregation in this case is unreasonable and therefore, even under the *Plessy* test, unconstitutional.

IV. The Road Ahead.

Segregated and unequal education, unfortunately, will not disappear overnight. The backlog of deficiency, the habits of the people, the accumulated patterns of residential segregation, and other factors remain as significant obstacles. But the elimination of State-imposed restrictions of law will provide opportunity for voluntary adjustment by the people. Intercultural problems which the abolition of segregation in education will raise in some schools will not be insoluble problems. Democratic education has the capacity to meet them. In any event, none of these possible inter-group problems will approach the magnitude of those raised by enforced segregation which discriminates against children of the minority group in violation of the Constitutional guarantee of "equal protection of the laws."

American Veterans Committee, Inc. (AVC)
Amicus Curiae

By Phineas Indritz
National Counsel
American Veterans Committee

October 9, 1952
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 8 /

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, et al.,
Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al,

Appeal from the United States District Court for the District of Kansas.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 8

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, et al.,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al,

Appeal from the United States District Court for the District of Kansas.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The undersigned as counsel for and on behalf of American Federation of Teachers, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae.* Consent has been given by counsel for appellants and appellees. The letters giving such consent accompany this brief.

The American Federation of Teachers is an organization of more than 350 locals of 60,000 teachers throughout the country, committed to a policy of "Democracy in Education—Education for Democracy". Its membership consists chiefly of classroom teachers who do the actual work of teaching the children in the nation's schools.

In its own affairs it is committed to a practice of complete equality and non-segregation between teachers of every race. Its Constitution provides:

> "Section 11 (of Article III). No discrimination shall ever be shown toward individual members, or applicants for membership because of race * * *."

It has worked unceasingly throughout its history, and with greater intensity in recent years, for the abolition of all forms of discrimination and segregation in education based on racial differences.

Its members, as shown by the proceedings of its national conventions, have repeatedly asserted a fixed opinion that segregated school systems are a basic violation of the Equal Protection Clause of the Fourteenth Amendment.

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Of Counsel.

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IN THE

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OLIVER BROWN, MRS. RICHARD LAWTON,
MRS. SADIE EMMANUEL, et al.,
Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KANSAS, et al,

Appeal from the United States District Court
for the District of Kansas.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

The American Federation of Teachers submits this brief as *amicus curiae* in view of the great importance to democracy and the cause of education of the constitutional issue involved in these cases.

Opinions Below.

Statutes Involved.

The opinions below and the statutes involved are set out in the brief of the appellants.

Question Presented.

The general question presented by this appeal is whether the State of Kansas is violating the mandates of the Fourteenth Amendment by its practice of maintaining separate schools for the education of white and colored children.

Statement.

This is a class action in which plaintiffs seek a decree declaring Section 72-1724 of the General Statutes of Kansas, 1949 to be unconstitutional insofar as it empowers the Board of Education of the City of Topeka "to organize and maintain separate schools for the education of white and colored children."

Pursuant to this statute, the City of Topeka, Kansas, has established and maintains a segregated system of schools for the first six grades. The City of Topeka is one school district. The district maintains eighteen schools for white children and four for colored children.

The case was heard by a three judge statutory court. The court found as a fact that the facilities in the schools for colored children were substantially equal. Hence the issue here is whether segregation of children in the grade schools is *per se* a denial of equal protection of the laws.

Summary of Argument.

In this brief *amicus curiae* the American Federation of Teachers will argue that segregation in the schools violates basic principles of the educational process; that Negroes forced by state law to attend segregated schools are, by virtue of such segregation denied the equal protection of the laws, in violation of the Fourteenth Amendment.

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ARGUMENT.

I.

The Statute of Kansas, providing for segregation of students in the Public Schools, violates the requirements of the equal protection clause of the Fourteenth Amendment. The doctrine of "Separate but Equal" facilities is fallacious.

The Fourteenth Amendment to the Constitution, in Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment made Negroes citizens of the United States and was intended further to protect them fully in the exercise of their rights and privileges. To make sure that this intent was fully known, Congress refused to readmit Southern States or seat their representatives until the states accepted the Fourteenth Amendment.

Its adoption, however, did not stop the practice of segregation in the Southern States, and when that issue was presented to this Court in 1896, in *Plessy* v. *Ferguson,* 163 U. S. 537, 550 (1896), involving a Louisiana statute which required separation of Negro and white passengers, this Court said:

> ". . . We cannot say that a law which authorizes or even requires the separation of the two races in public

> conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

In *Missouri ex rel. Gaines* v. *Canada, registrar,* 305 U. S. 337, 349, this Court said:

> "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State."

Recently, the doctrine of "separate by equal" facilities expressed in the *Plessy* and *Gaines* cases was held to be a menace to American democracy and indefensible by the President's Committee on Civil Rights which unequivocally advocated that it be eliminated. In its report, the Committee said:

> "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together. There is no adequate defense of segregation."

Furthermore, recent decisions of this Court enunciate principles in conflict with the rationale of the *Plessy* and *Gaines* cases. These include: *Takahashi* v. *Fish & Game Commission,* 332 U. S. 410; *Oyama* v. *California,* 332 U. S. 633, 640, 646 (1948); *Sipuel* v. *Board of Regents of the University of Oklahoma,* 332 U. S. 631 (1948); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

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In the *Shelley* case, this court, in considering private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes and holding that it was violative of the equal protection clause of the Fourteenth Amendment for state courts to enforce them said (at p. 23):

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

These principles cast doubt on the soundness of the rule laid down in the *Plessy* and *Gaines* cases. We submit that it should no longer be followed.

Nowhere has the fallacy of the doctrine of "separate but equal" facilities been more apparent than in the grade and high schools of the country. Elsewhere, in this brief we shall point out the sociological effects of this practice.

In *Sweatt* v. *Painter*, 339 U. S. 629, 70 S. Ct. Rep. 848, the court held that a separate law school established by Texas for Negro students could not be the equal of the University of Texas Law School.

In *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 70 S. Ct. Rep. 851, the court held that the requirements of state law that the instruction of a Negro graduate student in the University of Oklahoma be "upon a segregated basis" deprived the appellant in that case of his personal and present right to the equal protection of the laws.

There is no reason in experience for applying a different logic to children in grade and high schools. As the court

there said, our society grows increasingly complex and our need for trained leaders increases correspondingly.

We cannot give separate training to two segments of society and then expect that some magic will merge the individual from these segments into equal citizens having equal opportunities.

It is a mockery to say that those who aspire to teach and lead must have equal opportunity regardless of race, and still condemn to inequality those they are to teach and lead.

Ninety years of segregated schools demand the historical judgment that separate facilities are inevitably unequal and are not the way to equal opportunity.

In the segregated school system the growing citizen never has the chance to show his equal ability; he never has the

> "opportunity to secure acceptance by his fellow students on his own merits." *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 641.

He must wait until he has finished what schooling he gets before he enters the competition. For him "the personal and present right to the equal protection of the laws" is of as great practical importance as for the graduate student.

The Fourteenth Amendment is not for law students and postgraduates alone. It is meaningless if it does not apply to all children from the first day they enter the public schools.

To paraphrase the decision in the *Shelley* case, it seems to us that the segregation of students in public education as required by the Kansas Statute, violates the primary object of the Fourteenth Amendment: ". . . the establishment of equality in the enjoyment of basic civil and political

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rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

II.

Segregation in public schools inevitably results in inferior educational opportunities for the Negro.

Commenting on the study of Dr. John Norton and Dr. Eugene Lawler—Public School Expenditures (1944) W. Harden Hughes states:

> "The contrasts in support of white and Negro schools are appalling . . . the median expenditure per standard classroom unit in schools for white children is $1,160 as compared with $476 for Negro children. Only 2.56% of class rooms in the white schools fall below the $500 cost level while 52.59% of the class rooms for Negro children are below this level."[1]
>
> "The state supported institutions of higher learning for Negroes are far inferior" states Charles S. Mangum, Jr., "to their sister institutions for whites. Most of the inequalities which have been noted herein with respect to the public schools for whites and Negroes are also present in the Negro normal and technical schools. . . . There is hardly one among them that could compare with any good white college in the same area."[2]

Statistics on vocational education in the land grant schools and colleges among Negroes show:

> "that of the federal funds allotted for vocational training in 1934-35 white schools received 88.2% and Negro schools 11.8%."[3]

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[1] Negro Year Book, Tuskegee Institute 1947. "The Negro and Education." W. Harden Hughes, p. 56.

[2] The Legal Status of the Negro (p. 134), Charles S. Mangum, Jr., Chapel Hill University of N. C. Press, 1940.

[3] Vocational Education and Guidance of Negroes, Bulletin No. 38, 1937, U. S. Dept. of Interior, Office of Education, p. 13.

A recommendation of this report (1934-35) was:

> "that individuals and groups interested in the improvement of educational facilities continue and increase their efforts to promote equitability of educational opportunity and equitability in the distribution of funds without regard to race or color."[4]

In Texas, the expenditure for public schools was $1400 for whites per classroom unit and $700 for Negroes.[4] There is a corresponding discrimination in school transportation, salaries of teachers, library service and provision for training beyond the secondary school.

Several recent studies,[5] as well as many previous ones, all indicate the great disparity between the educational opportunities afforded white youth and those offered to Negro youth in the states where a segregated and discriminatory system of education prevails.

So obvious are the inequalities that in Vol. 1 of the National Survey of the Higher Education of Negroes we find this statement: "No one with a knowledge of the facts believes that Negroes enjoy all the privileges which American democracy expressly provides for the citizens of the U. S. and even for those aliens of the white race who reside among us. The question goes much deeper than the Negro citizens' *legal right to equal educational opportunity.* The question is whether American democracy and what we like to call the American way of life, can stand the strain of perpetuating an undemocratic situation; and whether the nation can bear the *social cost of utilizing only a fraction*

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[4] Public School Expenditures, Dr. John Norton and Dr. Eugene S. Lawler, American Council on Education, 1944.

[5] The Black & White of Rejections for Military Service, American Teachers Assn. Studies, ATA Montgomery, Ala., 1944; Public School Expenditures in the U. S., Dr. John K. Norton and Dr. Eugene S. Lawler; American Council on Education, Wash., D. C., 1944; Journal of Negro Education, Summer 1947.

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of the potential contribution of so large a portion of the American population." [6]

The Constitution is a living instrument, and a "separate but equal" doctrine based upon antiquated considerations, should not, at this time, and in this advanced era, be permitted to perpetuate a situation which denies full equality to Negroes in the pursuit of education.

III.

Segregation in public schools deprives the Negro student of an important element of the education process and he is thereby denied the equal educational opportunities mandated by the Fourteenth Amendment.

The practice of segregation in the field of education is a denial of education itself. Education means more than the physical school room and the books it contains, and the teacher who instructs. It includes the learning that comes from free and full association with other students in the school. To restrict that association is to deny full and equal opportunities in the learning process. To restrict that association is to deny the constitutional guarantee.

Psychologists show us that learning is an emotional as well as an intellectual process: that it is social as well as individual, and is best secured in an environment which encourages and stimulates the best effort of the individual and holds out the hope that this best effort will be accepted and used by society.

From infancy to adulthood the most satisfactory personality development occurs when the individual:

a. feels he is accepted and wanted by his community

[6] Socio-Economic Approach to Educational Problems, Misc. No. 6, Vol. 1, p. 1, Federal Security Agency, U. S. Office of Education, Wash., 1942.

b. secures aid and encouragement in his activities

c. has the satisfaction of contributing to the group without too many frustrating experiences

d. receives the approval of the group or some evidence of recognition.

"Another obvious fact about human development is that it is greatly facilitated by social contacts. . . . Social contacts make possible the enlargement of personal experience by fusing into it the accumulated experiences of the race."[7] (Here human race is intended.)

"More recently psychologists and other students of education have gained a livelier appreciation of the fact that learning does not take place merely because there exists an intelligence or mind. The physical condition of boys and girls, their emotional responses both in school and out, *all the environmental factors* which impinge upon them have influence upon their growth and development."[8]

"The security needs of children (and adults too) are more numerous and complicated than the elimination of gross fears suggests. They seem to be related to a larger but more subtle need which may be here labeled as the need for orientation. A person finds it desirable to know where he is in the world and how he stands with his fellows. To be 'lost' in either respect is to be in an uncomfortable frame of mind. Not to be spatially, temporally and socially oriented is to be deprived of the *prime conditions for effective learning and growth.*"[9]

In every situation there is the inter-relation of the individual to his group—which is one that increases with his maturity. First it is the family, then the local community, then the state, the nation, and finally the entire world. At

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[7] Judd, Charles H., Educational Psychology, p. 3, Houghton Mifflin, 1939.

[8] Hartmann, George W., Educational Psychology, Foreword, p. VI, American Book Co., 1940.

[9] Hartmann, George W., Educational Psychology, p. 240, American Book Co., 1940.

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no stage of development should any barriers be erected to prevent the individual from moving from a narrower group to a larger one, particularly barriers on race. As Lewin states:

> "The group to which an individual belongs is the ground on which he stands, which gives or denies him social status, gives or denies him security and help. The firmness or weakness of this ground might not be consciously perceived, just as the firmness of the physical ground on which we tread is not always thought of. Dynamically, however, the firmness and clearness of this ground determine what the *individual wishes to do, what he can do, and how he will do it.* This is equally true of the social ground as of the physical."[10]

Again he states:

> "It should be clear to the social scientist that it is hopeless to cope with this problem (discrimination) by providing *sufficient self esteem for members of minority groups* as individuals. The discrimination which these individuals experience is not directed against them as individuals, but as group members and only by raising their self *esteem as group members* to the normal level can a remedy be produced."[11]

An interesting survey of the opinion of social scientists on the effects of enforced segregation was made by Drs. Max Deutscher and Isidor Chein through a questionnaire[12] to 849 social scientists in all parts of the country. The questionnaire was answered by 571.

> "Ninety per cent of the total sample express the opinion that enforced segregation has detrimental effects on the segregated groups."[13]

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[10] Kurt Lewin, "Resolving Social Conflicts," p. 174, Harper & Bros., 1948.

[11] *Ibid*, p. 214.

[12] Max Deutscher and Isidor Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, Journal of Psychology, 1948-26, pp. 259-287.

[13] Page 265—above survey.

> "Eighty-three per cent of the respondents believe that enforced segregation has detrimental psychological effects on the group which enforces segregation."[14]

A few quotations from the social scientists make clear their views: "Feelings of not being wanted, of being classified as inferiors, of being assigned to low places are destructive to personality and development and injurious alike to slave and master."[15]

> "Clinical experience and experimental evidence point unmistakably to the conclusion that segregation implies a value judgment which in turn arouses hostility in the segregated and guilt feelings in the segregator. The effect is to set up a vicious circle making for group conflict."[16]

> "I don't see how anyone could question the statement that power over others—to segregate or any other power—has a psychological effect on both parties or that this effect is bad in any sense for the less powerful groups. The more powerful group may like the effect it has on itself in short term values, but hatred, rebellion, or dispair are attitudes they have aroused toward themselves and they will always have to cope with these results sooner or later unless they can practically eradicate the whole minority as Europeans did with the American Indian."[17]

If education can be made available to all so that each may develop to the fullest and give his contribution to society, we will find a peaceful way—rather than one of human destruction and tragedy—to bring freedom and justice to peoples.

The American Federation of Teachers believes that segregated and discriminatory education is undemocratic and contrary both to sound educational development as well as

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[14] (See Footnote 12), p. 265.
[15] (See Footnote 12), p. 274.
[16] (See Footnote 12), p. 275.
[17] (See Footnote 12), p. 279.

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to the basic law of the land—the United States Constitution. We subscribe to the principle that democratic education provides a total environment which will enable the individual to develop to his capacity, physically, emotionally, intellectually and spiritually.

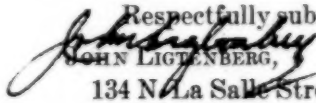
For such training to be fully effective, it is essential that each individual participate, without barriers of race, creed, or national origin, as a full fledged member in the home, the community, the state and the nation.

Accordingly, any restriction, particularly in the form of segregated and discriminatory schooling, which prevents the interplay of ideas, personalities, information and attitudes, impedes a democratic education and ultimately prevents a working democracy.

Conclusion.

Segregation of Negroes in public schools in any of our States inevitably results in depriving Negroes of educational opportunities provided by those States for white citizens. Negroes in such States are thereby denied the equal protection of the laws mandated by the Fourteenth Amendment. This Court should end these violations of the constitutional mandate by reversing the judgment in this case and granting the appellants the relief they pray for.

Respectfully submitted,



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BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

STATEMENT OF INTEREST

This brief *amicus curiae* is submitted with the consent of the parties.

The American Jewish Congress is an organization committed to the principle that the destinies of all Americans are indissolubly linked and that any act which unjustly injures one group necessarily injures all. Out of this firmly held belief, the American Jewish Congress created its Commission on Law and Social Action in 1945, in part "to fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

Believing as we do that Jewish interests are inseparable from the interests of justice, the American Jewish Congress cannot remain impassive or disinterested when persecution, discrimination or humiliation is inflicted upon any human being because of his race, religion, color, national origin or ancestry. Through the thousands of years of our tragic history we have learned one lesson well: the persecution at any time of any minority portends the shape and intensity of persecution of all minorities.

There is, however, an additional reason for our interest. The special concern of the Jewish people in human rights derives from an immemorial tradition which proclaims the common origin and end of all mankind and affirms, under the highest sanction of faith and human aspirations, the common and inalienable rights of all men. The struggle for human dignity and liberty is thus of the very substance of the Jewish tradition.

We submit this brief *amicus* because we are convinced that the policy of segregation has had a blighting effect upon Americans and consequently upon American democratic institutions. We believe that the doctrine of "separate but equal" has engendered hatred, fear and ignorance. We recognize in this triumvirate our greatest enemy in the struggle for human freedom. But our concern must not be construed as limited to minorities alone. The treatment of minorities in a community is indicative of its political and moral standards and ultimately determinative of the happiness of all its members. Our immediate objective here is to secure unconditional equality for Americans of Negro ancestry. Our ultimate objective in this case, as in all others, is to preserve the dignity of all men so that we may achieve full equality in a free society.

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STATEMENT OF THE CASE

The City of Topeka, pursuant to authority granted it by the General Statutes of Kansas of 1949 (Ch. 72-1724), maintains a segregated system of schools for the first six grades. The appellants, adult and infant Negroes, filed a class suit in the U. S. District Court against the Topeka School Board seeking a declaration of unconstitutionality and an injunction restraining the enforcement of the Kansas statutes and the segregation instituted thereunder, on the ground that such segregation violated the Fourteenth Amendment of the United States Constitution in that (1) Negro schools were inferior in facilities and (2) segregation, in and of itself, constituted an inequality in educational advantage. The State of Kansas intervened as a defendant.

A three-judge Court rejected appellant's first contention finding that the Negro schools were substantially equal to those allotted to whites (R. 245), a finding which appellants here do not challenge. Although the court found that segregation of white and colored children in public schools had "a detrimental effect upon the colored children" (R. 245), it considered itself bound by this Court's opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, and therefore also rejected appellant's second contention (R. 243-244). Appellants on direct appeal are now seeking a review of that decision. The decision below is unreported.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed solely to whether the requirement of equality contained in the Fourteenth Amendment of the United States Constitution is satisfied by affording "separate but equal" public grade school facilities to Negro and white children.

SUMMARY OF ARGUMENT

When a state establishes racially segregated public grade schools, it thereby perpetuates inequality between the races and discriminates against the Negro race in violation of the "equal protection" clause of the Fourteenth Amendment.

A. State imposed segregation stems from a theory of superiority of the white race over the Negro race inherited as a remnant of the institution of slavery.

B. The social inequality which was one of the results of slavery changes in both degree and nature when it is incorporated in the laws of a state. Such incorporation places the power of the state behind the inequality, freezes the unequal status and impedes its gradual change. The inequality, which thus receives the imprimatur of the state, causes a denial of the equal protection of the laws if it results in an inequality of values in the facilities provided by the state or causes oppression of a race.

C. (1) Segregated public grade schools do adopt a pre-existing inequality and place a badge of inferiority

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on the Negro race. Since the value of facilities is determined in part by the standing in the community of those who use them, the result is an inequality of value in the public school facilities provided for the separate races.

(2) In addition, because of the adoption of the pre-existing inequality, the Negro race suffers psychic injury in the segregated school system.

ARGUMENT

When a state establishes racially segregated public grade schools, it thereby perpetuates inequality between the races and discriminates against the Negro race in violation of the "equal protection" clause of the Fourteenth Amendment.

The segregated public school system of Topeka, Kansas, was found constitutional by the court below under what is known as the "separate but equal" doctrine. That doctrine holds that the "equal protection" clause of the Fourteenth Amendment is not violated when a state agency provides separate facilities for its white and Negro citizens as long as the facilities are equal (R. 240-244). We believe that that doctrine is erroneous on several counts. Here, however, we shall focus attention on only one of its aspects. It is our position that state-imposed racial segregation in public grade schools violates the Fourteenth Amendment because it adopts a classification based on concepts and practices of inequality and, by that adoption, contributes to, extends and deepens the discrimination resulting from the inequality and incorporates that discrimination in the schooling which it provides.

A. The Pre-Existing Inequality of Negroes and Whites

State-imposed segregation stems directly from a vestigial theory of the superiority and inferiority of races inherited as a remnant of the institution of slavery. With the freeing of slaves, attempts were made by the dominant white group to preserve its position of ascendancy by the enactment of discriminatory legislation. Immediately after the Civil War the southern states adopted laws limiting the rights of Negroes to own property, to institute law suits and to testify in judicial proceedings. They imposed different penalties on Negroes and whites for the same offenses and otherwise placed the freedmen under legal restraints. Stephenson, G. T., *Race Distinctions in American Law* (1910), pp. 35-66; Frazier, E. F., *The Negro in the United States* (1949), pp. 126-127. These "Black Codes," as they were called, were a plain reflection of the earlier attitude that Negro slaves, and those descended from them, "had no rights which the white man was bound to respect." *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393, 407 (1857). "It required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1879).

We shall show in the following sections, first, that the Fourteenth Amendment prohibits state action which incorporates, and thereby strengthens and entrenches, this pre-existing inequality and, second, that state-imposed racial segregation in public grade schools has that effect.

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B. The Constitutional Significance of State-Imposed Racial Segregation on the Lines of a Pre-Existing Social Inequality

The Fourteenth Amendment was intended to and did invalidate the gross discrimination of the Black Codes. *Slaughter House Cases*, 83 U. S. 36, 70 (1872). It may be assumed, at least for the purposes of this case, that it did not lay upon the states the affirmative obligation to undo all the results of slavery. Thus, the Amendment did not reach whatever social inequality remained. Private individuals and institutions were free to discriminate as they chose.

Specifically, no question would have arisen under the Amendment in the area of education if the states had simply refrained from providing public schools. But if they did provide public schools, they were required to do so in a manner which did not cause unequal treatment.

We pass over the question whether the Amendment would have been violated if the creation of public, racially-segregated schools had had no effect on the existing racial inequality. It is unnecessary to consider that question because, we submit, *when government gives official sanction to pre-existing social inequality, its action causes a change in both the degree and the nature of the inequality and incorporates it into its own activities.*

This change takes place because once a social classification based on group inferiority is formally adopted by the state, the ensuing official inferiority in turn intensifies and deepens the social inequality from which it stems. As long as law is not called into play to shape conduct, gradual changes in attitude can bring about corresponding changes in conduct patterns. These changes, in turn,

further the attitude changes. Once the law intervenes, however, gradual spontaneous change becomes impossible.*

Suppose, for example, that Kansas did not maintain a public school system and had no laws requiring segregation in education. As already noted, privately operated schools would be free to segregate and even to exclude racial groups entirely. Those private groups, however, who rejected racial inequality would also be free to act according to their principles. Most important, those who opposed segregation would be able to change the situation gradually by persuading one school authority at a time to change its policy. Each success they achieved would demonstrate the feasibility of non-segregated schools and thereby increase their chances of success with other schools.

On the other hand, when the state places the policy of segregation in its laws, it freezes the social inequality in whose mold the laws are cast. More than that, the laws eliminate the free play of individualism and force all, without exception, to conform their conduct to the caste system. It is then no longer possible to urge gradual change or to attempt step-by-step improvement. The statute becomes a bulwark against dissentient opinion, persuasion and even economic pressure.

An additional result of segregation laws is to give the otherwise inarticulate social feeling of racial superiority the sanction of official regulation. The feeling ac-

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* The manner in which the law "maintains one set of values against another" (Pound, Roscoe, *The Task of the Law* (1944), p. 25) has been intensively studied in recent years. For summaries of the findings, see Berger, Morroe, *Equality by Statute* (1952), pp. 170-193; Maslow, Will, *Prejudice, Discrimination, and the Law*, *The Annals*, May 1951, pp. 9-17.

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quires a concreteness and assertiveness which it would not otherwise possess. The stricter the regulation, the stronger and more articulate the feeling of social distance becomes. This Court itself took note of that fact when it characterized a law excluding Negroes from juries as a "stimulant to . . . race prejudice." *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1879).

The distinction between private and public schools just discussed finds a close parallel in *Shelley* v. *Kraemer,* 334 U. S. 1 (1948). This Court there noted that the Constitution is not violated where "the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit." 334 U. S., at 19. Where, however, the "imprimatur of the State" is placed on the discrimination, the Fourteenth Amendment becomes applicable and it makes no difference that "the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." 334 U. S., at 20.

So here the "full panoply of state power" (334 U. S., at 19) has been placed behind the inequality inherent in segregation. The state power is brought to bear in two ways. It enforces and extends the pre-existing social inequality (*supra,* pp. 7-9), and, at the same time, provides facilities which, because of that social inequality, are unequal in value (*infra,* pp. 11-12).

The barrier to change set up by segregation laws is the same in nature as that created by the state-enforced restrictive covenants condemned in the *Shelley* case. The Court there found beyond the reach of the Constitution mere "gentlemen's agreements" which derived no strength from the state. The discrimination adopted in those

agreements, like that adopted by privately operated schools, can be whittled away gradually. Institutions may be persuaded, by argument or pressure, to depart from established patterns. The vice of judicial enforcement of restrictive covenants lay in the fact that it froze patterns of discrimination and placed them beyond the reach of erosion; "but for the active intervention of the state courts" (334 U. S., at 19), change would have been possible. In the same way, segregation statutes use the authority of the state to preserve the inequality and discrimination which they incorporate.

This Court recognized in the *Plessy* case that the statute there considered did conform to existing social attitudes. It noted that the statute was enacted "with reference to the established usages, customs and traditions of the people . . ." 163 U. S., at 550. Where the Court erred, we submit, was in holding in effect that the state could ignore the status of inferiority in which those "usages" placed the Negro and could also ignore the reenforcing effect which its legislation had on that status.

In any event, where as here, the state does more and provides facilities to which the state-reenforced inequality attaches, the violation of the Constitution is plain. As we shall now show, segregation in public grade schools, by imposing a badge of inferiority on the Negro race, causes inequality in the facilities made available to it and results in oppression of that race within the public school system. We submit that the Fourteenth Amendment prohibits such use of the state's power to maintain inequality in public facilities.

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C. The Effect of Racial Segregation in Public Grade Schools

(1) *Enforced segregation in public grade schools stamps the Negro with a badge of inferiority and thereby renders inferior the facilities allocated to him by the state.*

It can hardly be disputed that an official regulation declaring that a group is inferior and consequently confining it to separate schools would be discriminatory. That much was virtually conceded in the *Plessy* decision when the Court characterized as a "fallacy . . . the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority." 163 U. S., at 551. It thereby implied that a different result would have been reached if the contrary were true.

An official declaration that the Negro race is inferior to the white and must therefore be confined to separate schools would necessarily depreciate the value of the Negro schools in the eyes of the community. This is because the value and desirability of property depends not only upon its intrinsic qualities but also upon its association with persons enjoying a certain reputation. The desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. Differences in value of this nature are significant under the Fourteenth Amendment as this Court recognized when it condemned segregation in state law schools because of differences in "those qualities which are incapable of objective measurement but which make for greatness in a law school," including "standing in the community, traditions and prestige." *Sweatt* v. *Painter,* 339 U. S. 629, 634 (1950).

We do not have here, of course, an express declaration by the State of Kansas that Negroes are inferior to whites.* Yet the same effect is achieved if a state establishes public school segregation along the lines of a preexisting social inequality. It is plain that that is what public school segregation does.

Examination of the pattern of segregation laws reveals plainly that they are designed not to prevent all contact between the races but to prevent contact on the basis of equality. It is the social definition of the situation that determines its treatment in both law and custom. Merely "shaking a black hand may be very repulsive to a white man if he surmises that a colored man conceives of the situation as implying equality." Johnson, *Patterns of Negro Segregation* (1943), p. 208. Those who insist upon the caste system in our society freely and unstintingly agree to the ritual of equal physical facilities so long as somehow there is also an accompanying communication that the Negro is inferior and is to remain so.

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*Other states having segregation laws have given express recognition to racial inequality in decisions holding that it is libelous *per se* to write that a white man is a Negro (*Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141 (1900); *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229 (1919); *Hargrove* v. *Okla. Press Pub. Co.*, 130 Okla. 76 (1928); *Flood* v. *News and Courier Co.*, 71 S. C. 112 (1905); *Stultz* v. *Cousins*, 242 Fed. 794 (C.C.A. 6, 1917); see also *Jones* v. *Polk & Co.*, 190 Ala. 243 (1913); *Atlanta Journal Co.* v. *Farmer*, 48 Ga. App. 273 (1934); *Wright* v. *F. W. Woolworth Co.*, 281 Ill. App. 495 (1935); *Williams* v. *Riddle*, 145 Ky. 459 (1911); *O'Connor* v. *Dallas Cotton Exchange*, 153 S. W. (2) 266 (Tex., 1941); Mangum, *The Legal Status of the Negro*, 1940, at p. 18) and in cases awarding damages to white passengers who are forced to ride in Jim Crow cars (*M.K.T. Railway Co. of Texas* v. *Ball*, 25 Tex. Civil App. 500 (1901); *Louisville and N.R. Co.* v. *Ritchel*, 148 Ky. 701 (1912); *Chicago R. I. and P. Ry. Co.* v. *Allison*, 120 Ark. 54 (1915)).

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Segregation laws provide the ready vocabulary for that communication. In at least one respect, this can be seen in the segregation laws themselves. Ten Southern states expressly exempt nurses or other attendants from the laws requiring segregation on railroads (Mangum, *The Legal Status of the Negro* (1940), pp. 188-189) and three of these disclose the intent of this exception by limiting it to "colored" attendants. *Florida* Statutes (1941), sec. 352.03; *Georgia* Code Ann. (1935), sec. 18-209; *No. Car.* Gen. Stat. (1943), sec. 60-94.

Even where the statutes are not so disingenuous the purpose is clear. By segregation "racial and cultural differences between southern whites and slaves were translated into terms of unquestionable superiority and inferiority." Johnson, *op. cit.*, p. 158. According to Dollard, *Caste and Class in a Southern Town* (1937), p. 98, the sole importance of segregation is to give whites, no matter how low in the social scale, a sense of power and importance. Negroes correspondingly must receive a position and a sense of inferiority. This primary role of segregation statutes is reflected in the candid admission of a Kentucky court:

> "It is also beyond dispute that the sentiment reflected in this legislation and in these opinions does not find the end or the perfection of its purpose in mere race separation alone. It goes much further in that, as is shown in the general feeling everywhere prevailing, the Negro, while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and domestic economy of the state, courts cannot shut their eyes. They must

> . . . notice . . . the position of the races and the attitude of the white race toward the Negro." *Axton Fisher Tobacco Co.* v. *The Evening Post,* 169 Ky. 64 (1916).

That the vocabulary of segregation is effectively understood by the entire community cannot be disputed at this date. Segregation provides a graphic and literal solution to the demand of the white world that Negroes be kept "in their place." To the whites in the community the enforced separation of races, as we have shown, is clearly understood as a symbolic affirmation of white dominance, dominance which, to keep itself alive, demands as tribute the continuous performance of the racial etiquette. See Doyle, *The Etiquette of Race Relations* (1937); Johnson, *Patterns of Negro Segregation* (1943), p. 158; McWilliams, *Race Discrimination and the Law,* Science and Society, Vol. IX, No. 1 (1945). "In this magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it and that feeling applies to every single Negro . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." Myrdal, *An American Dilemma* (1944), p. 100. Under these conditions "it is fallacious to say . . . that the intention and effect [of segregation] is not to impose any badge of inferiority . . . When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and when a white man and woman is seated on the fourth seat, separated only by a bit of wire mesh ten inches high on

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the back of the third seat this is a 'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' celebration." McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif. L. Rev. 5, 27 (1945).

Similarly, Negroes appreciate the implication of segregation (Stouffer, *Studies in Social Psychology in World War II,* Vol. 1, p. 566), resent its slur (Moton, *What the Negro Thinks* (1929), pp. 238-239), and resist it as a none too subtle mechanism for anchoring them in inferiority (Davis and Doliard, *Children of Bondage* (1940), p. 245).

These effects in the field of segregated education are well shown by the record in this case. Dr. Louisa Holt, a social psychologist, testified as follows on the impact of school segregation on the personality of the Negro child (R. 169-170):

> "The fact that it is enforced, that it is legal, I think, has more importance than the mere fact of segregation by itself does because this gives legal and official sanction to a policy which inevitably is interpreted both by white people and by negroes as denoting the inferiority of the negro group. Were it not for the sense that one group is inferior to the other, there would be no basis, and I am not granting that this is a rational basis, for such segregation."

The result of segregation has been the infusion of rigid, caste stratifications into our laws, our institutions, our conduct and our habits of perception until "the Negro is segregated in public thought as well as public carriers." Moton, *What the Negro Thinks* (1929), p. 55. Since both white and Negro view segregation as a method of assert-

ing and reenforcing the inferiority of the latter and since in fact segregation statutes have that effect, this Court should not continue to maintain the erroneous proposition enunciated in *Plessy* v. *Ferguson* that laws requiring separation "do not necessarily imply the inferiority of either race to the other." 163 U. S., at 544. Rather it should find that the schools for Negroes in a segregated system cannot be regarded as the equal of those for whites in respect to their "standing in the community, traditions and prestige." *Sweatt* case, *supra.* The Fourteenth Amendment plainly condemns the allocation to separate races of such unequal facilities.

(2) *Enforced separation does oppress the Negro community.*

Since segregation laws are based on a concept of inequality, place a badge of inferiority on the segregated race, and intensify and extend the existing stratification, it is not surprising that, in addition to depreciating the value of the separate facilities for Negroes, they have harmful results for the segregated group. Contrary to the assumption made in the *Plessy* case, segregation does cause "oppression of a particular class." 163 U. S., at 550. If proof of this were necessary, it has been supplied by the developed techniques of the social scientists, all of whom are agreed that segregation has profoundly adverse effects on the Negro community. This is particularly true of segregation in the public schools. *Segregation in Public Schools—A Violation of "Equal Protection,"* 50 Yale L. J. 1059, 1061; Gallagher, *American Caste and the Negro College* (1938); Davis and Dollard, *Children of Bondage* (1940); Woofter, *The Basis of Racial Adjustment*

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(1925); Bond, *The Education of the Negro in the American Social Order* (1934).

A survey of professional sociological, anthropological and psychological opinion on this subject has been conducted by Drs. Max Deutscher and Isidor Chein of the Commission on Community Interrelations of the American Jewish Congress. Eight hundred and forty-nine social scientists were polled, including the entire membership of the American Ethnological Society, the Division of Personality and Social Psychology of the American Psychological Association, and all of the members of the American Sociological Society who listed race relations or social psychology as their major field of interest. Returns were received from 517, or 61% of the number sent. 90% of the respondents indicated their opinion that enforced segregation has detrimental psychological effects on segregated groups even though equal facilities are provided. 4% failed to answer the item and only 2% indicated that segregation is free of such detrimental effects. Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion,* 26 The Journal of Psychology 259 (1948).

On the basis of what they have seen and know, these social scientists united in rejecting the "separate but equal" doctrine as a serviceable formula. In responding, many of them amplified their answers with additional comment. Those who conducted the survey remark that "the gist of these comments was the emphasis on the essential irrelevance of the physical attributes of the facilities furnished." Deutscher and Chein, *op. cit., supra,* at p. 280. The comments are quoted extensively in the article.

The professional opinions expressed in the Deutscher-Chein study are reiterated in the expert testimony given

in the case at bar which formed the basis of the trial court's conclusion that "segregation has a detrimental effect upon the colored children" (R. 245-246). For example, Dr. Hugh W. Speer, Chairman of the Department of Education at the University of Kansas, testified that regardless of the physical facilities apportioned to the Negro and white children, the colored child always received an inferior education in a segregated school since he lacked the opportunity "to learn his personal adjustments, his social adjustments and his citizenship skills in the presence of a cross-section of the population" (R. 126).

Dr. Speer was here taking note of the very point stressed by this Court in *Sweatt* v. *Painter*, 339 U. S. 629, 634 (1949) and *McLaurin* v. *Oklahoma*, 339 U. S. 637, 641 (1949). It was there held that the absence of the opportunity for contact with a group of persons representative of those among whom the student will eventually practice his profession constitutes, in the case of education on the professional level, an inequality in violation of the equal protection clause. Clearly in the case at bar the absence of the opportunity to associate with those with whom the Negro child must live and work in the future constitutes a deprivation of equal or greater magnitude. Many of these students will not go on to professional school and thus receive there the opportunity for such association which this Court has recently assured them.

The testimony in the instant case contains other evidence of the adverse effects of segregation on the Negro child. Both Dr. Louisa Holt (R. 170) and Dr. Horace B. English (R. 156) described the adverse effects of the feeling of inferiority engendered by segregation. Dr.

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Wilbur B. Brookover, a professor of sociology at Michigan State College, pointed out the deep resentment induced by the discrepancy between the vaunted American creed that all are created equal and the bitter fact of subordination through segregation (R. 164-165). These conclusions find support in the Deutscher-Chein study, in which one psychologist noted:

> "The effects of this enforced status on the level of self-esteem, on feelings of inferiority and personal insecurity, the gnawing doubts and the compensatory mechanisms, the blind and helpless and hard to handle more or less suppressed retaliatory rage, the displaced aggression and ambivalence toward their own kind with a consequent sense of isolation and of not belonging anywhere—all of these and much more are bad enough, but the ambiguity of status created by a society which insists on the fact that all men are born free and equal, and then turns about and acts as if they were not is even worse. The constant reminder—and even boasting—of this equality acts like salt upon a raw wound and, more basically, places them in a profoundly ambiguous and unstructured situation. Human beings simply cannot function efficiently in such situations if they have strong feelings and are strongly motivated—as many, if not most or all, members of discriminated against minority groups are—with regard to these situations." Deutscher and Chein, *op. cit., supra,* at p. 272.

Psychic injury always accompanies segregation. We think it patent that as between a system which imposes such penalties and one which does not, there can be no talk of equality.

CONCLUSION

Equality is impossible in a racially segregated grade school system. The inferior status in which it freezes the Negroes and the harmful effects which it has on them are the direct results of the fact that the state lends its power, resources and authority to the caste system. Under the principles of the *Shelley* case, *supra,* such use, or abuse, of state power is a violation of the Fourteenth Amendment. Regardless of where the doctrine of "white supremacy" originated, regardless of whether its tenets find explicit expression in state acts, and regardless of the avowed purpose of state-imposed racial segregation, that segregation is unconstitutional because, invoking "the full coercive power of government" (*Shelley* case, 334 U. S., at 19), it acts as no other force can to extend inequality, impede its elimination and incorporate it in the facilities which it provides for its citizens.

Respectfully submitted,

AMERICAN JEWISH CONGRESS,
Amicus Curiae,

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October 9, 1952

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IN THE

Supreme Court of the United States

October Term, 1952

No. 8 /

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*, *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

THE INTEREST OF THE CIO

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties. The CIO is an organization dedicated to the maintenance and extension of our democratic rights and civil liberties and therefore has a deep interest in the elimination of segregation and discrimination from every phase of American life.

The CIO's interest is also direct and personal. The CIO, through its constituent organizations, is endeavoring to practice non-segregation and non-discrimination in the everyday functioning of union affairs. Repeatedly in the past this endeavor has been obstructed by statutes, ordinances, and regulations which require segregation in public dining places, public meeting halls, toilet facilities, etc. These laws attempt to require CIO unions to maintain "equal but separate" facilities in

their own semi-public buildings, despite the avowed desire of the membership to avoid segregation in any form.

These requirements, whether in the form of regulations, statutes or ordinances, rest constitutionally on a line of reasoning and authority identical with that relied on by the court below in the present case. The disposition which this Court makes of the case is therefore of real and direct interest to the Congress of Industrial Organizations in the regulation of its activities.

THE QUESTIONS BEFORE THE COURT

In this case, we have a segregated public school system in which the District Court has found that the physical facilities, curriculum and teaching staff provided in the Negro schools are substantially equal to those provided in the white schools.

The District Court, however, did not stop with its finding as to physical facilities. It also found, in line with the virtually unanimous opinion of social scientists, that

> "Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and deprive them of some of the benefits they would receive in a racially integrated school system." R. 246.

The District Court, nevertheless, refused to enjoin the maintenance of segregation. It held that the decisions of this Court, and, particularly *Plessy* v. *Ferguson*, required denial of the relief sought.

Hence this Court is now faced with the question which it found unnecessary to decide in *Sweatt* v. *Painter*, 339 U.S. 629, viz.: whether "*Plessy* v. *Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." *Id.* at 636.

ARGUMENT

In this brief *amicus* we shall, of course, not attempt to encompass the full range of the points argued by the parties to the case. Rather we shall seek simply to point up certain aspects of the case which might otherwise escape attention.

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I

THE DISTRICT COURT MISINTERPRETED THE SWEATT AND McLAURIN DECISIONS

Plessy v. *Ferguson* established the broad doctrine that laws "requiring the separation of the two races in schools, theaters, and railway carriages" do not violate the 14th Amendment if the facilities provided for the two races are equal, 163 U.S. 537, 545. In recent years the Court has been repeatedly asked to repudiate that doctrine and to hold that the mere fact of compulsory separation constitutes a denial of the equal protection of the laws, forbidden by the 14th Amendment.

The Court has, however, thus far avoided either re-affirming or rejecting the *Plessy* doctrine. Instead, it has treated each case on its merits and, where inequality has been found, has directed that appropriate relief be granted. *Sweatt* v. *Painter*, 339 U.S. 629; *McLaurin* v. *Board of Regents*, 339 U.S. 637. This approach was said, in the *Sweatt* case, to be required by the established doctrine that "this Court will decide constitutional questions only when necessary to the disposition of the case at hand and such decisions will be drawn as narrowly as possible." 339 U.S. 629, 631.

The decisions of this Court in the *Sweatt* and *McLaurin* cases were, however, interpreted by the District Court in the present case as leaving intact the *Plessy* doctrine that the provision of separate but physically equal school facilities would not violate the equal protection clause of the 14th Amendment. Since the District Court found that the only inequality in the Topeka system was inherent in segregation itself, it concluded that the *Plessy* case controlled and dismissed the complaint.

This conclusion is obviously erroneous, as the decisions in the *Sweatt* and *McLaurin* cases themselves show. In those cases, the Court has implicitly limited the doctrine, if not the holding, of the *Plessy* case. The broad ruling of that case that the provision of "separate but equal" school systems is constitutionally valid necessarily presupposes that inequality does not arise from mere separation. If compulsory sep-

aration in itself creates inequality, "separate but equal" is a contradiction in terms. In the *Sweatt* and *McLaurin* cases, the Court did refuse to overrule the *Plessy* case directly. But it made it perfectly clear that it was simply refusing to reach the question of whether, as a matter of law, compulsory separation of the races *always* in itself means inequality. That is the question which is now before the Court.

Where it is shown that the facilities offered to Negroes in a particular case are not equal to those offered to whites because they are segregated, and also because they are physically inferior, there is no constitutional doctrine which requires that this Court shall decide the case on the second ground rather than the first. Both are claims of inequality under the laws. Either is available as the "narrow" basis for decision. The Court could hold that the inequality created by segregation was a sufficient basis for decision and therefore not reach the alleged difference in the physical facilities. Equally, it could hold that, the physical facilities being unequal, it need not pass upon the alleged inequality created by the enforced separation of the races. Or, as it did in the *Sweatt* case, it could look both at the difference in physical facilities and the difference in educational opportunity created by segregation itself. Neither approach is forbidden to the Court by its own doctrine of limited constitutional decision, if the decision is based upon the facts found in the record of the particular case. What is excluded by the "narrow" approach which the court has recently adopted is the broad generalization, implicit in the *Plessy* case, that separation in itself can *never* be a ground for showing inequality.

The generalization implicit in *Plessy* is clearly no longer the law. In the *Sweatt* case, the Court explicitly recognized the inequality in the educational opportunity offered to Negro law students by the State of Texas arising out of the very fact of separation. Referring to the fact that white students would be excluded from the Negro law school, the Court concluded:

> "With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he

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would receive if admitted to the University of Texas Law School." 339 U.S. at 634.

In *McLaurin*, the issue was even clearer. In that case, McLaurin was offered the use of the identical physical facilities, the same faculty, the same curriculum, the same items—in short—which the District Court referred to in its findings of physical equality in the present case. But, because these were offered under segregated restrictions the Court found, on the facts of that case, that an unconstitutional inequality existed.

What the Court did in the *Sweatt* and *McLaurin* cases, therefore, seems to us to be this. The Court made no broad generalization as to whether compulsory segregation in itself constituted a violation of the 14th Amendment. The Court did not hold, at that time, that "separate" facilities were invalid. But it also did not hold that "equal but separate" facilities were valid. The Court in effect said that inequality can be created by compulsory segregation, and held as a matter of law that segregation *per se* created inequality in graduate and legal education. As to other kinds of education—and, indeed, as to other facilities than education which are provided by the state or regulated by it—the Court expressed no opinion.

In the present case public school education is before the Court. And the case comes here with an express finding that segregation in the public schools does create inequality. Unless the Court is prepared to rule that such a finding cannot stand as a matter of law, we submit that the *Sweatt* and *McLaurin* cases necessarily require that the decision below be reversed. Equality before the law does not require just that there be no substantial difference in the physical educational facilities offered by the state. Negro schools housed in a new building, with qualified teachers and well-balanced curricula still could not be said to be equal to similar schools for whites if each Negro school was deliberately, and by specific authority of the State, placed next door to a boiler factory so as to impair substantially the ability of the pupils to hear, and hence to learn. Yet it is an analogous impairment that the court below has here found. It has found that the ability of pupils

in the Negro schools to obtain the education offered to them is substantially impaired by the very fact of segregation. This impairment is the result of a deliberate policy specifically authorized by the state. If this be so, we do not understand how it can sensibly be argued that the Negro pupils are being afforded "the equal protection of the laws."

II

THE COURT SHOULD HOLD THAT ENFORCED SEGREGATION IS ILLEGAL PER SE.

This Court, in the *Sweatt* and *McLaurin* cases, refused to announce any broad principles concerning the validity of state-enforced segregation *per se*. It limited its conclusions to the specific cases of inequality which were before it.

It seems to us, however, that there are cogent arguments against such an approach. If the question of the validity of compulsory racial segregation were a new question, there is no doubt that the Court properly should hesitate to announce broad doctrine in this field. But the prior actions of the Court may have placed a larger responsibility upon it. In *Plessy* v. *Ferguson*, the Court decided broadly that compulsory racial segregation did not violate the 14th Amendment. With this broad pronunciamento on the record, it may very well be argued that the Court now has a responsibility, if not to reverse the *Plessy* case, at least to indicate some doubt as to the continued validity of its doctrine. By failing to do so, the Court is in effect telling the states that, absent any finding of inequality, the compulsory segregation of the races is constitutionally permissible. Whether the Court likes it or not, its continued silence on this broad question is taken by many, including the court below, to represent a positive statement that the doctrine of *Plessy* v. *Ferguson*, except as specifically modified, remains the law.

Even if we accept the Court's refusal to reach the broad issue of *Plessy* v. *Ferguson*, however, it may not be amiss to consider certain broader questions. To take one step at a time is not to deny the usefulness of looking forward to where you

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are going. Such broadeer considerations, of course, need not be stated by the Court. But they are nevertheless relevant in the Court's decision as to whether it will take the immediate step before it.

Three considerations seem to us worthy of discussion. The first is the general question of the doctrine of *Plessy* v. *Ferguson* and the arguments which we believe have been erroneously addressed to the holding of that case. The second is the extent to which the compulsory nature of primary school education should be regarded as differentiating it from the cases of higher education already decided by the courts. Finally, we think that a word should be said concerning the "racial friction and tension"[1] which have been relied upon by some courts to justify their refusal to determine whether segregated education is, in fact, equal education.

1. *Compulsory intermingling is not the only alternative to compulsory segregation.* Much of the argument relating to the basic question of the validity of racial segregation under the 14th Amendment has, we believe, missed the point. For example, in the *Briggs* case, No. 101, this Term, it seems to have been assumed by the defendants that the only alternative to compulsory segregation is compulsory intermingling of the races. Testimony was offered by the defendants in that case to the effect that separation of the races in the public schools would occur even "if this issue should be settled on a voluntary basis" because if Negroes were given a choice as to whether to attend Negro schools or schools which were predominantly white, they would prefer to attend schools of their own race.[2]

---

[1] *Briggs* v. *Elliott*, No. 101, this Term, R. 180.

[2] "Q. Do you know what the Negro's reaction would be to mixed schools?

. . . .

A. I could not predict what they would do but I have an opinion that is based upon what a number of Negro school administrators have said to me, that if this issue should be settled on a voluntary basis that you would have a continuance of substantially the same situation.

. . .

A good many Negroes, Negro school administrators have said that if they remain free to choose the schools to which they would go, they would prefer to have schools of their own race."

—*Briggs* v. *Elliott*, No. 101, this Term, R. 116–117

Argument based upon such testimony seems to us to miss the very point at issue. The essence of the whole segregation controversy lies in the distinction between a provision of law *permitting* individuals to separate themselves according to race and a provision *requiring* them so to separate. As we pointed out in the *Sweatt* and *McLaurin* cases, it is this important distinction which the Court itself ignored in *Plessy* v. *Ferguson*. A law permitting individuals to separate themselves according to race permits individuals to exercise their own freedom of choice, to respond in whatever way their prejudices or lack of prejudices may impel them. To require individuals so to separate permits no such choice. Prejudice is imposed by the constituted authority of the state without regard to the preferences of the individual. Yet this Court in the *Plessy* case treated the two together and assumed that they were the same. Thus the Court said that "we cannot say that a law which authorizes or even requires the separation of the two races in public conveyance" is violative of the 14th Amendment. 163 U.S. at 550. And the argument against the statute, the Court said, "assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races." 163 U.S. at 551.

The argument, of course, need make no such assumption. The alternatives are not enforced segregation or enforced commingling. Nor is the question whether a law may constitutionally *permit* the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a state may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

The Court could confuse the issue, as it did in the *Plessy* case, only because it implicitly assumed throughout the opinion that the Negro race was "inferior" [*] and that, given freedom of choice, all whites would refuse to associate with Negroes. On that assumption, and only on that assumption, the only alternatives were segregation and compulsory intermingling,

---

[*] "If one race be inferior to the other socially," the Court said, "the Constitution of the United States cannot put them upon the same plane." 163 U.S. at 551.

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and permissive separation was the same thing as compulsory separation.

The assumption is false. The Congress of Industrial Organizations is living proof that it is false. And, apart from matters of proof, certainly such an assumption, embodying itself the very prejudices at which the 14th Amendment was aimed, has no place in our constitutional doctrine.

2. *There are objections to segregation which are particularly applicable to the public schools.* These general concepts —that permissive separation is not the same as compulsory segregation and that the constitutional evil in all these cases is not the separation of the races but the denial to the individual of his right to choose to be separate or not—may, perhaps, be usefully applied in dealing with the particular kind of segregation problem here presented, viz: public school education.

Public school education is different from the graduate and legal education situations with which the Court dealt in the *Sweatt* and *McLaurin* cases. To pretend otherwise is foolish. But the only difference is not the *mores* of the community. There are other differences, and these differences weigh particularly against segregation in the public schools.

One such difference is the fact that public education is usually compulsory, while legal and graduate education is not. The state does compel children to go to school. And since it does, it may be argued that a different rule should apply to public school education than applies to other forms of education which the state offers on a voluntary basis. Cf. *Hamilton* v. *University of California*, 293 U.S. 245.

Compulsory segregation coupled with compulsory attendance is particularly objectionable. There is nothing which requires a state to compel attendance by each pupil at a specific school. In many communities it is customary to permit individual students, or their parents, to exercise a choice concerning the particular school which they will attend. That, in fact, is the pattern in the Topeka case now before the Court (R. 245). The fact that the state compels children to

go to school, in other words, need not necessarily mean that it must deny to them a choice of schools. It is possible, in the words of the testimony in the *Briggs* case, that this matter can "be settled on a voluntary basis." The appellants do not here complain that the state should compel Negroes to attend white schools. They complain only that it forbids those Negroes who want to attend the white schools from doing so. It may very well be true that most Negroes, if given a choice, will continue to attend schools which are predominantly attended by Negroes and that very few would choose to attend the predominantly white schools. But this lends no support whatsoever to the action of the state in denying to the Negroes the opportunity so to choose.

We do not mean, be it understood, that there is anything in the 14th Amendment which makes it mandatory that pupils be given a choice of school. We only mean that the elimination of compulsory segregation is not the same thing as compulsory attendance of whites at Negro schools, or Negroes at white schools, because the states can, wherever they now compel separation, offer separation on a voluntary basis. Even compulsory attendance at particular schools based on residential districting rests ultimately on the voluntary choice of residence. Negroes and whites would no more be compelled to attend the same schools under such regulations than were Negroes and whites compelled to live in the same neighborhood when compulsory residential segregation was declared invalid in *Buchanan* v. *Warley*, 245 U.S. 60.

If it eventually declares that the States are forbidden to enforce their constitutional and statutory declarations that no Negro shall ever be taught in the same public school as white, the Court will, it is true, necessarily limit the freedom of choice of some. Since public education is assumed to be compulsory and since it is possible that some Negroes will exercise the choice, if it is given to them, of attending the "white schools," it may very well be that some white children will be forced to attend schools in which there are some Negroes in attendance. That is the true measure, we submit, of the "compulsion" which would be involved in the invalidation of segre-

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gation in the public schools.' Surely the Constitution does not recognize the right of the prejudiced to be free from the sight of those against whom they are prejudiced, or justify the imposition of restraints upon one segment of the community in order to satisfy the desire of some that there be such restraints.

Another difference between segregation in the public schools and segregation in the graduate schools is that the former affects the students at a younger and therefore more impressionable age. Students are not only unable to avoid segregation in the public schools, as by not attending, but are more adversely affected by it because they are younger. The testimony of sociologists is uniform as to the deleterious effects of segregation on Negro children, and in a different way, on white, and the younger the children the more these effects are accentuated.

3. *Threatened resentment by some whites is no basis for denying to Negroes the equal protection of the laws.* The District Court in this case made a finding of fact, based on evidence submitted to it, that the very fact of segregation reduced the educational opportunity of children required by the state to attend Negro schools. Similar evidence was offered in the South Carolina case, *Briggs* v. *Elliott*, No. 101. The Court there, however, refused to consider such evidence. It said that this question is not a question of constitutional right but of legislative policy, "which must be formulated not *in vacuo* or with doctrinaire disregard of existing conditions but in a realistic approach to the situations to which it is to be applied" (R. 180). The issue as to the effect of segregation upon educational opportunity, raised by the plaintiffs, it said, was on the same footing as the issue of "racial friction and tension" which was raised by the defendant. Neither question, it believed, should properly be resolved by the courts; both considerations were appropriate matters only for legislative judgment.

The essential error in this approach is that it reserves for

'If the defendants in the *Briggs* case are right in their contention that Negroes will prefer Negro schools, the "compulsion" will be zero—since there will be no Negro students in the white schools. The extent to which they are wrong is exactly the extent of the discrimination which is practiced against the Negroes under a segregated system.

legislative judgment by the states the balancing of rights protected by the Constitution, on the one hand, against other objectives presumably desired by the state, on the other. It is no answer to a claim that segregation creates inequality, and hence violates a constitutionally protected right, to say that the state, as a matter of legislative judgment, regards other considerations as more important.

There is no claim here that the elimination of segregation, and of the inequality which is created thereby, in the public schools would do more than create a "violent emotional reaction" in the communities (R. 114). There is no claim that there would be any immediate danger of open disturbances of the public peace. But even if there were such claims, they would be irrelevant. The Constitution does not say that all persons shall be given the equal protection of the laws insofar as it is convenient to do so. As this Court said in *Buchanan* v. *Warley*, 245 U.S. 60, in answer to an argument that segregation would promote the public peace by preventing race conflicts:

> "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

Prediction is hazardous. Insofar, however, as the actual history of the integration of educational facilities in the past can shed light on the effect of a decision enjoining segregation today, it leads to the conclusion that the vague threats of grave unrest which are always relied upon in these cases to justify the continued denial of equality of rights have as much substance, and no more, than the claims made in *Buchanan* v. *Warley*, thirty-five years ago, that an injunction against compulsory residential segregation would lead to vast racial conflagrations.

Certainly the experience of the Congress of Industrial Organizations supports the view that the dire consequences which are so often predicted are merely phantoms. The CIO, through its Southern Organizing Committee, is proving daily that the myth of incompatability between white and Negro is but a

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myth. There are frictions and tensions, to be sure. But they are not nearly of the magnitude usualiy pictured. We have proved that it is possible for free men, white and Negro, to associate themselves together voluntarily without conflict, in the absence of compulsion by the state.

CONCLUSION

For the reasons stated we respectfully urge that the judgment of the court below should be reversed.

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IN THE

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October Term, 1952

No. 8 /

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL.,
Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,
Appellees.

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Interest of the *Amici*

This brief is filed, with the consent of both parties, on behalf of the American Civil Liberties Union, the American Ethical Union, American Jewish Committee, the Anti-

Defamation League of B'nai B'rith, the Japanese American Citizens League and the Unitarian Fellowship for Social Justice. The Appendix contains a description of each of these organizations.

The present case and the companion cases, all involving the constitutionality of racial segregation in public elementary and secondary schools, present an issue with which all six organizations are deeply concerned because such segregation deprives millions of persons of rights that are freely enjoyed by others and adversely affects the entire democratic structure of our society.

We have read the briefs of the appellants, with the appendix thereto, and we unequivocally endorse the arguments, legal, educational and sociological, therein advanced. In this *amici* brief we are urging arguments which have not been made in the appellants' briefs and which we believe should be presented to this Court.

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Statement of the Case

The adult appellants are Negro citizens of the United States and of the State of Kansas (R. 3-4) while the infant appellants are their children eligible to attend and now attending elementary schools in Topeka, Kansas, a city of the first class within the meaning of Section 13-101, General Statutes of Kansas, 1949. Appellees are State officers empowered by State law to maintain and operate the public schools of Topeka, Kansas.

On March 22, 1951, appellants instituted this action seeking a declaratory judgment and an injunction to compel the State to admit Negro children to the elementary public schools of Topeka on an unsegregated basis on the ground that segregation deprived them of equal educational opportunities within the meaning of the Fourteenth Amendment (R. 2-7). In their answer, appellees admitted that they acted pursuant to the statute, that infant appellants were not eligible to attend any of the eighteen "white" elementary schools solely because of their race and color (R. 12, 24), but that they were eligible to attend the equivalent public schools maintained for Negro children in the City of Topeka (R. 11, 12). The Attorney General of the State of Kansas filed a separate answer defending the validity of the statute in question (R. 14).

The court below was convened in accordance with Title 28, United States Code, §2284 and on June 25-26 a trial on the merits took place (R. 63 *et seq.*). On August 3, 1951, the court below filed its opinion, 98 F. Supp. 797 (R. 238-244), its findings of fact (R. 244-246), and conclusions of law (R. 246-247), and entered a final judgment and decree in appellees' favor denying the relief sought (R. 247).

Appellants filed a petition for appeal on October 1, 1951 (R. 248), and an order allowing the appeal was duly entered (R. 250). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28, United States Code, §§1253 and 2201 (b).

The Statute Involved

Segregated elementary schools in Topeka, Kansas, are maintained solely pursuant to the authority of Section 72-1724 of the General Statutes of Kansas (1949) which reads as follows:

> Powers of board; separate schools for white and colored children; manual training. The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kans.; no discrimination on account of color shall be made in high schools except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public-school system of said city. (G. S. 1868, Ch. 18, §75; L. 1879, Ch. 81, §1; L. 1905, Ch. 414, §1; Feb. 28; R. S. 1923, §72-1724.)

The Question Presented

The question presented by this appeal is whether the State of Kansas, or indeed any State, by establishing racial segregation in its public elementary school system, has violated the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

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SUMMARY OF ARGUMENT

This Court has never ruled directly on the constitutionality of racial segregation in public elementary schools. *Plessy* v. *Ferguson,* 163 U. S. 537 (1896) and *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), relied upon by the court below, are not controlling here.

Segregation in State-supported educational institutions violates the equal protection of the laws guaranteed by the Fourteenth Amendment in that it is an inadmissible classification. This Court has consistently rejected differential treatment by State authority predicated upon racial classifications or distinctions.

The finding of the lower court that Negro children are disadvantaged by the segregated public school system necessitates granting the relief requested. That which is unequal in fact cannot be equal in law and, therefore, segregation and equality cannot co-exist in public education.

POINT I

The validity under the equal protection of the laws clause of the Fourteenth Amendment of racial segregation in public educational facilities has never been decided by this Court.

The issue now squarely before this Court is whether the State of Kansas, pursuant to statute, may maintain and operate racially segregated public elementary schools, without heed to the damage inflicted by segregation upon its Negro victims. Despite the transcendent importance of the question, this Court has never ruled directly on the constitutionality of racial segregation in public education. The Court has ruled on related problems, such as the validity of racial segregation in transportation and in housing. Regretfully, it has, but always in *dictum,* appeared to accept racial segregation where the validity of segregation was not actually before the Court. Historically, these dicta reflect the fact that prior to World War I, the status of the American Negro was such that he could make no realistic demand for equality of treatment in those sections of the country in which he lived in substantial numbers. Because of his depressed economic condition and concentration in agriculture, his children could not even obtain the most elementary education. Myrdal, An American Dilemma, Ch. 8-9 (1944).

Following the adoption in 1868 of the Fourteenth Amendment, the earliest case in which some reference was made by this Court to racial segregation in education was *Hall* v. *DeCuir,* 95 U. S. 485 (1878). That case involved the validity of a State statute prohibiting segregation in

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public carriers. The statute was declared unconstitutional as an improper regulation of foreign and interstate commerce. In a concurring opinion, Mr. Justice Clifford reviewed with approval the conclusions of a number of State cases which had upheld the reasonableness of racial segregation in education and stated in *dictum* that segregation in the public schools did not violate the Fourteenth Amendment if physically equal facilities for Negroes were provided. It is probably unnecessary for us to note that no evidence was offered in that case, because it would have been irrelevant, that school segregation must in fact involve inequality.

In 1896 this Court decided *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), which sustained the constitutionality of a Louisiana statute requiring public carriers to furnish separate but equal coach accommodations for whites and Negroes. The Court as before, in *dictum,* cited with approval several old State cases which had held that a State could require the segregation of racial groups in its educational system.

The constitutionality of "separate but equal" facilities in education was concededly not before the Court in either the *Hall* or the *Plessy* cases. Yet, although there was no evidentiary or psycho-sociological basis for a discussion of equal facilities in education, and in spite of the fact that the statements of the Court were clearly *dicta,* the *Plessy* case has been cited to this date by State and lower Federal courts to sustain the constitutionality of segregation in public educational institutions. See cases cited, 46 Mich. L. Rev. 639, 643 (1948).

Three years later, this Court decided *Cumming* v. *County Board of Education,* 175 U. S. 528 (1899). There an injunction was sought to restrain a board of education

in Georgia from maintaining a high school for white children where none was maintained for Negro children. The State court had upheld the board, saying that its allocation of funds did not involve bad faith or abuse of discretion. In affirming the decision of the State court, this Court speaking through Mr. Justice Harlan, the lone dissenter in *Plessy,* stated expressly that racial segregation in the school system was not in issue. (542, 546)

The next case before this Court which involved compulsory educational segregation was *Berea College* v. *Kentucky,* 211 U. S. 45 (1908), wherein the validity of a State statute which prohibited domestic corporations from teaching white and Negro pupils in the same private educational institution was attacked. While the scope of the statute was broad enough to include individuals as well as corporations, this Court said:

> . . . it is unnecessary for us to consider anything more than the question of its validity as applied to corporations. . . . Even if it were conceded that its assertions of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations. (54)

This Court agreed with the reasoning of the State court that the statute could be upheld as coming within the power of a State over one of its own corporate creatures. The statute was not deemed to have worked a deprivation of property rights. The rights of individuals were not considered.[1]

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[1] Interestingly, since the decisions of this Court in *Sweatt* v. *Painter,* 339 U. S. 629 (1950) and in *McLaurin* v. *Oklahoma,* 339 U. S. 637 (1950), Berea College accepts Negro students.

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Not until 1927 did racial classification in educational institutions again become the subject of controversy before this Court. In *Gong Lum* v. *Rice,* 275 U. S. 78 (1927), a Chinese girl contested the right of the State of Mississippi to assign her to a Negro school under the State's segregated school system. Mississippi contended that under its statute requiring separate schools to be maintained for children of the white and colored races, the plaintiff could not insist on being classed with the whites and that the legislature was not compelled to provide separate schools for each of the non-white races.

The issue of segregation was not presented in that case. The plaintiff accepted the system of segregation in the public schools of the State but contested her classification within that system.

Nor was the validity of segregation before the Court in the case of *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938). There the petitioner was refused admission to the University of Missouri Law School, a State-supported institution, solely because he was a Negro. He brought mandamus to compel the University to admit him. The State, having no law school for Negroes, sought to fulfill its obligation to provide equal educational facilities by offering to pay the petitioner's tuition for a legal education in another State. This the Court held did not satisfy the constitutional requirement. It said that the petitioner was entitled to be admitted to the University of Missouri Law School in the absence of other and proper provision for his legal training within the State of Missouri. The issue was whether an otherwise qualified Negro applicant for law training could be excluded from the only State-supported law school. This Court assumed that

the validity of equal facilities in racially separate schools was settled by earlier decisions and cited the *Plessy* case, *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), both of which involved segregation in public carriers, and the *Gong Lum* case. But the constitutional validity of segregation was not decided.

The next consideration of a related problem was in 1948 in *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U. S. 631. This Court, in a *per curiam* decision, said that the State must provide law school facilities for the Negro petitioner "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group" (633). The facts in the *Sipuel* case were similar to those in the *Gaines* case, in that no law school facilities were afforded Negroes by the State of Oklahoma.

Segregation was not at issue in the *Sipuel* case. This Court stated in *Fisher* v. *Hurst*, 333 U. S. 147 (1948), that:

> The petition for certiorari in *Sipuel* v. *University of Oklahoma* did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here. (150)

The most recent cases involving segregation in public institutions of learning were *Sweatt* v. *Painter*, 339 U. S. 629 (1950) and *McLaurin* v. *Oklahoma State Board of Regents*, 339 U. S. 637 (1950). Although the petitioners and numerous *amici* in those cases urged this Court to rule expressly that discrimination inevitably results from enforced segregation in educational institutions, the Court did not reach that question. In *Sweatt*, Mr. Chief Justice Vinson, speaking for a unanimous Court, said, "Nor need we

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reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation" (636). The judgment of the court below was reversed and the University of Texas Law School was ordered to admit the petitioner because equivalent educational opportunity was not afforded by the hastily organized Negro law school.

In *McLaurin,* again speaking for a unanimous bench, Mr. Chief Justice Vinson expressly limited the decision:

> In this case, we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race. We decide only this issue . . . (638)

Thus in no case previously before this Court, in which racial segregation in public education has been the subject of comment in an opinion, has the Court felt called upon to rule squarely on the issue: Does segregation in public educational institutions meet the requirements of the equal protection of the laws clause of the Fourteenth Amendment?

We emphasize that absence of a specific ruling at the outset of this brief because of the thread of urgency running through the fabric of much previous argument on the crucial issue in this case, namely, that the "separate but equal" doctrine, as it has been thought to apply to public educational institutions, should be "overruled". Indeed, in that framework, there is nothing to overrule. But there are *dicta* which must be disavowed. The constitutionality of segregation in educational institutions was clearly not involved in *Plessy* or *Gong Lum*, the two cases relied upon by the court below.

POINT II

Racial segregation in public educational institutions is an unconstitutional classification under the equal protection of the laws clause of the Fourteenth Amendment.

This Court's decisions in cases involving the constitutionality of governmental action reveal a special scrutiny and constant vigilance in those instances where such action was predicated upon alleged racial distinctions or where racial classifications were involved. Except in times of overriding peril or crisis, this Court has rejected all obvious or devious efforts to establish racial or religious lines of demarcation for the enjoyment of civil rights.

Whereas in cases involving other types of legislative classifications, the "one who assails the classification . . . must carry the burden of showing that it does not rest upon any reasonable basis", *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79 (1911), "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect". *Korematsu* v. *U. S.*, 323 U. S. 214, 216 (1944).

Again, "only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause." *Oyama* v. *California*, 332 U. S. 633, 646 (1948). In *Hirabayashi* v. *U. S.*, 320 U. S. 81 (1943), this Court said:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doc-

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> trine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. (100)

In the application of these principles, the Court has, with one exception (discussed *infra*), always declared governmental classification based on race or color to be constitutionally invalid.

This Court has ruled that Negroes must be treated the same as whites with respect to the privilege and duty of jury service. *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). It has stricken down state statutes aimed at keeping the Negro "in his place." *Bailey* v. *Alabama,* 219 U. S. 219 (1911); *U. S.* v. *Reynolds,* 235 U. S. 133 (1914). Common carriers engaged in interstate travel have been prevented from segregating and discriminating on the basis of race or color. *Mitchell* v. *U. S.,* 313 U. S. 80 (1941); *Morgan* v. *Virginia,* 328 U. S. 373 (1946); *Henderson* v. *U. S.,* 339 U. S. 816 (1950). Repeated instances of prejudice in criminal cases evidenced by brutal treatment of Negroes have been condemned. *Brown* v. *Mississippi,* 297 U. S. 278 (1936); *Chambers* v. *Florida,* 309 U. S. 227 (1940); *Shepherd* v. *Florida,* 341 U. S. 50 (1951). Racial segregation through zoning and attempts to institutionalize ghettos by restrictive covenants have been outlawed. *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948). Discrimination has been forbidden in labor unions that receive their collective bargaining and representation powers by virtue of statute. *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210 (1944); *Brotherhood of R. R. Trainmen* v. *Howard,* — U. S. —, 72 S. Ct. 1022 (1952).

From time to time, this Court has stricken down all the various devices used to prevent or limit Negroes from participating in elections. *Guinn* v. *U. S.*, 238 U. S. 347 (1915); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Smith* v. *Allwright*, 321 U. S. 649 (1944). So, too, laws which in their administration have effected a limitation or denial of the right to carry on a business or calling because of race or ancestry, have been declared unconstitutional. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948).

In *Buchanan* v. *Warley*, 245 U. S. 60, which involved a racial residential zoning ordinance, the State invoked its authority to pass laws in the exercise of its police power, and urged that this compulsory separation of the races in habitation be sustained because it would "promote the public peace by preventing race conflicts" (81). This Court rejected that contention, saying:

> The authority of the state to pass laws in the exercise of the police power . . . is very broad . . . [and] the exercise of this power is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power . . . cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution . . . (74).

The police power of the State, broad as it is, does not justify a racial classification where rights created or protected by the Constitution are involved.

In *Shelley* v. *Kraemer*, 334 U. S. 1, this Court, by unanimous decision, held that the enforcement of racial restrictive covenants by State courts is State action,

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prohibited by the equal protection clause of the Fourteenth Amendment. In the course of its decision, the Court measurably strengthened the equal protection clause as a formidable barrier to restrictions having the effect of racial segregation. The contention was there pressed that since the State courts stand ready to enforce racial covenants excluding white persons from occupancy or ownership, enforcement of covenants excluding Negroes is not a denial of equal protection. This Court rejected the equality of application argument, decisively dismissing it in the following language:

> This contention does not bear scruitiny. . . . The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. (21, 22)

There has been but one recent departure from this rule. This Court stated that "in the crisis of war and of threatened invasion" when the national safety might appear to be imperilled, it will permit a racial classification by the Federal Government. *Hirabayashi* v. *U. S.*, 320 U. S. 81, 101. That case involved a prosecution for failure to obey a curfew order directed against citizens of Japanese ancestry. *Korematsu* v. *U. S.*, 323 U. S. 214, arising out of the same war emergency, involved the validity of a governmental order excluding all persons of Japanese ancestry from the West Coast military area. The Court, on the grounds of overriding pressing public urgency in time of war, sustained the racial classification

in these cases, but it emphasized that this was an extraordinary exception. "[L]egislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume", continued the Court, "that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion" has made necessary this racial classification, which "is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant." *Hirabayashi* v. *U. S., supra,* 101.

Clearly, State laws providing for racial segregation in public educational facilities are not accompanied by any "pressing public necessity". The record here is barren of any such showing, as indeed it would have to be. Rather, there is a pressing public necessity to give all American citizens their due—equality of opportunity to use educational facilities established by the State for its inhabitants.

POINT III

The finding of the court below, that Negro children are disadvantaged by the segregated public school system of Topeka, requires this Court to disavow the "separate but equal" doctrine as it has been applied to public educational institutions.

In one vital respect, the problem posed by this record is sharpened to the point of unique narrowness. The unchallenged finding that segregation irreparably damages the child lifts this case out of the murky realm of speculation on the issue of "equality" of facilities, into the

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area of certainty that segregation and equality cannot co-exist. That which is unequal in fact cannot be equal in law.

It is respectfully submitted that the finding of the court below, that Negro children were disadvantaged by the segregation of white and colored students in the public elementary schools, requires this Court to reverse the lower court's refusal to grant the requested relief. The lower court found as a fact that the segregation of white and Negro children in the public schools "has a detrimental effect upon the colored children"; that such segregation creates in Negro children a "sense of inferiority" which "affects the motivation of a child to learn"; that legally sanctioned segregation "therefore has a tendency to retard the educational and mental development of [N]egro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Educators and social scientists have long proclaimed that these and other social evils necessarily flow from racially segregated education. *Segregation in Public Schools—A Violation of "Equal Protection of the Laws"*, 56 Yale L. J. 1059, 1061 (1947). See also Long, *Some Psychogenic Hazards of Segregated Education of Negroes*, 4 J. of Negro Ed. 336, 343 (1935); Long, *The Intelligence of Colored Elementary Pupils in Washington, D. C.*, 3 J. of Negro Ed. 205-222 (1934); Gallagher, American Caste and the Negro College, 109, 184, 321-2 (1938); Bond, Education of the Negro in the American Social Order, 385 (1934); President's Commission on Higher Education, 2 Higher Education for American Democracy 35 (1947); Heinrich, The Psychology of a Suppressed People, 52, 57-

61 (1937); Myrdal, An American Dilemma, 54-5, 97-101, 577-8, 758; Frenkel-Brunswik, *A Study of Prejudice in Children,* 1 Human Relations 295, 305 (1948); Goodman, Race Awareness in Young Children (1952); Adorno, Frenkel-Brunswik, Levinson and Sanford, The Authoritarian Personality, Ch. IV, V (1950).

Whenever this Court has been presented with a record that established inequality in fact as between educational opportunities offered by the State to its white and Negro inhabitants, it has ordered the immediate termination of the inequality. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Fisher* v. *Hurst,* 333 U. S. 147; *Sweatt* v. *Painter,* 339 U. S. 629. In *McLaurin* v. *Oklahoma,* 339 U. S. 637, this Court went even further to hold that officially imposed racial segregation within a State-maintained school violated the equal protection clause. It is noteworthy that the court below said in its opinion, where "segregation *within* a school as in the *McLaurin* case is a denial of due process, it is difficult to see why segregation in *separate* schools would not result in the same denial." *Brown* v. *Board of Education of Topeka,* 98 F. Supp. 797, 800 (Emphasis added).

We respectfully urge this Court to follow the principles it recently enunciated in *Sweatt* and *McLaurin,* rather than the unsound ones of *Plessy* and *Gong Lum,* and to hold unequivocally that racial segregation *per se* in all State educational institutions, is a violation of the equal protection of the laws clause of the Fourteenth Amendment.

The Need to Disavow *Plessy*

As we explained in Point I, we believe that *Plessy* is not controlling. Assuming, *arguendo,* that the court below was justified by *Plessy* in refusing to hold that segregation

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in public elementary schools is *per se* discrimination under the Fourteenth Amendment, this Court should now expressly overrule *Plessy* and reverse the court below. This Court has not hesitated in the past to overrule or reconsider and reverse earlier decisions where the nature and consequences of discrimination became fully disclosed or apparent upon later consideration. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943), reversing *Jones* v. *Opelika,* 316 U. S. 584 (1942); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943), overruling *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940); *Smith* v. *Allwright,* 321 U. S. 649, overruling *Grovey* v. *Townsend,* 295 U. S. 45 (1935). "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court through its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith* v. *Allwright, supra,* 655 and cases cited in footnote 10 thereto.

Lower courts, State and federal, have indicated clearly that they believe a break with the "separate but equal" doctrine in education is "in the wind", but they insist that they must await such a holding by this Court. *Belton* v. *Gebhart,* decided by the Delaware Court of Chancery, April 1, 1952, affirmed by the Supreme Court of that State on August 28, 1952; *Banks* v. *San Francisco Housing Authority,* decided October 1, 1952, by the Superior Court of San Francisco; *Brown* v. *Board of Education of Topeka,* 98 F. Supp. 797, 798; *Briggs* v. *Elliott,* 98 F. Supp. 529, 535 (1951).

It is not surprising that American courts are questioning the validity of *Plessy* in view of the tremendous changes which have taken place since the turn of the century in the understanding of the nature of the individual

and his relationships to racial groupings and to society. Scientific research in the fields of anthropology, sociology, biology and education has demonstrated the fallaciousness of the racial and blood strain concepts which are basic to the majority opinion in *Plessy.*

Peaceful Integration Will Follow

The defenders of racial segregation have frequently expressed the fear that compulsory destruction of the barriers in the public schools would increase racial tensions and even cause strife. Such results, obviously, should be avoided if possible, without yielding constitutional principles. Experience, however, has clearly demonstrated that these dire predictions are unfounded.

Following this Court's decision in *McLaurin* v. *Oklahoma,* 339 U. S. 637, Negro students applied for admission and were admitted in large numbers to that State's colleges and universities. By June 1951, approximately 400 Negroes were enrolled at the University of Oklahoma and at Oklahoma A & M, all without the slightest increase in racial tension, but rather with every sign of increased mutual understanding and respect. The Oklahoma City Daily Oklahoman, June 7, 1951.

In Texas, after the decision in *Sweatt* v. *Painter,* 339 U. S. 629, two Negroes were admitted to the University of Texas Law School and two others were admitted to the Dental School. 52 American Jewish Yearbook 42 (1951); The Houston Chronicle, Sept. 10, 1952. Negroes have also been admitted to private institutions of higher learning in Texas following *Sweatt.* Southern Methodist University (The Houston Post, January 9, 1951), Amarillo College (Dallas Times Herald, October 2, 1951) and several other junior colleges (The Houston Informer, December 5, 1951) have all found that the admission of Negroes was

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possible without any adverse effect upon interracial relations. Quite the contrary. The Austin Statesman of November 14, 1950, reported the white students at Southern Methodist University advised the president that "SMU student opinion favors admitting Negroes to the school."

The University of Arkansas has accepted Negroes for LL.B. and M.D. degrees. Little Rock Arkansas Gazette, July 1, 1951; New York Post, August 24, 1948. Notwithstanding the fact that the University of Florida has thus far refused to admit Negroes, the Florida Student Government Association, an organization of student leaders representing all colleges and universities in the State, unanimously passed a resolution calling for an immediate end to racial segregation in the State's institutions of higher learning. Miami Herald, May 6, 1951. The University of Kentucky since 1949 has enrolled Negro students. New York Herald Tribune, June 23, 1949. By July 1950, twelve Negroes were attending classes at the University and "[t]hey took their places quietly in the student body without any open hostility." Dawkins, *Kentucky Outgrows Segregation,* The Survey, July 1950. Private educational institutions have followed the lead of the University of Kentucky. Berea College led the way. Three Roman Catholic colleges in Louisville, Nazareth, Ursuline and Bellarmine Colleges, immediately followed suit. Next to fall in line was the University of Louisville with a student body of seven thousand. Southern Baptist Theological Seminary and Louisville Theological Seminary now also admit Negroes on an unsegregated basis.

In July 1950, the first Negroes were admitted to the University of Missouri and less than two years later a Negro was appointed to the faculty. St. Louis Post-

Dispatch, July 7, 1950; St. Louis Globe-Democrat, April 17, 1952. St. Louis University has admitted Negroes to all its facilities for the past few years. They have been fully integrated into the University program with no unhappy results. During the academic year 1950-51, a total of 351 Negro students was enrolled and there were five Negro faculty members. The experience of institutions like St. Louis University has demonstrated that the admission of Negro students poses no problem of acceptance by white students. Morisey, *A New Trend in Private Colleges,* New South, Aug.-Sept. 1951. Another private university in St. Louis, Washington University, admits Negroes to all its branches and schools. St. Louis Post-Dispatch, May 11, 1952. Its experience has been identical with that of St. Louis University.

In July 1951, the University of North Carolina admitted its first Negro student. Washington Times-Herald, July 17, 1951. The following September, six additional Negro students attending the University, were excluded from the regular student cheering section at a football game. When the entire student body protested this action by the University authorities, it was quickly reversed. New York Herald Tribune, September 28, 1951.

Since 1951, the University of Virginia has been admitting Negro students and "the formerly 'all-white' schools which have accepted Negro students have found that their presence creates no special problem". Richmond News Leader, September 25, 1952.

The College of William and Mary, which next to Harvard University is the oldest of the country's colleges, has admitted two Negro students, both of whom are attending regular day classes. According to President

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Chandler, "[t]he presence of these two Negro graduate students has not created any special problems on the campus." *Ibid.*

By July 1951, there were approximately one thousand Negro students in previously "all-white" institutions of higher education in the South. "They have encountered virtually no open objection to their presence." Saveth, *The Supreme Court and Segregation,* The Survey, July 1951.

Just as the admission of Negroes to formerly "all-white" colleges and universities has created no friction or other difficulties, so too experience has proved that integration of white and Negro children at the elementary and high school levels can be acieved without incident.

In the State of New Mexico where segregation is allowed, though not required, in the public schools, the town of Carlsbad maintained separate schools for the two races until 1951. Following the refusal of the State School Board to accredit the inferior Negro high school, the local school authorities voted to admit Negroes to the "white" school. "Carlsbad white students approved the move. The 1951 graduating class and the high school senior council voted unanimously to welcome the Negro students. The junior and senior class and faculty members were 95 per cent in favor of it." Santa Fe New Mexican, September 2, 1951. The integration has not caused a single untoward incident to date. Furthermore, racial segregation was abolished in Alamagordo's public schools in August of this year and the first Negro teacher was hired to teach in that New Mexico city's integrated public schools. There has been no disharmony as a result of either action.

Racial segregation in public schools is not required in Arizona. Local school boards are free to determine whether or not they will maintain a dual educational system. Under this local option provision, segregation has been abandoned in the public schools of every city and town in the State except Phoenix. The transition from segregation to integration was made in all these communities without any difficulty.

Despite the fact that segregation in public schools has been banned in Illinois for many years, segregation was the practice in most of the southern counties. A 1949 State statute provided that no State funds should be made available to any school district where racial segregation of students is practiced. This statute led to a movement to abolish segregation in the southern communities of Illinois. Notwithstanding an 85-year-old policy of racial segregation in the public schools of East St. Louis, the local board of education abandoned segregation and adopted a policy of integration. There was "no indication of any organized resistance to the change" which was effected without incident. The New York Times, January 30, 1950. Segregation in public schools was also abandoned in Harrisburg (Chicago Sun-Times, September 26, 1950), in Alton, a stronghold of racial discrimination even during World War II (Pittsburgh Courier, December 1, 1951), and in Cairo at the southernmost tip of the State.

A similar process of uneventful integration is underway in southern Ohio. In Glendale, a town about fifteen miles from the Kentucky border, segregation in the public schools was ended in October of this year when the local board of education was advised that exclusion of Negro pupils from a formerly "all-white" school violated the

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Constitution. In Dayton, the school board abolished segregation in the use of two swimming pools at Roosevelt High School on June 22, 1950. Dayton Journal Herald, June 23, 1950.

New Jersey is another State which, while normally considered a Northern State, has a long-standing tradition of racial segregation in its southern regions. In November 1947, the people of New Jersey adopted a new State Constitution which prohibited any person from being "segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin". When this Constitution was adopted, cynics remarked that the clause against racial segregation was an excellent statement of principle but they predicted that segregation would not be eliminated for at least a generation. In 1948, the New Jersey Department of Education made a survey of the 52 school districts in the State which were reported to practice segregation in one form or another. It found that in 43 districts, segregation was imposed by the school authorities. These districts ranged in size from rural areas with one-room schools to large cities with many schools. The end of the school year 1950-51 saw the complete elimination of segregation in 39 of the 43 school districts involved. In the other 4 districts, steps had by that time been taken and building proposals were underway which would bring about complete integration in the near future. The report of the New Jersey Department of Education states:

> A most significant factor in this transition is that it has been done with a minimum of friction and a maximum of good will.
>
> Another important factor has been the success with which colored teachers, who formerly taught classes

consisting of all colored children, have been employed to teach classes of mixed races. While many individual examples could be cited, one in particular bears mentioning. The one in question contained the only junior high school operated on a segregated basis. This junior high school was a fairly large institution and naturally existed in a good sized city. Today, the student body of this school is approximately one-third Negro and two-thirds white. The teachers who formerly were teaching all-Negro junior high school classes have been completely integrated into the new setup and include teachers of all regular and special subjects. The morale of both the student body and faculty is excellent. *Biennial Report for the Years July 1, 1949, to June 30, 1951,* State of New Jersey, Department of Education, Division Against Discrimination 12, 13.

On the basis of the accumulated experience, instances of which we have described above, we are convinced that integration can and will be accomplished in the public schools of the South without "bloodshed and violence" if the law enforcement agencies, federal or local, demonstrate that they will not tolerate breaches of the peace or incitement. Americans are law abiding people and abhor klanism and violence.

Segregation Is An Economic Waste

There is another cogent reason that this Court should speak out clearly and definitively now. Since the "separate but equal" doctrine in public education will have to be abandoned ultimately, it should be abandoned sooner rather than later, to forestall the wasteful expenditure by many States of huge sums of money to build segregated schools when that money could be used more economically and enduringly to build and improve public schools where they will provide the greatest good for the greatest number. This we believe is a necessary consequence of the constitutional requirement that the State must grant each person equal protection of its laws.

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The President's Committee on Civil Rights, in its historic report, To Secure These Rights (1947), states:

> The South is one of the poorer sections of the country and has at best only limited funds to spend on its schools. With 34.5 percent of the country's population, 17 southern states and the District of Columbia have 39.4 percent of our school children. Yet the South has only one-fifth of the taxpaying wealth of the nation. Actually, on a percentage basis, the South spends a greater share of its income on education than do the wealthier states in other parts of the country. (63)

The South has been struggling under a heavy financial burden to support its educational system, with the Negro schools admittedly inferior to the white. The southern States would have to expend over one and one-half billion dollars to bring the Negro schools to the level of the "white" schools and, in addition, approximately eighty-one million dollars annually just to maintain parity. Charles H. Thompson, Dean, Graduate School of Howard University, *Letter to the Editor,* The New York Times, April 6, 1952. This additional burden is beyond the capacity of the South to bear. Bond, in Education of the Negro in the American Social Order (1934) sums this up:

> If the South had an entirely homogeneous population, it would not be able to maintain schools of high quality for the children unless its states and local communities resorted to heavy, almost crushing rates of taxation. The situation is further complicated by the fact that a dual system is maintained. Considering the expenditures made for Negro schools, it is clear that the plaint frequently made that this dual system *is* a burden is hardly true; but it is also clear that if an honest attempt were made to maintain "equal, though separate schools", the burden would be impossible even beyond the limitation of existing poverty. (231)

Public schools should be planned and erected as part of the development of the total community. They should be built in those areas that have expanding populations and needs for such facilities, rather than in opportunistic response to random law suits or threats of law suits, as is now the case in many southern States.

Conclusion

The United States is now engaged in an ideological world conflict in which the practices of our democracy are the subject of close scrutiny abroad. We cannot afford, nor will the world permit us, to rest upon democratic pretensions unrelated to reality.

The people of other lands listen not only to our Voice of America which quite properly extols the virtues of democracy; they listen to broadcasts from Communist sources as well. We know that our enemies seize eagerly upon the weaknesses of our democracy and, for propaganda purposes, magnify, exaggerate and distort happenings in the United States. Not so well known, although possibly more significant, is that the liberal and conservative press abroad is constantly comparing our declarations and statements about democracy with our actual practices at home. Domestic incidents are noted and commented upon. Our discriminatory practices in education, in employment, in housing, have all been the subject of much adverse press comment in those foreign countries which we are trying to keep in the democratic camp.

While *McGee* v. *Mississippi*, 40 So. 2nd 160 (1949), was the subject of some considerable comment in Communist circles here and elsewhere, the Paris office of the American

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Jewish Committee assembled characteristic press comment from liberal, conservative and Catholic European newspapers:

Semailles, a liberal Marseilles newspaper, said on May 18, 1951:

> In associating ourselves with the United States in the defense of liberty, we have included in the notion of liberty, a respect for all human beings, the notion of the common fraternity of all men. And it appears that in this association, we, too, have much to bring. What the world awaits from us is not cannons and atomic bombs, but the permanent and vigilant affirmation of the inalienable right of all men to be judged according to their acts and not according to the color of their skin or the latitude in which they were born. Otherwise, where is the difference between our enemies and ourselves?

An editorial, entitled "An American Tragedy", in the Vienna *Arbeiter-Zeitung,* one of the staunchest anti-Communist publications in Europe, said on February 4, 1951:

> The Communist reply to accusations made about the injustices and cruelties of their dictatorship, of forced labor, of the arbitrariness of their courts and their violation of human dignity, by pointing to the insincerity of American democracy which permits racial persecution and deprives millions of human beings of their equal rights on the basis of the color of their skin.
>
> One cannot appear before the world as a fighter for freedom and right when one is unable to eliminate injustice in one's own house.

L'Aube, Paris organ of the Popular Republican Movement (MRP), the second largest political party in France, led by Georges Bidault and Foreign Minister Robert Schuman, in its May 9, 1951, issue said:

> How much does a Negro weigh in a world where people of all colors are struggling with the bitter forces of nature and societies? Why is there so much noise about a trial which after all is an internal affair, not only of the United States of America, but of one of its states? He weighs exactly that of all those whose lot it is to protest an injustice. And the injustice in this instance has as its name, racism. Our reaction to injustice does not depend on the region of the world where the wrong was committed. It is the more bitter to know that it took place in a continent which gave for liberty enough of its sons not to deliver up to hatred of a poor Negro; that is what weighs heavily.

On April 7, 1950, the Cologne *Welt Der Arbeit*, official publication of the anti-Communist German trade unions, carried an article entitled, "The Negro Question in the U. S." That article contained the following significant language:

> In recent weeks, one found in the German press the following items: In Frankfurt-am-Main the proprietor of a cafe was fined 600 DM by American Occupation Authorities because he had ejected two colored American soldiers from his establishment. In Washington, the Capital of the U. S. A., Doctor Bunche, who made a name for himself as the UN intermediary in Palestine, was refused admittance to a movie house because he was colored. He then went to another movie house where he spoke French and was admitted because it was believed he was a foreigner. In the one case, the American authorities want foreigners to treat every colored soldier with dignity as an American citizen and punish any transgression of this principle. On the other hand, world-famous leaders of the colored population are deprived of their full equality. How are these two attitudes to be reconciled? It is only too natural that the average European can make no sense of such contradictions. The racial attitudes in the U. S. have no parallel in the entire world.

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And finally, we have the following quotation from the liberal *Le Matin* of Antwerp, Belgium, in May 1951:

> The crime of racism is odious. And, without doubt, the world will never know true peace while there exist nations, peoples or races that believe themselves superior to other nations, peoples or races. It is a painful declaration to make at the moment when our American friends are presenting themselves in the United Nations as the sturdy defenders of the free world.

Legally imposed segregation in our country, in any shape, manner or form, weakens our program to build and strengthen world democracy and combat totalitarianism. In education, at the lower levels, it indelibly fixes anti-social attitudes and behavior patterns by building inter-group antagonisms. It forces a sense of limitation upon the child and destroys incentive. It produces feelings of inferiority and discourages racial self-appreciation.

For all of the reasons urged herein, State-imposed racial segregation in public schools, denies to the appellants herein, and to all similarly situated Negro children, equal protection of the laws in every meaningful sense of those words.

The judgment of the court below should be reversed.

Respectfully submitted,

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November 15, 1952

APPENDIX

American Civil Liberties Union

The American Civil Liberties Union is a private organization composed of individual citizens. It is devoted to supporting the Bill of Rights—for everybody. Founded in 1920, it has, day in and day out, actively championed the three-fold cause of civil liberties, the heart and core of democratic government, as set forth in the Constitution and the Declaration of Independence: (1) Government by the people, grounded on freedom of inquiry and expression—speech, press, assembly and religion—for everybody; (2) specific rights guaranteed to the people, such as due process and fair trial—for everybody; and (3) equality of the people before the law—for everybody, regardless of race, color, place of birth, position, income, political opinions, or religious belief.

The Union has no cause to serve other than civil liberties. It is dedicated simply and solely to furthering the actual practice of democracy. It defends the civil liberties of everybody, including those whose anti-democratic opinions it abhors and opposes, like Communists, Nazis, Fascists and Ku Klux Klanners.

American Ethical Union

The American Ethical Union is a national association of Societies for Ethical Culture. Its purpose is to bring into close fellowship of thought and action existing Ethical Societies and to promote the establishment of new societies. It is thus devoted, on a national scale, as is each society in its local setting, to the promotion of the knowledge, the love and the practice of the right in all the relationships of life. It asserts the supreme importance of the ethical factor in all the relations of life and affirms the belief that the greatest spiritual values are to be found in man's relationship to man. Through its religious and educational programs it seeks to make the individual more adequate in his personal relationships and better able to contribute to the life of his community. The Ethical Society has as one of its objectives the inspiring words of St. Paul: "He has made of one blood all nations of men to dwell on the earth."

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American Jewish Committee

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

During the forty-six years of its existence it has been one of the fundamental tenets of the organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason the American Jewish Committee has on many occasions fought in defense of civil liberties even though Jewish interests did not appear to be specifically involved.

Anti-Defamation League of B'nai B'rith

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of over 350,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

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Japanese American Citizens League

The Japanese American Citizens League is the national organization of Americans of Japanese ancestry. Established in 1930, its story is an account of a group of young Americans treasuring their birthright of American citizenship, defending it and seeking to be worthy of it. Although its membership is composed primarily of Americans of Japanese ancestry, membership is open to all Americans who believe in its principles.

The purpose of the organization is to promote good citizenship, protect the rights of Americans of Japanese ancestry, and acquaint the public in general with this group of citizens toward their full acceptance into American life. The twin mottoes of "For Better Americans in a Greater America" and "Security Through Unity" express this purpose.

Unitarian Fellowship for Social Justice

The Rev. Dr. John Haynes Holmes and a group of other Unitarian clergymen established the Unitarian Fellowship for Social Justice in 1908. They sought "to sustain one another in united action against social injustice and in the realization of religious ideals in present-day society." Dr. Holmes served for three years as the Fellowship's first president.

The Fellowship concerns itself especially with freedom of conscience, the rights of minorities, the defense of public education, and substantial efforts to strengthen the United Nations and to plan for peace.

The Fellowship participates in the United Unitarian Appeal for its funds, and it is affiliated with the American Unitarian Association through the Association's Department of Adult Education and Social Relations. The society has individual members, organizational affiliates, and chapters throughout the United States and Canada in Unitarian and liberal community churches.

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Nos. 1, 8, 10

Supreme Court of the United States

OCTOBER TERM, 1953

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No. 8

GEBHART, et al., *Petitioners*
v.
BELTON, et al., *Respondents*
No. 10

ON RE-ARGUMENT

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (A. V. C.)

Amicus Curiae

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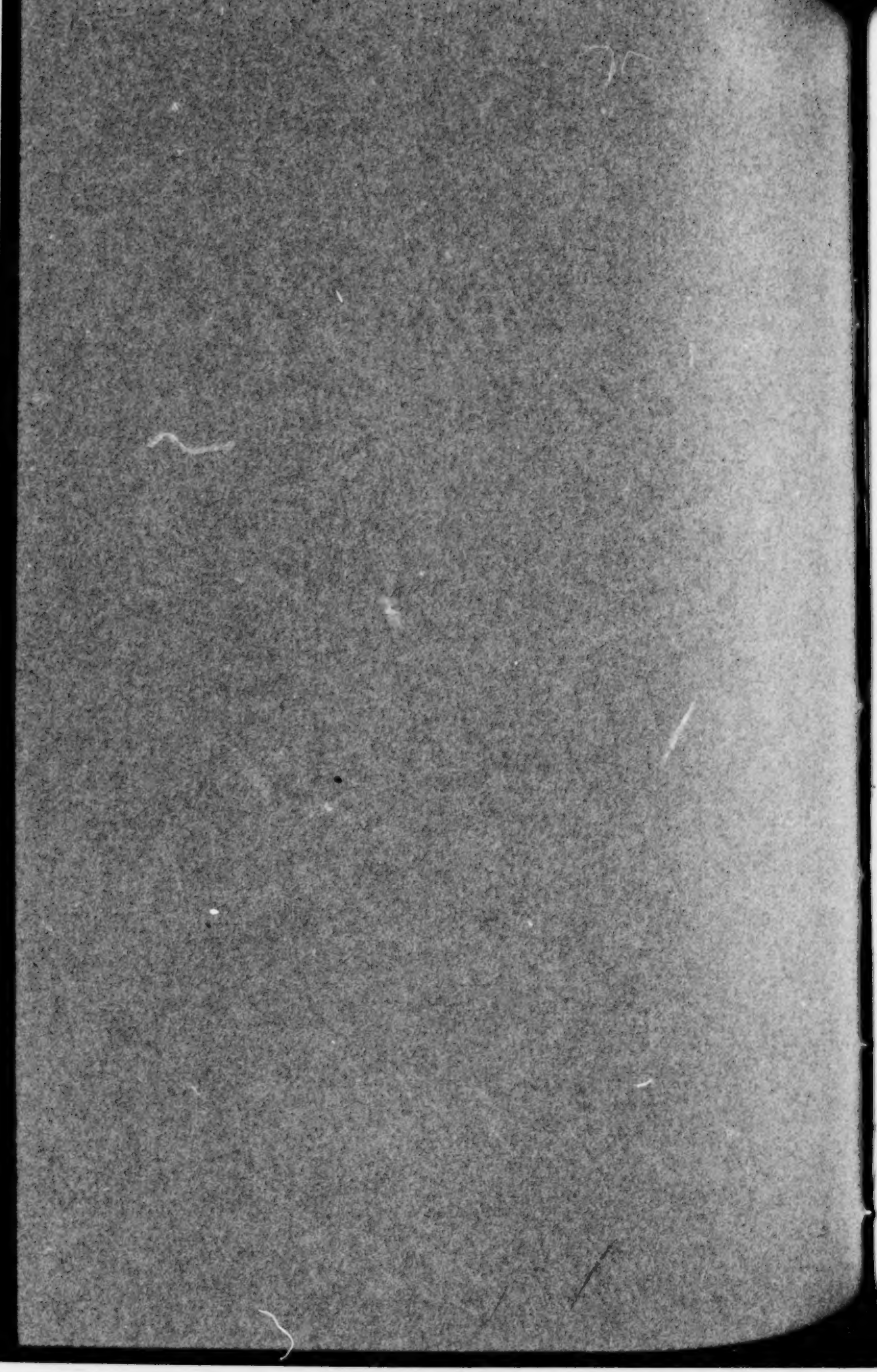

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} No. 10

ON RE-ARGUMENT

BRIEF OF
AMERICAN VETERANS COMMITTEE, INC. (A. V. C.)

Amicus Curiae

PRELIMINARY STATEMENT

The American Veterans Committee, Inc., is a nation-wide organization of veterans who served honorably in the Armed Forces of the United States during World Wars I and II, and the Korean Conflict. During the 1952 Term,

we filed briefs, with consent of the parties, in two of the five school segregation cases now on reargument before this Court pursuant to the Court's order of June 8, 1953 (345 U. S. 972). *Brown* v. *Board of Education of Topeka*, No. 8, and *Bolling* v. *Sharpe*, No. 413, both in October Term, 1952. In those briefs we urged the following points:

(a) That racial segregation imposed by State law in public schools violates the equal protection guarantee of the Fourteenth Amendment even where the discriminatory effect of the segregation can be described as solely psychological.

(b) That compulsory racial segregation in public schools cannot be supported under any proper test.

(c) That even if the *Plessy* postulate of "reasonable" racial segregation were applicable to public schooling and had any vitality at present,[1] the segregation in these cases is unreasonable and therefore unconstitutional under the *Plessy* rule itself.

(d) That the right guaranteed by the Fourteenth Amendment to be free from racial discrimination by governmental authority is so basic to our free society as to have become a right constitutionally accorded to free men under the Due Process clause of the Fifth Amendment to be free from arbitrary racial discrimination by the Federal Government or agencies acting under its authority, including the District of Columbia government.

(e) That this Court's 1950 decisions in the *Sweatt* and *McLaurin* cases, dealing with racial segregation in education at the graduate school level, require the elimination of racial segregation in public schools at the levels of

[1] Our Brief in the *Brown* case last term (No. 8 then, No. 1 now) reminded this Court that analyses dissecting the unsound foundations of the majority opinion in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) are contained in the Briefs of the American Veterans Committee and the United States filed in the case of *Henderson* v. *United States*, 339 U. S. 816 (1950), No. 25, Oct. Term, 1949.

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education involved in the present cases (elementary, junior high, and senior high, school), inasmuch as the racial segregation at any of these levels produces educational handicaps for the colored students.

(f) That equality of educational opportunity cannot be achieved within a racially segregated system.

(g) That the people are ready for and will accept racial integration in the public school systems.

In this brief on the reargument, we shall seek to present answers only on questions 4 and 5.

We have conducted researches on questions 1 and 2 (relating to the history of the adoption of the Fourteenth Amendment) which convince us that it was intended to forbid in every portion of our United States every distinction and difference in treatment by or under governmental authority which is based on race or color, and to make our Constitution, as Mr. Justice Harlan memorably described it, a Constitution which "is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896).[2] But we do not here recite the evidence or spell out the history—other briefs proffered to this Court will undoubtedly do so profusely.

As to question 3, we believe that our previous briefs in these cases adequately present our argument that this Court has the judicial power, and the duty, in construing the Fourteenth Amendment and its application to these cases, either directly or through the Due Process clause

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[2] The late Mr. Chief Justice Vinson stated this understanding for a unanimous Court as follows in *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948):

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

of the Fifth Amendment, to abolish racial segregation in public schools.

QUESTION 4

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

The assumption on which question 4 is based is that this Court has ruled that racial segregation in public schools violates the Constitution and that the Negro children in these cases are entitled to education in nonsegregated schools.

I. THE NATURE OF THE RIGHT

This Court has repeatedly held, in cases involving racial discrimination, that the constitutional rights asserted by an individual against whom the racial discrimination has been imposed by governmental authority are "personal" rights, not group rights to be merged and averaged with the rights of all others of his race and then balanced against the rights of all white persons averaged as a group. *Henderson* v. *United States*, 339 U. S. 816, 825-826 (1950); *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948); *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941); *Buchanan* v. *Warley*, 245 U. S. 60, 80 (1917); *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938). This Court has also ruled that the education which a State must provide for a Negro "in conformity with the equal protection clause of the Fourteenth Amendment" must be provided for him "as soon as" it is provided for any white person. *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948). These rulings

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were epitomized when this Court unanimously characterized the right to secure public education without unconstitutional racial discrimination as "personal and present." *Sweatt* v. *Painter*, 339 U. S. 629, 635 (1950).

II. WHEN THE CHILDREN NAMED AS COMPLAINANTS SHOULD BE ADMITTED INTO NONSEGREGATED SCHOOLS.

In view of the rulings mentioned above, when this Court holds that racial segregation is unconstitutional, the Negro children who are complainants in these cases have a constitutional right to enter the schools which, on the basis of their age, educational level, residence, and other proper scholastic criteria, they could and would enter if they were labeled "white" instead of "colored." If the decision comes after the beginning of a school term, their right to equal (unsegregated) education "as soon as" others may have it becomes a right to enter that school not later than the beginning of the school term immediately following the entry of this Court's mandate. Therefore, the minor Negro complainants in these cases should be allowed to enter the schools, and at the time, mentioned in this section.

III. THE ELIMINATION OF RACIALLY SEGREGATED SCHOOLS.

In the light of the answer in the preceding section, and since all the cases here involved are class actions, we interpret questions 4 and 5 as being directed, not to the admission of the Negro children whose names appear in the pleadings in these cases, but to the general matter of eliminating racially segregated public schools.

A. Normal geographic school districting and choice of schools.

Question 4(a) seems to imply that a decree ordering admission of Negro children into schools heretofore attended solely by white children must necessarily refer

to normal geographic school districting and/or to admission of the children into "schools of their choice."

The administration of public school systems is not, and need not by this Court be, thus limited. These cases do not involve modes of administering the public schools, except at one point: that the governmental authorities make no racial distinctions between children in the operation of the public school system.

The easiest way to operate a normal public school system without racial distinctions is by assigning children to schools according to their residence within normal geographic school zones. It is a factual, impersonal, and traditional criterion in administering public schools. It tends to reflect the normal neighborhood pattern, it permits easier programming of school and community needs, and it avoids the imbalance between schools which results from unrestrained migration of pupils. Nevertheless, we do not contend that the Constitutional guarantee of equal protection of the laws requires that boards of education be compelled to admit children into schools solely on geographic bases, or that the boards be compelled to permit, or be enjoined from permitting, each child to "choose" which of several public schools he will attend. *Cf. Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Farrington* v. *Tokushige*, 273 U. S. 284, 298 (1927). These are matters of public school administration which are committed to the sound judgment of school officials; they are not matters to be regulated by judicial decree.

We say only that the public school authorities, no matter what distinctions they draw based on educational factors, community residence, local circumstances, or other grounds, may not distinguish between children on the basis of their racial ancestry. Accordingly, we recommend that this Court's decree, issued upon the holding that racial segregation in the public schools is unconstitutional, (a) simply forbid the school authorities from making racial distinctions or differences in treatment on the basis of race or color, by way of segregation or otherwise, in the

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administration of the public school system, and (b) make no requirements, one way or the other, with respect to geographic school zones or choice by children as to which school they will attend.

B. When is "forthwith."

Question 4(a) refers to the "forthwith" admission of Negro children into public schools (presumably schools previously attended solely by white children). We do not understand the word "forthwith" as meaning the day after this Court's decree is issued. Even the best run school system will require some time to adjust its records, facilities and other administrative affairs from the artificial patterns imposed by the segregated system to an integrated system which deals with children as children rather than as colors ranging from Caucasoid pink to ebony. Presumably, however, this Court will announce its decisions in these cases during Term time which generally has been between October and June. We would suppose that the school authorities in these cases could make the necessary adjustments during the months preceding the opening of schools in September.

We have no doubt, if an additional school term is required to enable the school authorities to change from the segregated to an integrated system, that the equity power of our judicial system is sufficiently comprehensive and flexible to permit such an adjustment. But we urge that if this Court frames its decree to permit the court of first instance to allow such additional time, the decree specifically impose upon the school authorities the burden of proving, by substantial and probative evidence presented to that court, the need for such additional time.

C. Integration of these schools can and will be successfully achieved

We cannot visualize what unusual circumstances may require delay in integration beyond the opening of the school term following this Court's announcement of its

decisions that segregation in public school education is unconstitutional. The Delaware schools involved in No. 10 (*Gebhart* v. *Belton*) are now integrated and operate without difficulty; and the Attorney General of Delaware candidly concedes that the Delaware authorities "do not anticipate any serious problems of adjustment" (Brief for Petitioners on Reargument in *Gebhart* v. *Belton*, No. 10, p. 44). The Kansas schools involved in No. 1 (*Brown* v. *Board of Education of Topeka*) can admittedly be integrated without difficulty; not only did the Assistant Attorney General of Kansas say so last Term at the Bar of this Court, but the Board of Education of Topeka has already integrated some of the schools here involved.

The District of Columbia picture is equally clear. We are confident, on the basis of close and considerable analysis of, and experience with, the District of Columbia milieu, that integration of its dual school system could, when the legal bars are removed, proceed rapidly, peacefully, and successfully. Indeed, so rapidly has integration advanced in the District that public school segregation is quite out of tune with the rest of the community.[3]

Intimations that violence beyond the control of the District of Columbia authorities would result from desegregation of its schools, such as were contained in the brief filed last Term by the respondents in the *Bolling* case referring (at p. 23) to "attitudes which are antipathetical to the co-mingling of the races in schools or otherwise" and stating that "racial tensions exist and racial clashes have occurred considerably further north," are simply without substance.

It is significant that this Court's recent decision ending racial segregation in the public restaurants of the District

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[3] Phineas Indritz, *Racial Ramparts in the Nation's Capital*, 41 Georgetown Law Journ. 297 (March 1953). Just yesterday (Nov. 25, 1953) the District Commissioners issued an Order forbidding racial distinctions, in practically all agencies under their direct control, concerning employees and use of public facilities and services. *Washington Post*, p. 1 (Nov. 26, 1953).

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of Columbia was followed by complete acceptance of non-segregation without any disturbances or friction. *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U. S. 100 (June 8, 1953).

The District's peaceful acceptance of integration in other equally "sensitive" areas such as swimming pools, theatres, private and parochial schools, parks, play areas, department stores, etc., in all public buildings, and in many other areas of daily living, demonstrates how flimsy is any intimation of possible violence. See article cited in footnote 3.

Indeed, the school officials of the District of Columbia have already devoted considerable study to the "plans, procedures and techniques of transition from" the segregated to a nonsegregated system if and when this Court decides that racial segregation in public schools is unconstitutional.[4] The Superintendent of D. C. schools

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[4] In our previous Brief (pp. 7-8, in *Bolling* v. *Sharpe*, No. 413, Oct. Term, 1952) we suggested that the District of Columbia Board of Education "is striving to mitigate the many racial inequalities in the school system."

We now confess error as to this statement. We had relied on the accuracy of the self-serving statements by the Superintendent of Schools that all possible efforts were being made to eliminate the shortages of teachers and other inequalities in Division 2 (colored). Events during the past year make it appear that the Board's efforts are simply to relieve the extraordinary pressures of the most glaring deficiencies in that Division. They are not intended to "equalize" the facilities between Division 1 and Division 2. This has been admitted by the Superintendent of Schools. See *Hearings* on 1954 D. C. Appropriation bill (H.R. 5471), Subcom. of Senate Comm. on Appro., 83rd Cong., 1st sess., p. 172. Even if they would, the District authorities cannot follow in the footsteps of those State authorities who seek to avoid the legal repudiation of the *Plessy* doctrine by promising to spend millions of dollars to provide "separate and equal" facilities. A charitable view, perhaps, is that the District Board of Education realizes that equalization is impossible within the segregated system and therefore is simply marking time until this Court removes the legal bar to integration. The result, however, is that the Board has sloughed onto this Court the burden and responsibility for establishing moral treatment of the District's school children which the Board itself ought to carry.

characterized as "very helpful" and "thoughtful" the 160 written statements submitted by "the organized citizenry of Washington" when the Board of Education invited "statements expressing their ideas on the mechanics of integration of the schools should the present system of segregation be abolished by the Supreme Court's decision, and also on the methods to be employed to educate the public for any change which may be required." *"The Superintendent and the officers will not be unprepared in the event that major changes in the organization are required."* Public Schools of the District of Columbia, *Report of the Superintendent of Schools to the Board of Education, 1952-1953,* pp. iii-iv (emphasis supplied).

The other two cases here involved, which arise from Virginia and South Carolina, do not require different treatment by this Court. Significantly, although the appellees in the Virginia case (*Davis* v. *County School Board of Prince Edward County,* No. 4) stated that segregation was designed to prevent violence and reduce resentment, they frankly admitted that "The passage of time has removed violence and substantially removed resentment in Virginia." Brief for Appellees, No. 191, Oct. Term, 1952, p. 17. In South Carolina, integration of the public schools will involve a greater emotional adjustment than in the other cases. But we believe the people of South Carolina can and will make that adjustment. The events of World War II and its aftermaths have in the past several years brought about a vast reorientation of the community attitudes which formerly buttressed racial segregation. More and more, the people of the South are striving to discard the discriminations which grew from previous prejudices.[4a] In ever growing

[4a] A notable example was the election, in the spring of 1953, of a Negro (Dr. Rufus E. Clement, President of Atlanta University) to the Board of Education of Atlanta, Georgia. He carried 8 of the City's 9 wards, in an election where the white voters outnumbered the colored voters, 92,000 to 18,000.

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degree it is apparent that they would travel even faster toward that objective were it not for the lag of the law.

South Carolinians respect the Constitution. They will, under a positive ruling by the highest Court of the land that racial segregation is unconstitutional, comply with that ruling in their public schools. The more positive the ruling, the greater will be its acceptance.

D. The law versus lawlessness.

In any event, the possibility of local incident due to racial friction, would provide, as this Court has time and again reiterated, no relevant legal basis for depriving law abiding persons of their legal rights. *Buchanan* v. *Warley*, 245 U. S. 60, 80-81 (1917); *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941); *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948). The Constitution does not surrender to hooliganism; and there is no need to do so. *Racial Violence and Civil Rights Law Enforcement*, 18 U. of Chi. L. Rev. 769 (1951); Frank, *Can Courts Erase the Color Line?*, 21 Journ. of Negro Educ. 304, 309-310 (1952).

QUESTION 5

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

I. WHAT THIS COURT'S DECREE SHOULD CONTAIN

This Court should not undertake, either itself or vicariously through a special master, a detailed study of local conditions and educational problems such as would be necessary to formulate the specific terms of decrees which will foresee and meet every possible contingency concerning the many individuals and circumstances involved in the readjustment of school districts, educational methods, patterns of pupil attendance, etc., to meet the over-riding requirements of the Constitution. Such problems, if submitted to the judicial ken at all, are properly the initial concern of courts of first instance which, whatever their lack concerning great constitutional issues, are more appropriate tribunals for dealing with local problems. But even the courts of first instance cannot meet all problems in an identical way. Differences in facts and unforeseen circumstances may compel variations in approach, both in substance and procedure. We therefore think this Court should remand these cases to the courts of first instance with only the following directions:

(a) That the courts of first instance order and enjoin the respective boards of education:

(1) to admit and educate the named minor complainants in these cases, if then qualified in all respects that a white child would be qualified, and without regard to his race or color, in such school as a white child similarly situated would be admitted and educated; the admission to be made at the beginning of the school term immediately following the issuance of this Court's decision.[5]

(2) to refrain, in the administration of their respective school systems, from making any dis-

[5] Such a provision would apparently be moot in No. 1 (*Brown* v. *Board of Education of Topeka*) and No. 10 (*Gebhart* v. *Belton*), to the extent that the complainants in those cases have already been admitted to unsegregated education.

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tinction, or providing any difference in treatment or education, solely on the basis of race or color, with respect to any pupil or any child who seeks admission in any school as a pupil; this injunction to become effective immediately prior to the beginning of the school term next following the issuance of this Court's decision.

(b) That the court of first instance retain jurisdiction of the cases, at least during the period of transition, to deal, upon motion by either side, with any special problems which may arise in complying with the provisions mentioned above.

II. THE PRINCIPLES WHICH SHOULD GOVERN ANY "GRADUALISM" POLICY.

The suggestions and recommendations we have just made are based on the thesis that effective adjustment to a nonsegregated system does not require detailed administrative supervision by this Court or any special limitations to slow down the normal functioning of its decree. But if this Court determines that "an effective gradual adjustment . . . to a system not based on color distinctions" requires slower implementation of its decision holding racial segregation in public schools unconstitutional,[6] we urge that this Court apply such "gradualism" policy in a manner (a) that *would not deprive any individual child of its personal and present rights under our fundamental Charter of Liberties,* and (b) that *would not serve local bodies with an excuse for interminably dragging their heels.*

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[6] As indicated above, we assume that Questions 4 and 5 were intended to apply to the admission, not of the named complainants, but only of those members of the class not named as parties in these cases. In any event, we think that the principles mentioned in the text of this section require granting to the named complainants the relief urged in section II of our answers to Question 4. To delay the complainants' enjoyment of their rights after this Court has announced their rights would be to deny them their rights.

III. THE "VOLUNTARY" METHOD OF GRADUAL ADJUSTMENT.

One method which may slow down the process of integration without violating the rights of individual children, or operating on a 1000 years schedule, is to permit school boards to operate without readjustment until such time as children desiring integrated education apply for admission to schools hitherto attended by children of another race. In many areas, there may be a diffidence to voluntary mixing of school children heretofore separately educated which may result in slower integration than would occur where the compulsory school attendance laws are invoked to aid integration. When a child applies for admission to a school theretofore attended by children of other races, the process of readjustment to integration will and should begin. Whatever problems may arise can and should be dealt with then. The duty of the school authorities is to maintain orderly school programs without regard to race or color, and to refrain from denying admission to any child in any school, and from treating any child differently, at any time, on the basis of race or color.

One advantage of this "voluntary" method of achieving gradual adjustment is that it would lean heavily on the state of readiness each local community may have for integration. One of its disadvantages would be the tendency to substitute the irresponsibility and uncertainty of "mores" for orderly application of the compulsory school laws in the context of constitutional requirements.

All other methods of gradual adjustment to racial integration of the public schools which we have considered either violate one or both of the principles mentioned in the preceding section, or are, we think, appropriate only for administrative or community action. Thus, procedures such as integrating only a limited and specific number of schools, or grades, per year, would wholly disregard the rights and needs of individual children seeking non-

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segregated education. Moreover, authorizing such arbitrary methods would encourage evasiveness and procrastination in conforming to the requirements of the Constitution. The techniques of intercultural education, use of media of mass communication, training of police, teachers and administrators, etc., are obviously not appropriate for utilization in judicial decrees.

We repeat and stand firm on our recommendations (a) that this Court refrain from formulating detailed decrees in these cases either *sua sponte* or upon recommendations by a special master, and (b) that the task of monitoring "gradual adjustment", if it is to be undertaken by the judiciary, be delegated to courts of first instance with their larger familiarity with local conditions, subject to appellate review of any error committed.

This Court's decrees should, we urge, follow the principles discussed above, but not attempt beyond that to circumscribe narrowly either the terms of the lower courts' decrees or their procedures in arriving at specific terms. We concur with the Attorney General of Delaware that "the details" of gradual adjustment "cannot be worked out in a vacuum; and if this Court, or any lower Court, should attempt at this time to work out a general scheme, it would probably create more problems than it would solve." Brief for Petitioners on Reargument in *Gebhart* v. *Belton*, No. 10, p. 44. The dynamics of integration require much flexibility; and it is elementary that "courts deal with concrete legal issues, presented in actual cases, not abstractions." *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 423 (1940).

IV. "GRADUALISM" BY THE JUDICIARY IS UNNECESSARY.

We desire to emphasize that the above suggestions concerning "gradual adjustment", sincerely made by us to aid this Court if it chooses to follow such a policy, are not, in our opinion, indispensable for effective adjustment to

integrated education. We think it is unnecessary for this Court to espouse a formal policy of "gradualism" now. It was not deemed necessary, and its absence produced no difficulties, when this Court decreed the end of racial discrimination, whether by segregation or otherwise, in voting,[7] interstate travel,[8] land ownership,[9] D. C. restaurants,[10] employment,[11] graduate education,[12] jury service,[13] etc.

Experience shows that "wherever segregation has been abolished, no blood has flowed."[14] The experience of public school integration in New Jersey following the adoption in 1947 of a constitutional provision forbidding segregated schools is particularly instructive. Desegregation was by constitutional command. Of many different methods used in the various communities to integrate the

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[7] *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1949); *Terry* v. *Adams*, 345 U. S. 461 (1953); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Rice* v. *Elmore*, 165 F. (2d) 387 (C.A. 4, 1947), *cert. den.* 333 U. S. 875 (1948).

[8] *Henderson* v. *United States*, 339 U. S. 816 (1950); *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948).

[9] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930); *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Oyama* v. *California*, 332 U. S. 633 (1948).

[10] *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U. S. 100 (1953).

[11] *Railway Mail Ass'n.* v. *Corsi*, 326 U. S. 88 (1945); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Takahashi* v. *Fish & Game Comm.*, 334 U. S. 410 (1948); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952).

[12] *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938).

[13] *Ex parte Virginia*, 100 U. S. 339 (1880); *Virginia* v. *Rives*, 100 U. S. 313 (1880); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Avery* v. *Georgia*, 345 U. S. 559 (1953).

[14] *Time* magazine, *When the Barriers Fall*, p. 40 (Aug. 31, 1953); Frederic Wertham, *Psychiatric Observations on Abolition of School Segregation*, 26 J. of Educ. Soc. 333 (March 1953); Ralph T. Jans, *Racial Integration at Berea College, 1950-1953*, 22 J. of Neg. Ed. 26 (Winter 1953).

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public schools, no single formula outranked the others in effectiveness. What the New Jersey experience proved was "that the best way to integrate is to do it."[15]

Respectfully submitted,

AMERICAN VETERANS COMMITTEE, INC.
Amicus Curiae

By PHINEAS INDRITZ
National Counsel
American Veterans Committee

November 30, 1953
Washington, D. C.

---

[15] Joseph L. Bustard, *The New Jersey Story: The Development of Racially Integrated Public Schools*, 21 J. of Neg. Ed. 275, 285 (Summer 1952).

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. 1

OLIVER BROWN, ET AL.,

Appellants,

VS.

BOARD OF EDUCATION OF TOPEKA, KANSAS, etc., ET AL.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

ADDITIONAL BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

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does the actual work of teaching the children of the nation, is committed to a practice of complete equality between teachers and children of every race. This principle is written indelibly in its constitution and by-laws.

It desires to lay before the court the results of its study of the legal and historical questions raised by this Honorable Court in asking for a reargument of the "school segregation cases". The accompanying brief, largely the work of its Committee on Democratic Human Relations, is submitted as a contribution to the solution of the important issues involved.

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Selma M. Borchardt,

Of Counsel.

BLEED THROUGH

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BRIEF OF AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

As a contribution to the solution of the important issues involved in the "segregated school cases" the American Federation of Teachers submits this brief upon some of the historical and legal questions raised by this Honorable Court in proposing a re-argument.

The Opinions Below, Questions Presented, Statutes and Constitutions Involved, and Statements of Facts have been stated in previous briefs filed in these causes.

Summary of Argument.

The arguments presented in our previous briefs *Amicus Curiae* and those presented herewith are summarized in the Introduction to the Argument.

ARGUMENT.

Introduction:

Need to consider cases in broad aspects.

The American Federation of Teachers which is dedicated to "education for democracy and democracy in education" is deeply interested in the cases before the Supreme Court challenging the constitutionality of segregation in public elementary and secondary schools. The arguments the Federation submitted in October 1952 against segregated public education are equally valid in 1953 and we urge their favorable re-consideration.

We have studied carefully the historical and legal questions raised by the court in asking for a re-argument of the cases this year. While it is essential to have accurate and clear cut answers to these questions, the American Federation of Teachers believes that the interests of the United States, both national and international, demand the consideration of other factors as well as those raised by the Court.

In addition to the arguments presented in our brief October, 1952, namely:

> 1. The Constitutions and Statutes of states providing for segregation of students in the public schools, violate the requirements of the equal protection clause of the Fourteenth Amendment. The doctrine of "separate but equal" facilities is fallacious . . .
>
> 2. Segregation in public schools inevitably results in inferior educational opportunities for Negroes . . .
>
> 3. Segregation in public schools deprives the Negro student of an important element of the education process and he is thereby denied the equal educational opportunities mandated by the Fourteenth Amendment . . .

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the Federation urges the abolition of segregated schooling on the elementary and secondary levels for the following reasons:

I. The strengthening and preservation of a democratic society demands an educated citizenry.

II. The intent of the 14th amendment was to make the Negro a citizen and protect his voting rights.

III. To exercise his right of choice effectively a voter must not only be educated but educated among all those who make up the total community.

IV. An integrated school system will aid tremendously in developing harmonious relations among the people of the South and thereby throughout the country.

Conclusion.

A decision in favor of integrated schooling on every level is necessary, not only to give substance to our declared principles but to win over the peoples of Asia and Africa to a belief in the sincerity of the United States.

I.

THE STRENGTHENING AND PRESERVATION OF A DEMOCRATIC SOCIETY DEMANDS AN EDUCATED CITIZENRY.

A democratic society is founded on the belief that all men are equal and capable of governing themselves. It holds further that men create the institutions of government for the purpose of safeguarding their rights of "life, liberty and the pursuit of happiness." To govern wisely, as well as to use effective checks upon governmental authority to prevent abuses, requires an alert, well-educated citizenry.

The early founders of this country were well aware of this need for the maintenance of popular government. They gave many evidences of their concern for public education in their writings and in their activities.

President George Washington in his first inaugural address stated:

> "Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of the community, as in ours, it is proportionably essential. To the security of a free constitution it contributes in various ways, by convincing those who are intrusted with the public administration that every valuable end of government is best answered by the enlightened confidence of the people and by teaching the people themselves to know and value their own rights, to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burdens proceeding from a disregard to their convenience and those resulting from the exigen-

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cies of society; to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last and uniting a speedy but temperate 'vigilance against encroachments with an inviolable respect to the laws'[1]

Washington not only urged the establishment of a national university but, in his will, left 50 shares in the Potomac Company for such an institution to which the youth of fortune and talents from all parts thereof (of the U. S.) might be sent for the completion of their education in all branches of polite literature; in arts and sciences; and in acquiring knowledge in the principles of politics and good governments.[2]

In his Farewell Address, Washington left this final admonition; "Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened.[3]

John Adams in his DISSERTATION ON THE CANON FEUDAL LAW: "But the fact is certain; and whenever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion."[4] He stated later in another essay: *"Thoughts on Government"*—" . . . Laws for the liberal education of youth, especially of the lower classes of people, are so extremely wise and useful,

[1] Maxims of Washington, pp. 184-85, John Frederick Shroeder Mt. Vernon Ladies Association—Mt. Vernon, Va., 1942.

[2] Writings of Washington—Vol. 37, p. 280, U. S. Government Printing Office, 1940.

[3] Farewell Address, p. 179, Maxims of Washington, John Frederick Schroeder, Mt. Vernon Ladies Association. Mt. Vernon, Va., 1942.

[4] Selected Writings of John Adams and John Quincy Adams, Adrienne Koch and William Peden, Alfred A. Knopf, 1940.

that to a humane and generous mind, no expense for this purpose would be thought extravagant." [5]

Thomas Jefferson's career was filled with activities in behalf of public education because he was convinced an informed public opinion was essential to maintaining freedom. As a member of the Virginia legislature he introduced bills for providing the state with a system of free public schools. He wanted especially written on his grave marker that he established the University of Virginia. His authorship of the Land Act of 1784, established the precedent followed in the Northwestern Ordinance of 1787 of granting land by the national government for the support of education.

Like Washington, he called attention, in his first inaugural address to the importance of education and the need for the national government to be concerned about it. "... The diffusion of information I deem (one) of the essential principles of our government and consequently (one) which ought to shape its administration" [6]

In a letter to James Madison he stated:

> "Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the utmost security for the preservation of a due degree of liberty." [7]

The working man too realized the importance of education and a generation later, became quite vocal in his unions and political groups in demanding free public schools. He urged this not only for the self improvement of the worker but also for his more effective functioning as a citizen. At a New York State convention of the Workingman's Party in 1830 one address stated in part:

> "The right of suffrage which we enjoy cannot be understandingly exercised by those whose want of edu-

[5] Ibid., p. 56.

[6] The Jeffersonian Encyclopedia, John P. Foley, Editor, Funk and Wagnalls, 1900.

[7] Ibid., p. 277.

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cation deprives them of the means of acquiring such information as is necessary for a proper and correct discharge of this duty."[8]

In a circular to the workingmen of Philadelphia (1830) by the Workingmen's Republican Association of the Northern Liberties, the organization made this appeal: "Let the productive classes then unite for the preservation of their free institutions and, by providing for all the children in the Commonwealth republican education preserve our liberties from the dangers of foreign invasion or domestic infringement."[9]

A trade union of Newark demanded education for their children as "a matter of right and duty". Its members argued: "Education alone, and that generally diffused is the only prop that will support the fabric of Democracy from being crushed beneath the weight of monopolized and moneyed artistocracy."[10]

And the workers of the First Congressional District of Pennsylvania (1830) supported the candidacy of Stephen Simpson because "he is a friend and indefatigable defender of a system of general education which will place citizens of this extensive republic on an equality: a system that will fit the poor as well as the rich to become our future legislators; a system that will bring the children of the poor and the rich to mix together as a band of republican brethren; united in youth in acquisition of knowledge they will grow up together jealous of naught but the republican

[8] History of Labor in the United States, Vol. 1, p. 283, J. R. Commons, MacMillan, 1918.

[9] Ibid., p. 227.

[10] Pioneers of Labor, p. 11, Pamphlet of Amalgamated Meat Cutters and Butcher Workmen of North America, Mayer and Muller Co., Chicago, 1949.

character of their country and present to the world the sublime spectacle of a truly republican government in practice as well as in theory." [11]

As a result of the concern of the founders of this country and the persistent demands of labor unions, the free public school has become an integral part of American life. No other institution gives as tangible an evidence of American faith in the democratic way of life as the free public school and none is so generally supported by the great mass of people. It is ironic that this American institution is permitted by Southern State laws to violate and desecrate this faith so flagrantly and constantly.

II.

THE INTENT OF THE 14TH AMENDMENT WAS TO MAKE THE NEGRO A CITIZEN AND PROTECT HIS VOTING RIGHTS.

The 14th amendment, by stating specifically that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside" [12] intended to make the Negro a citizen. It also intended to make the Negro a voter and protect his voting rights by placing a penalty upon the states that disfranchised him—namely, cutting down the state's representation in Congress. Section 2 of the amendment states; ". . . But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives to Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state . . . the basis

[11] History of Labor in the U. S., J. R. Commons, Vol. 1, p. 228, MacMillan, 1918.

[12] 14th Amendment, U.S. Constitution, Section 1.

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of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such state." [13]

The debates in the 39th and the 41st Congresses and the state conventions and in the state legislatures which ratified the 14th amendment clearly indicate that both the proponents and opponents of the amendment realized that it protected the citizenship and voting rights of the Negro. Moreover, they show that the debaters were conscious of the issue of segregation in education. The Congressional Globe reports on February 19, 1866 that Senator Yates of Illinois while making a speech in the Senate for the proposed 14th Amendment said:

> " . . . the senate at this session have passed the bill (S. 61) to protect all persons . . . in their civil rights . . . here, sir, I contend, we have fully established the principle . . . protecting the inhabitants, of every race and color, without regard to any previous condition of slavery in all their civil and political rights. . . " [14]

A week later in the House Representative Rogers of New Jersey while arguing against the 14th Amendment stated that:

> "In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the state to provide for white children and black children to attend the same school, upon the principle that all the people . . . shall have equal pro-

[13] 14th Amendment, Section 2.

[14] Toward a Non-Segregated South, Edwin R. Brook, Christian Century, September, 1953.

[14a] Congressional Globe, 39th Congress, First Session, February 19, 1866.

tection in the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." [15]

For a short period after the adoption of the Fourteenth Amendment there was no segregation at the University of South Carolina. Indeed it was not until the Tillman Constitutional Convention of 1895 that separate schools were provided for Negro and white children. Yet in 1868, Governor Orr voiced the opinion that the new amendment would bring immediate dire results. He addressed the Assembly as follows:

". . . The Constitution provides that there shall be kept open, at least six months in each year, one or more schools in each school district. . . . Another Section, however, declares that all the public schools, colleges and universities of the State, supported in whole or in part by public funds, shall be free and open to all the children, and youths of the State, without regard to race or color.

If it shall be attempted to establish schools where both races are to be taught, no provision being made for their separation, the whole system will result in a disastrous failure. The prejudices of race, whether just or unjust, exists in full force not more in South Carolina than in New England and the West. In the last named localities, separate schools are provided for white and colored children, and in a community where these prejudices prevail in so strong a degree, how unreasonable is it to attempt the organization of mixed schools. It cannot but result in constant feuds and collisions between the children, in which the parents respectively, will necessarily take up the quarrels

[15] Congressional Globe, 39th Congress, First Session, March 1, 1866.

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and the entire community thus be involved in continual tumult; the consequence of misguided efforts of unwise persons." [16]

In 1868 under the spirit of the Fourteenth Amendment, the people of Louisiana ratified a constitution by a vote of 66,152 to 48,739. This constitution provided:

> "The general assembly shall establish at least one free public school in every parish throughout the State, and shall provide for its support by taxation or otherwise. All children of this State between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana." [17]

By 1898 the political climate had so changed that the new constitution decreed separate schools based on race in this fashion:

> "There shall be free public schools for the white and colored races separately established by the General Assembly, throughout the State, for the education of all the children of the State between the ages of six and eighteen years; provided, that where kindergarten schools exist, children between the ages of four and six may be admitted into said schools." [18]

Virginia's Constitutional Convention of 1867-68 brought into prominence one James W. Hunnicutt who summarized

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[16] Journal of the Assembly of South Carolina, Special Session, 1868, p. 44.

[17] Constitution of Louisiana, 1868, Title VII, Article 135.

[18] Constitution of Louisiana, 1898, Article 248.

the position of his caucus of the Republican Party in a speech on January 9, 1869 this way:

> ". . . Our banner is thrown to the breeze, and upon it is written 'the unconditional preservation of the Union.' That is the first plank. The second is, 'a republican form of government.' The third is, 'the equal rights of all men, civil and political, before the law, without regard to race, caste or color.' The last is, 'the establishment of systems of general education for all the children in the land without regard to race, caste or color.' these are the objects of the members on this side of the House." [19]

Even clearer language is that used by the Fredericksburg's convention which besides electing delegates to the constitutional convention adopted this resolution:

> "that our candidates must pledge themselves to sustain the principles of the Republican Party, especially the equal political rights of all men in all respects; a system of common schools in which no distinctions shall be made on account of color and race, a general provision for the poor and a just and equitable system of taxation." [20]

It is apparent in our opinion, that the delegates to the convention of 1868 were conscious of the problem of segregated public schools. Many of them thought that the Fourteenth Amendment covered this point adequately and consequently specific reference to it in the State Constitution was not necessary. During the debates, a resolution by Dr. Thomas Bayne, a delegate from Norfolk, which spelled out non-segregation in public schools, met defeat as did

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[19] Debates and Proceedings of Constitutional Convention of Virginia, 1867-1868, p. 337.

[20] Political History of the Reconstruction in Virginia, H. J. Eckenrode.

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likewise a provision to establish separate schools by Eustace Gibson.

The first State Legislature which was dominated by conservatives made segregated public schools legitimate. The importance of this move in creating a segregated society is obvious in the letter of W. H. Ruffner, the first superintendent of public instruction, who in answering the assumption of Reverend R. L. Dabney that education will lead inevitably to "amalgamation" observes:

> ". . . But if under the ordinary associations of life there would be any tendencies in the direction of amalgamation, the school system would oppose a powerful barrier to such tendency. In fact, of all the public arrangements of Southern society, the school system alone renders a bold, emphatic testimony to the immiscibility of the races. We find Negroes in our churches, our theatres, our courthouses, our rail-cars, our halls of legislation; but there is one place where no Negro enters, and that is a WHITE PUBLIC SCHOOL HOUSE. The law separates the races in education, and in nothing else. The effect of this separation enters into the educational thought and training of the young, and establishes the habits and etiquette of society with a firmness that nothing else is doing, or could do. . . ." [21]

Thirty years passed before the "plans" of the superintendent bore fruit as a fait accompli. The General Assembly of Virginia extended the segregated principle to other fields according to this time schedule:

1900, Chapter 226, Segregation in Railroads.

1900, Chapter 312, Segregation in Steamboats.

---

[21] Collected Papers of William H. Ruffner, (letter in answer to R. L. Dabney) 6-11.

1901, Chapter 198, Segregation in Street-cars.

1912, Chapter 157, Segregation in Residential areas.

1918, Chapter 301, Segregation in Penitentiaries.

1926, Chapter 569, Segregation in places of public amusement.[22]

A consideration of ALL of the historical evidence on the question of segregation in public education in the southern states will confirm our findings in Virginia, South Carolina, and Louisiana. These affirm that the political leaders during the late eighteen sixties possessed an understanding of the effect of segregation on our public institutions and that Negroes enjoyed a fair measure of freedom. They also demonstrate that the Negro gradually lost full citizenship privileges by the turn of the century, if provisions on segregation in state constitutions and statutes or actual practices are our criteria. In a sense then, this brief constitutes an argument to restore the rights of the Negro guaranteed him originally in the Fourteenth Amendment.

III.

TO EXERCISE HIS RIGHT OF CHOICE EFFECTIVELY A VOTER MUST NOT ONLY BE EDUCATED AMONG ALL THOSE WHO MAKE UP THE TOTAL COMMUNITY.

So necessary is education to a wise use of the ballot that most states have laws that voters must be able to read and write as a minimum requirement for voting. The reading requirement, whether on the elementary or the more advanced level has a content suited for adults who are to help

[22] Statutes of the General Assembly of Virginia.

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vote the kind of laws and the type of leadership their communities will have.

In South Carolina it is the state constitution that is considered appropriate:

> "Any person who shall apply for registration after January 1, 1898, if otherwise qualified, shall be registered: provided, that he or she can both read and write any section of this constitution submitted to him or her by the registration officer. . . ."

In New York on the other hand, it is a literacy test that is required:

> " 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, should have become so entitled on or after January first, nineteen hundred twenty-two, and has not already voted in a general election in the State of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

The New York Board of Regents provides each applicant with one of a possible twelve examinations on subjects such as: The Hoover Dam, Thomas Edison, The Ausable Chasm, Samuel Adams, polio, Charles Lindbergh, Washington at Newburgh. He is required to answer correctly six out of eight questions on the topic in writing. Thus not only must the new voter read and write, he must also comprehend.

But it is not considered sufficient for a voter just to be able to read about issues and candidates. He is expected to have a more intimate knowledge of the individuals running for office and be able to weigh and judge in choosing

among them. The necessity for the voter to know the merits and demerits of candidates is further attested by the "short ballot" movement. This aims to present to the voter only a few candidates so that he may know each more thoroughly.

Candidates too, are required to live in the districts from which they are elected, not only that they may serve the people more effectively, but that the people may be represented by one whom they know well. Richard S. Childs in his article The Short Ballot, makes this point when he asserts:

> ". . . That the candidates should be conspicuous is vital. The people must be able to see what they are doing; they must know the candidate, otherwise they are not in control of the situation, but are only going through the motions of controlling."[23]

Childs goes on to show how important this is to the development of democratic government by this comment:

> ". . . If the government is to be brought within the sure control of the people, the ballot must be brought within the sure control of the individual voter. We must get on a basis where the real intentions of the average voter finds intelligent expression on the entire ballot so as to produce normally the kind of government the voters want whether that kind be good or bad."[24]

It is here that the public school plays a significant role, for it is in their learning together that prospective voters get to know and understand each other, learn the problems of their respective communities and discover those who may provide desirable leadership. More and more schools are being used not only as training ground for political aspirants, but also for forums where these aspirants meet

[23] The Short Ballot, Richard S. Childs, National Municipal League, 1930, p. 15.

[24] Ibid., p. 20.

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representatives of the entire community and discuss issues with them face to face.

The public schools then of the South must be integrated to serve the needs of all citizens, both white and black, in the effective exercise of their ballot—one of the main props of a democratic society.

IV.

AN INTEGRATED SCHOOL SYSTEM WILL AID TREMENDOUSLY IN DEVELOPING HARMONIOUS RELATIONS AMONG ALL GROUPS IN THE UNITED STATES.

The tensions and conflicts between races in the United States has resulted not from integrations but from the segregation and discrimination in custom and in law which have been inflicted upon the Negro. In no institution has this discrimination been so glaring as in the public school system of the South where the inequalities in facilities for white and Negro children daily incite contempt on one hand and bitterness on the other. A graphic picture of this inequality is presented by Edwin L. Brook in his article: "Toward a Non-Segregated South."[14]

> "Consider, for example, my own community, a small town in Northern Louisiana. It has a fine brick school plant for whites, with grammar and high school departments well equipped for an enrollment of about 250 pupils. It has gymnasium, lunch room, home economics building and agricultural building. On the outskirts of town there is a Negro school consisting of wood-frame buildings which are over-crowded and inadequately equipped. There is no gymnasium and the facilities on all levels cannot compare with those of the white school. Yet even as it is, the Negro school represents a tremendous advance over previous condi-

[14] Toward a Non-Segregated South, Edwin R. Brook, Christian Century, September, 1953.

> tions. It was not many years ago that the students were meeting in a tent in a near-by Negro churchyard. Now a number of small rural schools have been consolidated and the present building erected."

Contrast this with areas where integration has been the practice. Here there are no humiliating distinctions. The Negro student is accepted and is recognized for what he is —one of the many varieties of an American.

After the *Sweatt-McLaurin* decision, 339 U. S. 629, 637 which made integration possible in state colleges and universities in the South, Negro students were accepted without any difficulty. Today between 1000 and 2000 of them are studying on over 80 campuses as irrefutable testimony to this fact. On the elementary and secondary level integration has followed suit in areas like Arizona, New Mexico, Southern Illinois, Ohio, and New Jersey. Even the private preparatory schools of New England States have joined this democratic development. The Yale Law Journal summarizes the trend:

> ". . . As a result of the recent Supreme Court cases, over a thousand Negroes have been peacefully integrated into southern graduate and professional schools. Social ostracism has not been as great as was expected. Furthermore, in Illinois, Indiana, and New Jersey, state legislatures have forced reluctant communities to eliminate segregation in their grade schools. Despite local resentment and protest, the integration of Negro and white children has generally proceeded peacefully.
>
> "Other forms of desegration have recently occurred in the South and despite sporadic racial violence the transition has in general been peaceful. In some instances the desegration has occurred in activities where southern insistence on segregation has been most adamant. Thus, in St. Louis and Washington, D. C., in spite of strong public protest, segregation in municipal swimming pools has been successfully prohibited. Experience in the elimination of segregation in public

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parks, sporting events, theatres and movies has been the same. Likewise, in the armed forces, where resistance to racial integration has been traditional, segregation is fast disappearing at the command of the President. In the allied fields of racial discrimination, such as white primaries, all-white juries and segregated interstate travel, court orders have partially overcome deeply rooted patterns of discrimination. All of this progress has been made in the face of continuous threats of violence and non-conformance by southern leaders.

"These instances of southern adjustment to enforced desegregation strongly suggest that the normal reaction of the South to Supreme Court decisions is not violent. Generally, the only resistance takes the form of attempted circumvention. Tighter decrees and persistent enforcement ultimately overcome even this type of resistance. Thus, there is little reason for the courts to allow threats of violence and civil strife to delay desegregation.

"In the long run it is well established that segregation intensifies rather than eases racial tension. Instead of encouraging racial cooperation, segregation fosters mutual fear and suspicion which is the basis of racial violence. Thus, every inroad in racial segregation which the courts can effect maximizes the opportunity for eventual racial reconciliation."[25]

THE AMERICAN FEDERATION OF TEACHERS feels that desegregation on the American scene is successfully proceeding in various ways—by voluntary community action, by legislative acts, by judicial review, by military and religious authority and by individual initiative.

In all of these cases the question of appropriate method, timing and who should take the initiative, arises. We believe that the public school being one of the molders for our citizens of tomorrow should take the lead; we believe

[25] Yale Law Journal, Volume 61 No. 5, May 1952.

the time is now—we believe we have the 'know-how'—we believe the most logical authority is the Supreme Court.

The experience of the United States Department of Defense can be of service to us in this connection. The armed forces, once completely segregated has in three years, almost become totally desegregated. Listen to John A. Hannah, Assistant Secretary of Defense, in an interview on ending segregation:

> Q: Have you solved the problem of segregation in the Army?
>
> A: I think remarkable progress has been made. The Air Force and the Navy are completely integrated. The Army is about 95 per cent integrated.
>
> Q: What does that mean?
>
> A: That means that there are no colored men in the Navy or the Air Force who are serving in "colored" units. They are all serving in integrated units. And that is true of 95 per cent of the colored men in the Army. We still have a few colored units, but they are being done away with rapidly. In eight months there will be no non-integrated units in the Army. Universally the answer from our commanders is that it is desirable and works out very well in spite of all contrary predictions—it works very well.
>
> Q: There has been no resistance, no violence or demonstrations about it?
>
> A: No. The colored men are very effective members of the armed forces. Some of them are more effective than others, of course, depending upon their background and training.
>
> Q: Are they adept for any particular types of jobs?
>
> A: We don't know that yet.
>
> Q: How many colored officers are there in command positions in these integrated setups?
>
> A: There are a goodly number. There are not as many colored officers proportionately as there are white officers.
>
> Q: Are they commanding white troops?

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A: Yes, and there are a great many more than there used to be because, as the colored officers begin to demonstrate ability, they begin to move up.

Q: Is there a quota system?

A: None.

Q: How many Negroes are there in the Army?

A: I do not recall the exact number, but about 13 per cent of the Army is colored.

Q: Are you thinking about lowering physical standards at all?

A: No. There have been requests from the services for the raising of the mental qualification at the minimum level. At the present time, we require each of the services to take a certain percentage of the four mental categories. Whether a man enlists or comes in in the draft, they are all given examinations at the examining stations and are put into one of four categories, and then we require each of the services to take the same percentage of each of the categories. The services think they are very definitely hindered by being required to take too many Category 4 people—the people in the lowest mental category.[26]

New Jersey, like Illinois and Ohio, is contiguous with states that have a segregated pattern. New Jersey's experience in desegregation in the southern part of the state is brought out by Joseph L. Bustard, Assistant Commissioner of Education in a speech delivered at Howard University, April 16, 1952 when he reported:

"... A very recent survey in New Jersey shows that at the present time, forty of the forty-three school districts involved were completely integrated as of September 1951. The remaining three districts all have taken some steps toward integration, but in all three of these districts, building programs are underway, that when finished, will make integration complete.

"Sometimes the question arises should integration in the public schools follow or lead movements for integration in other areas of community life. The New Jersey experience would seem to indicate that the

[26] U.S. News and World Reports: October 16, 1953—Interview with John A. Hannah, Assistant Secretary of Defense, pp. 99, 100.

schools can and should lead. Practically all of the segregated schools had segregated parent-teacher associations. Today, in almost all of the districts affected, there are strong integrated PTA's with Negroes serving as officers and executive committee members. In several communities, Y.M.C.A.'s that were segregated have become integrated. In a few communities, Negroes are serving as members of boards of education and in some others, policemen have been appointed and handle the same type of assignment as any other officer on the force. In fact, even a few of the North Jersey cities have restudied old school zones, that at one time or another had been jerrymandered, and as a result have announced new school district lines.

"While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it."[27]

In most instances of successful integration in public school the first step seems to be the establishment of legal authority. William W. Barnes in a review of the methods used by a local board of education in solving this problem writes:

". . . In conclusion, therefore, it is safe to say that the following policies and attitudes must be a part of any desegregation program undertaken in any community, whether it be large or small. First, there must be some legal authority giving initial impetus to an integration program. Second, an objective survey of all installations, faculties, pupil compositions and community attitudes should be made. Third, and perhaps most important, once the decision to desegregate is made, the carrying out of the plans made must be done in a positive manner with no deviation, apology, exception or vacillation whatsoever. If these three

[27] The New Jersey Story: Concerning the Development of Racially integrated Public Schools, pp. 9, 17, April 1953, New Jersey Department of Education.

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major suggestions are carried out, the successful experiences of over forty school districts in the State of New Jersey indicate that the integration of white and colored school systems can be accomplished to the satisfaction of all the people affected." [28]

The majority of the people in the south will accept a Supreme Court decision outlawing segregation on the elementary and secondary level as they accepted the decision outlawing the white primary. Especially will they do so, if the law-enforcement agencies on the national, state and local levels all indicate publicly that they will not countenance anything but orderly acceptance of a Supreme Court decision in favor of an integrated school system.

Conclusion.

The United States, in the cold war with Soviet Russia and its satellites is disturbed by the "neutralism" of India and other sections of the darker world. The factor of color has as dominant a part in this neutralism as the unwillingness to be drawn into a conflict between these powers. Constantly in the U. N. and in the press of these countries there is pointed out the gap between our professions of democracy and our practice in so far as people of color are concerned. The western world is still too unaware of the upheavals taking place among the darker people of the world and too indifferent to the significance of these upheavals for the white world.

In so far as we eliminate among our citizens barriers based on race and color, to that degree we are helping to

[28] Eliminating Segregation in New Jersey Public Schools, William W. Barnes, Field Supervisor, Division Against Discrimination, New Jersey Department of Education, p. 7, October 15, 1953.

create a "more perfect union here" and a reservoir of good will for us in the vast world of color.

A decision outlawing segregation in education on the elementary and secondary level will not only advance the educational opportunities of both whites and Negroes in the South, but it will also give convincing evidence to millions in Asia and Africa that the United States is willing to give more than lip service to the principles on which it is founded.

Respectfully submitted,

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OCT 1 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 1 etc.

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v.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL.,
Appellants,
v.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
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COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,
v.
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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF FLORIDA

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State Capitol Building
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Preliminary Statement

This amicus brief filed by the Attorney General of the State of Florida pursuant to permission granted by the Court in its decision of May 17, 1954, in the above cases, contends that the Court should resolve its implementation decision in favor of the propositions stated in questions 4B and 5D.

The Court will find from a study of this brief that a sincere and thorough effort has been made by the Attorney General of Florida to present reasonable and logical answers to questions 4 and 5. These answers are respectfully submitted by way of assistance to the Court and are based upon a scientific survey of the factual situation in Florida, embracing practical, psychological, economic and sociological effects, as well as an exhaustive research of legal principles.

However, in filing this brief in answer to the hypothetical questions propounded, the Attorney General is not intervening in the cause nor is he authorized to submit the State of Florida as a direct party to the instant cases. Neither can his brief preclude the Florida legislature or the people of Florida from taking any legislative or constitutional action dealing with the segregation problem.

Part One

A discussion of the reasons for a period of gradual adjustment to desegregation to be permitted in Florida with broad powers of discretion vested in local school authorities to determine administrative procedures.

A. The Need For Time In Revising The State Legal Structure

There is a need for reasonable time and planning by State and local authorities in any revision of the existing legal structure of the State of Florida, (which now provides an administrative framework for the operation of a dual system of public schools) in order to provide a legal and administrative structure in which compliance with the Brown decision can be accomplished in an orderly manner.

Examples of Florida constitutional, statutory, and state school board regulatory provisions related directly or indirectly to segregated public schools are set forth in Appendix B.

The basic change which must be made if Florida is to comply with the non-segregation decision is either a repeal or revision of Article XII, Section 12, of the Florida Constitution, which provides:

> "*White and colored; separate schools.*—White and colored children shall not be taught in the same school, but impartial provision shall be made for both."

This provision in the basic law of Florida has been in existence since 1885. During the past 69 years it has been rigidly observed and has provided the foundation for an intricate segregated public school system, in accord with social customs which cannot be changed overnight without

completely upsetting established school administrative procedure in school planning, transportation, teacher employment, capital outlay, districting, scholastic standards, public health, school discipline as well as many other facets of the tremendously complicated school structure in Florida.

Assuming that the basic law of Florida pertaining to a dual system of schools (Art. XII, Section 12, of the Florida Constitution) is rendered nugatory by the decision of this court in the Brown case, the Florida legislature must revise the entire School Code of Florida to the extent that the present code is predicated upon a dual system of education, and all administrative procedures which have developed under said code are grounded on the fundamental principle of a segregated system. A simple repeal of the various statutory and administrative procedures now provided for the operation of the school system (which may prove to be in conflict with the Brown decision) could only result in the creation of a vacuum in methods of school administration. The consequent immediate inrush of turbulent ideas into this vacuum without legal guidance or administrative regulation might well cause a tornado which would devastate the entire school system.

This system has grown through the years since the establishment of the "separate but equal" doctrine by the Court in the *Plessy v. Ferguson case (163 U.S. 537)*, into a mammoth and intricate system of public education in Florida involving the annual expenditure of $138,895,123.15 and the welfare of 650,285 children. We do not believe that this system, which took over half a century to develop, can be transformed overnight.

The bare mechanical process of enacting legislation requires reasonable time for study by legislative committees, the time depending upon the complexity of the problem, and must conform to the legally established time for convening the legislature. On a problem of the magnitude of the one at

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issue, the study of legislative committees must be preceded by exhaustive study on the part of school officials and citizens' educational committees in order that the legislature may have the benefit of their recommendations.

I. EXAMPLES OF LEGISLATIVE PROBLEMS

(a) Scholarships

An example of the type of legislative problem which must be considered by school officials and the legislature is contained in Section 239.41, Florida Statutes.[1]

This law at present provides for 1,050 scholarships of $400 each year for students desiring to train for the teaching profession.[2]

According to the State Department of Education, awarding of the scholarships is done on a basis of county representation, race, and competitive test scores of psychological and scholastic aptitude. A compilation of the scores of the 740 white twelfth grade applicants in the Spring of 1954 yielded an average score of 340. Compilation of the 488 Negro twelfth grade applicants yielded an average score of 237. In the previous year, 1953, 664 white applicants made an average score of 342 while the Negro applicants made an average score of 237. This difference is classified as very significant, and should be interpreted as meaning that factors other than chance explain the different results between white and Negro scores.

In view of the wide divergence in achievement levels between the white and Negro races, as demonstrated by the scholarship examinations, and desiring to make these scholarship opportunities available to students of both races, it

1. See page 218, Appendix B.
2. See page 235, Appendix B.

was recognized that provision would have to be made whereby Negro students would not have to compete against white students for these awards. Therefore, the legislature of Florida provided that the scholarships should be apportioned to white and Negro applicants according to the ratio of white and Negro population in the counties. Only in this way can Negro students in this state be assured of receiving a proportionate share of state scholarships awarded on the basis of competitive examinations.

If the Court's decision in the Brown case is to be interpreted that no distinction can be made on the basis of race in the operation of Florida's school system, it is apparent that Section 239.41, Florida Statutes, will have to be revised if the state is to continue its policy of encouraging Negro as well as white students to enter the teaching field.

It is apparent that the overall problem of teacher shortages cannot be solved immediately by law. It can be solved eventually by provisions such as Section 239.41, Florida Statutes, which is calculated to encourage a larger number of people to qualify themselves as teachers. If Section 239.41, Florida Statutes, is revised, however, to preclude immediately any recognition of a difference in scholastic achievement between Negro and white applicants for teacher scholarships, such revision would make it virtually impossible for the great majority of Negro students in Florida to receive scholarships, and from an economic standpoint they form the group of potential teachers who need such assistance most.

The problem can be solved, however, by time, without working an undue hardship on Negro students or creating an even greater shortage of teachers in Florida.

Dr. Gilbert Porter, Executive Secretary of Florida State Teachers Association had this to say on the subject in addressing a meeting of Negro teachers in Tallahassee on August 19, 1954:

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"It is of no avail to blind ourselves to the marked difference in scholastic achievement between white and Negro students. This difference is not our fault, but it is there and must be recognized. If the doors to the state white universities were thrown open to Negro students today, it would make little difference because a great majority of Negro students could not pass an impartial entrance examination. We, as Negro teachers, can provide the only solution to this dilemma if given a reasonable amount of time, but it will mean an absolute dedication to his work on the part of every Negro teacher. Negro teachers can close the gap between Negro and white students if they will work hard enough. We have come a long way already in closing that gap and it can be closed completely within the foreseeable future if we will work hard enough. Any Negro teacher who is not willing to dedicate himself to this purpose should step out of the way because he is standing in the way of the progress of our race. Either we must remove this difference in scholastic standing or admit that we are inferior—and I will die and go to the hot place before I will ever admit that I am inferior."

Whatever is done by school officials and the Florida legislature to fit the Florida teacher scholarship act (Sec. 239.41, Florida Statutes) into the framework of the new concept of a non-segregated school system enunciated by the Court, should take into consideration the human rights and legal equities of members of the Negro race who would like to enter the one professional field which is now open to them on a large scale, and which they are now not only invited but urged to enter on a basis of absolute economic and professional equality. A strict legal application of the principle that no distinction can be made on the basis of race in public schools would necessarily have to ignore practical and human factors as they now exist which are of fundamental importance to the operation of a public school system in Florida. One thing is apparent. No equi-

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table and workable solution can be found unless sufficient time is permitted by the Court in the application of its decree abolishing segregated schools, to allow for an abatement of the problems involved and an equitable adjustment by the school system to so drastic a change in its basic structure.

(b) Powers and Duties of County School Boards

The problems which will necessarily confront the Florida legislature in revising the provision of Section 230.23, Florida Statutes,[1] alone, are so involved and complicated if practical questions of school administration are to be considered, that no immediate solution is feasible.

Section 230.23, Florida Statutes, provides the powers and duties of county school boards and establishes a framework within which they may authorize schools to be located and maintained. It provides in part:

> "Authorize schools to be located and maintained in those communities in the county where they are needed to accommodate as far as practicable and without unnecessary expense all the youth who should be entitled to the facilities of such schools, separate schools to be provided for white and Negro children; and approve the area from which children are to attend each such schools, such area to be known as the attendance area for that school . . . "

Bearing in mind that this provision of the law has been followed throughout the development of the Florida school system and the location of schools decided in accord with its intent, a simple repeal of this provision would provide no systematic guide or formula for local school boards to follow in attempting to redesign and reorganize the dual sys-

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1. See page 217, Appendix B.

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tem now in operation, which at present involves real estate estimated to be valued at $300,000,000 and a current building program now under way involving from $90,000,000 to $100,000,000,[1] into a single non-segregated system.

The conversion of this $300,000,000 school plant into a non-segregated system will clearly take a great deal of planning if the old primary factor of racial segregation is removed in school location, construction and operation.

The State Department of Education reports[2] that:

> "Florida provides annually $400 per instruction unit for Capital Outlay needs which for the 67 counties totaled $9,451,600 in 1953-54 and has been computed at $10,199,448 for the 1954-55 estimate. This money is spent in each county according to the needs recommended by a state-conducted school building survey. With the help of these individual county surveys it was estimated as of January, 1954 that $97,000,000 will be needed to provide facilities for white children and $50,000,000 will be needed to provide facilities for Negro children. Since the activation as of the effective date January 1, 1953 of a Constitutional Amendment providing for the issuance of revenue certificates by the State Board of Education against anticipated state Capital Outlay funds for the next thirty years more than $43,000,000 in state guaranteed bonds have been issued to provide additional facilities for both races. By the fall of 1954 there will have been a total of $70,000,000 of these bonds issued and in the foreseeable future the total will be $90,000,000 to $100,000,000. At the present time 2182 classrooms are under construction as a result of the issuance of these bonds."

The planning included in making necessary surveys, acquisition of sites, financing and engineering involved in the present construction program, although performed at top speed under the compulsion of a critical shortage of school

1. See page 188, Appendix A.
2. See page 187, Appendix A.

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buildings in Florida, is a continuing process and requires several years to carry out successfully.

Much of this school planning with regard to the allocation and use of existing structures as well as new construction will have to be re-evaluated and revised in accord with the entirely new and basic change to a non-segregated system.

These facts, when considered in the light of the overcrowded conditions now prevailing in many Florida schools, must be studied by the legislature and school officials in any effort to provide adequate administrative means of complying with the Court's decision. According to the State Department of Education, during the school year 1953-54, *eighty-one schools in 18 Florida counties were forced to operate double sessions because of the lack of classroom space and trained teachers.* In many instances to integrate immediately in particular schools would mean overcrowding of school facilities resulting in serious administrative problems too numerous to detail.

When these problems are further complicated by the drastic change in the legal framework of segregated schools in Florida, it is apparent that such factors should be recognized by the Court and sufficient time allowed for their orderly solution.

(c) State Board of Education and State Superintendent

A third example of the complex problems which will confront school officials and the Florida legislature in revising the framework of laws within which the school system can operate efficiently in compliance with the Brown decision is found in Sections 229.07,[1] 229.08,[2] Florida Statutes, relating to the authority and rule-making powers

1. See page 215, Appendix B.
2. See page 216, Appendix B.

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and duties of the State Board of Education; and Sections 229.16[3] and 229.17[4] relating to the duties of the State Superintendent of Public Instruction.

Although these provisions may not directly relate to segregated schools, they have in each instance been enacted and administered in accord with the basic provision of Florida law requiring a dual school system, and some revision will be necessary in the administrative powers granted therein in order to insure compliance with the Court's decree.

Specific problems in this regard are found in State Board Regulations adopted April 27, 1954 (page 154, State Board Regulations, page 219, Appendix B) related to the calculation of instruction units and salary allocations from the Foundation Program; State Board Regulation adopted March 21, 1950 (page 164, State Board Regulations, page 220, Appendix B), related to Administrative and Special Instructional Service; State Board Regulation adopted March 21, 1950 (page 171, State Board Regulations, page 221, Appendix B), related to units for supervisors of instruction; State Board Regulation adopted July 3, 1947 (page 28, State Board Regulations, page 226, Appendix B), related to School Advisory Committees; State Board Regulation adopted March 21, 1950 (page 148, State Board Regulations, page 228, Appendix B), related to the qualifications, duties and procedure for employment of supervisors of instruction; State Board Regulation adopted July 3, 1947 (page 156, State Board Regulations, page 232, Appendix B), related to isolated schools, State Board Regulation adopted July 21, 1953 (page 225, State Board Regulations, page 235, Appendix B), related to the distribution of general scholarships; State Board Regulation adopted July 3, 1947 (page 229, State Board Regulations, page 242, Appendix B), related to State Supervisory Services.

3. See page 216, Appendix B.
4. See page 217, Appendix B.

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II. DISCUSSION OF LEGISLATIVE ATTITUDES

In setting out these examples of legislative problems which will require reasonable time for solution, we do not intend to imply that the members of the Florida legislature are at present willing to accept a desegregated school system. In fact, from such information as is now available on this point there is reason to believe that members of the Florida legislature are to a large extent unsympathetic to the Court's decision in the Brown case. A survey of leadership opinion regarding segregation in Florida conducted by the Attorney General included the following statement in the survey report (page 126, Appendix A):

> "Although the 79 members of the state legislature who returned questionnaires constitute almost 45% of the 176 legislators and legislative nominees, to whom the forms were sent, generalizations as to the entire membership of the legislature on the basis of their responses are entirely unwarranted. Any attempt to predict the action of the legislature at its next session would be even more presumptuous. The responses of these legislators to two special questions asked of them are presented below as a matter of interest, however.
>
> "The legislators were asked to indicate which of five possible courses of action should be followed at the next session of the legislature. The percentage checking each course, and the details of the five courses of action, are shown in Table 20 (Appendix A). The legislators were also asked whether they believed that there is any legal way to continue segregation in Florida schools indefinitely. Of the 79 respondents, 34.20% replied 'yes', 25.31% replied 'no' and 39.32% answered 'Don't know' or gave no answer."

Table 20, Appendix A, indicates that 40.5% of the members of the legislature who responded to the questionnaire wanted to preserve segregation indefinitely by whatever means possible.

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It is even more significant that the Florida legislature in its 1951 session amended the appropriations act for the State Universities to provide that in the event Section 12 of Article 12 of the Florida Constitution shall be held unconstitutional by any court of competent jurisdiction or in the event the segregation of races as required by Section 12, Article 12 of the Florida Constitution should be disregarded, that no funds under the appropriations act shall be released to the Universities (page 683, Journal of the Florida House of Representatives, May 10, 1951). This amendment contained in Chapter 26859, General Laws of Florida, 1951, was vetoed by the Governor.

On the other hand, it is not our purpose to imply that the Florida legislature will refuse to take any action to provide a framework of laws designed to implement the Court's decision. Only the legislature itself under our form of government can determine what course of action it will pursue and we know of no way it can be coerced in making this determination except through the will of a majority of the people voiced through the ballot.

One thing seems apparent, however, under these circumstances. The Court upon equitable principles ought to extend to our legislature a reasonable period of forbearance during which the normal processes of legislative authority can be afforded time and opportunity to implement the Court's decision. The great multitude of problems the decision has created in the legal structure of our school system should warrant the Court in granting our legislature full opportunity to revise our school laws.

Such a period of forbearance is in keeping with the spirit of confidence which, under our system of democracy, is essential to maintain among the three branches of government. It is in keeping with the spirit of confidence which must be maintained between state governments and the Federation of States which has delegated to this Court

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its judicial authority. A fundamental precept in the practical workings of this spirit of confidence is the use of persuasion rather than coercion or compulsion. We believe that this Court will not attempt to use its powers of coercion precipitately and prematurely against any state whose legislature has not had time to revise its basic school laws to meet the requirements of transition.

Our Florida legislature under our Constitution does not convene again until April, 1955 for its biennial 60-day session.

Even at that session there may not be known the terms of the implementation pattern, since they are dependent upon whether the Court acts prior to April, 1955. Furthermore, whether the necessary spade-work and drafting of legislation to adequately provide for the transition can be accomplished within said session is largely a matter of conjecture, so multitudinous and complex are the problems.

We reiterate: the State, having so long relied on and lived under the Plessy doctrine, should have no unseemly haste visited upon its legislature in trying to meet the needs of transition, especially when it is considered by many to be, at best, a "bitter pill" for the legislature to swallow. Rather, the reasonable, considerate and tempered course would be to allow our legislature a requisite and ample period of time to study, debate and enact implementation legislation. This we believe the court from innate principles of equity will allow.

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B. The Need For Time In Revising Administrative Procedures

In addition to the problem of statutory revision, the Court should consider the need for time in adjusting the literally thousands of administrative policies and regulations of local school boards and school superintendents which have been formulated within the framework of law to meet local conditions in each of the 67 counties of Florida which will have to be revised and reorganized to conform to new legislative enactments resulting from the Brown decision. It is apparent that considerable time must be allowed before workable administrative policies of this kind can be evolved. Speaking to a group of Negro leaders in Jacksonville on July 30, 1954, Florida State School Superintendent Thomas D. Bailey, said:

> "As I see it, the ultimate problem is to establish a policy and a program which will preserve the public school system by having the support of the people. No system of public education will endure for long without public support. No program of desegregation in our public schools can be effective, unless the people in each community are in agreement in attempting it."

School board members, school trustees and school superintendents are elective officials in Florida. They are obviously well aware that any administrative policies they adopt implementing state laws enacted pursuant to the Brown decision must meet with at least some degree of acceptance on the part of the people in the community if they are to prove workable.

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I EXAMPLES

(a) Transportation

Perhaps the best example of this type of problem is the practical difficulties which will be encountered in converting the present dual school bus transportation system into a single system.

During the school year 1953-54 Florida's school system operated 2212 buses. These buses traveled 30,910,944 miles to transport 209,492 pupils at a cost of $4,506,667 (see page 186, Appendix A). These figures may be compared with Florida Greyhound Lines, the largest motor bus common carrier in Florida, which operates 175 buses in the state. A court order merging Florida Greyhound Lines with a competing line would necessarily allow a considerable period of time for revising routes and schedules to avoid duplication and insure maximum service to the public, but such a merger would be relatively uncomplicated compared to the problems involved in merging Florida's dual school bus system.

The problems of merging what amounts to two bus systems into one system without regard to race are obviously complicated. Hundreds of bus routes and schedules will have to be revised in line with the school redistricting which must take place. In accomplishing such a drastic revision of bus routes and schedules the *paramount factor in school bus transportation, i.e., safety,* must be considered at all times in the light of the fact that *discipline among the passengers is directly related to safety.* Discipline on school buses is maintained by one person, the driver. The ability of the driver to maintain discipline and a reasonable degree of safety while transporting mixed racial groups which may be antagonistic must clearly be considered in re-routing and re-scheduling school bus routes. Such consideration on the part of local school boards will require degrees

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of time in direct ratio to the complexity of the local situation in relation to the size and distribution of the Negro population and the intensity of opposition to desegregated schools on the part of the citizens.

(b) Redistricting

The redistricting of school attendance areas along normal geographic lines on the basis of a single school system rather than a dual system as it now exists is another problem which will require a great deal of time in proper planning and execution.

(c) Scholastic Standards

Perhaps an even greater problem which will confront school officials on both the state and county level is the maintenance of scholastic standards in the intermingling of two groups of students so widely divergent on the basis of achievement levels. According to the State Department of Education (see page 190, Appendix A):

> "A comparison of the performance of white and Negro high school seniors on a uniform placement-test battery given each spring in the high schools throughout the State of Florida is shown in Table 4, page 196, Appendix A. The number of participants corresponds with the total twelfth grade membership during the five-year period, 1949-1953. This table shows, for example, that on all five tests 59% of the Negroes rank no higher than the lowest 10% of the whites. On the general ability scale, the fifty percentile or mid-point on the white scale corresponds with the ninety-five percentile of the Negro scale. In other words, only 5% of the Negroes are above the mid-point of the white general ability level. Studies of grades at the University of Florida indicate that white high school seniors with placement test percentile ranks below fifty have less than a 50% likelihood of making satisfactory grades in college. While factors such as size of high

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school, adequacy of materials, economic level, and home environment are recognized as being contributing factors, no attempt is made here to analyze or measure the controlling factors."

In some large schools it is possible to divide students in the same age groups into different classes, taking into consideration their achievement level, but smaller schools do not have sufficient classroom space or teachers to make such a division possible. In the latter class of schools it is clear that an immediate and arbitrary intermingling of students falling into such widely divergent achievement level groups could only result in lowering the scholastic standards of the entire school and adding to the problems of discipline and instructional procedures. The Negro students would suffer if compelled to compete against white students of the same age but whose achievement level was 2 or 3 grades higher and the white students would be seriously retarded.

This problem is not insoluble and it is not advanced as a reason for permanent segregation in the schools. It is, however, a problem which must be taken into consideration by school officials in any attempt at integration of the races in the schools and it is a problem which will require careful planning, new techniques, and a great deal of time if it is to be solved without doing serious harm to both races and to the school system.

(d) Health and Moral Welfare

Still another example of school administrative problems in achieving an integrated school system is related to health and moral welfare. Writing in the Readers Digest, September, 1954, page 53, Mr. Hodding Carter, Editor and Publisher of the Delta Democrat Times, Greenville, Mississippi, said:

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"If only because of economic inequalities, there is a wide cultural gap between Negro and white in the South, and especially in those states where dwell the most Negroes. These heavily Negro states are also largely agrarian. Among the rural and small-town Negroes, the rates of near-illiteracy, of communicable diseases, of minor and major crimes are far higher than among the whites. The rural Negro's living standards, though rising are still low, and he is still easy-going in his morals, as witness the five to ten times higher incidence of extramarital households and illegitimacy among Negroes than among whites in the South. The Southern mother doesn't see a vision of a clean scrubbed little Negro child about to embark on a great adventure. She sees a symbol of the cultural lags of which she is more than just statistically aware."

Specifically, with regard to Florida, the State Board of Health reports that during the year 1953 there was a total of 58,262 white births in the state, of which 1,111 were illegitimate. During this same period there was a total of 21,825 Negro births of which 5,249 were illegitimate. Percentagewise, this means that 1.9% of white births in Florida during 1953 were illegitimate and 24% of Negro births were illegitimate[1].

According to the State Board of Health there was a total of 11,459 cases of gonorrhea reported in Florida during 1953 of which 10,206 were among the Negro population.[2] We feel that this cultural gap should be honestly recognized by both white and Negro leaders as a problem requiring time for solution rather than an arbitrary and blind refusal to admit that it exists or that it is related to public school administration.

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1. Annual Report, Florida State Board of Health for 1953, Supplement No. 1, Florida Vital Statistics.
2. Annual Report, Florida State Board of Health 1953, Supplement No. 2, Florida Morbidity Statistics 1953, Table No. 5, page 25.

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C. The Need For Time In Gaining Public Acceptance

There is a need for time in gaining public acceptance of desegregation because of the psychological and sociological effects of desegregation upon the community.

I. A SURVEY OF LEADERSHIP OPINION

A sincere and exhaustive effort has been made by the Attorney General of Florida to ascertain, as accurately as possible, the feelings of the people of Florida with regard to segregation in public schools. This survey was authorized by the Florida Cabinet which allocated $10,000 for the purpose. This effort was made primarily for the purpose of obtaining information which would be of use to the Court in formulating its final decree in the Brown case.

In making the survey and study, every possible precaution was taken to insure its impartiality and scientific accuracy. It was made with the advice and under the supervision of an interracial advisory committee composed of individuals chosen on the basis of their professional standing in the field of education; specialized knowledge which would be helpful in making such a study; reputation for civic-mindedness and impartiality and because they were willing to devote their time without pay in carrying out a task so enormous in scope in the brief time available. A more detailed explanation of the scientific methods and techniques employed in making this study is given with the

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complete survey report itself, which is made a part of this brief and included as Appendix A. The General Conclusions of this report are as follows:

II. GENERAL CONCLUSIONS

1. On the basis of data from all relevant sources included in this study, it is evident that in Florida white leadership opinion with reference to the Supreme Court's decision is far from being homogeneous. Approximately three-fourths of the white leaders polled disagree, in principle, with the decision. There are approximately 30% who violently disagree with the decision to the extent that they would refuse to cooperate with any move to end segregation or would actively oppose it. While the majority of white persons answering opposed the decision, it is also true that a large majority indicated they were willing to do what the courts and school officials decided.

2. A large majority of the Negro leaders acclaim the decision as being right.

3. Only a small minority of leaders of both races advocate immediate, complete desegregation. White leaders, if they accept the idea that segregation should be ended eventually, tend to advocate a very gradual, indefinite transition period, with a preparatory period of education. Negroes tend to advocate a gradual transition, but one beginning soon and lasting over a much shorter period of time.

4. There are definite variations between regions, counties, communities and sections of communities as to whether desegregation can be accomplished, even gradually, without conflict and public disorder. The analysis of trends in Negro registration and voting in primary elections, shows similar variations in the extent to which Negroes have availed themselves of the right to register and vote. At least some of these variations in voting behavior must be ac-

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counted for by white resistance to Negro political participation. This indicates that there are regional variations not only in racial attitudes but in overt action.

Regional, county and community variations in responses to questionnaires and interviews are sufficiently marked to suggest that in some communities desegregation could be undertaken now if local leaders so decided, but that in others widespread social disorder would result from immediate steps to end segregation. There would be problems, of course, in any area of the state, but these would be vastly greater in some areas than in others.

5. While a minority of both white and Negro leaders expect serious violence to occur if desegregation is attempted, there is a widespread lack of confidence in the ability of peace officers to maintain law and order if serious violence does start. This is especially true of the peace officers themselves, except in Dade County. This has important implications. While it is true that expressed attitudes are not necessarily predictive of actual behavior, there seems little doubt that there is a minority of whites who would actively and violently resist desegregation, especially immediate desegregation. It has been concluded from the analysis of experiences with desegregation in other areas, "A small minority may precipitate overt resistance or violent opposition to desegregation in spite of general acceptance or accommodation by the majority."[1]

6. Opposition of peace officers to desegregation, lack of confidence in their ability to maintain law and order in the face of violent resistance, and the existence of a positive relationship between these two opinions indicates that less than firm, positive action to prevent public disorder might be expected from many of the police, especially in some communities. Elected officials, county and school, also show

1. Kenneth B. Clark, "Findings," Journal of Social Issues, IX, No. 4 (1953), 50.

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a high degree of opposition. Yet it has been pointed out, again on the basis of experience in other states, that the accomplishment of efficient desegregation with a minimum of social disturbance depends upon:

A. A clear and unequivocal statement of policy by leaders with prestige and other authorities;
B. Firm enforcement of the changed policy by authorities and persistence in the execution of this policy in the face of initial resistance;
C. A willingness to deal with violations, attempted violations, and incitement to violations by a resort to the law and strong enforcement action;
D. A refusal of the authorities to resort to, engage in or tolerate subterfuges, gerrymandering or other devices for evading the principles and the fact of desegregation;
E. An appeal to the individuals concerned in terms of their religious principles of brotherhood and their acceptance of the American traditions of fair play and equal justice.

It may be concluded that the absence of a firm, enthusiastic public policy of making desegregation effective would create the type of situation in which attitudes would be most likely to be translated into action.[1]

7. In view of white feelings that immediate desegregation would not work and that to require it would constitute a negation of local autonomy, it may be postulated that the chances of developing firm official and, perhaps, public support for any program of desegregation would be maximized by a decree which would create the feeling that the Court recognizes local problems and will allow a gradual transition with some degree of local determination.

8. There is a strong likelihood that many white children would be withdrawn from public schools by their parents

1. Experience shows that where the steps listed above have been taken, predictions of serious social disturbances have not been borne out.

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and sent to private schools. It seems logical, however, that this practice would be confined primarily to families in the higher income brackets. As a result, a form of socio-economic class segregation might be substituted for racial segregation in education.

9. It is evident that a vast area of misunderstanding as to each other's feelings about segregation exists between the races. White leaders believe Negroes to be much more satisfied with segregation than Negroes are and Negro leaders believe that whites are much more willing to accept desegregation gracefully than whites proved to be. Hence a logical first step towards implementing the principle set forth by the Court, and one suggested by both whites and Negroes, would seem to be the taking of positive, cooperative steps to bridge this gap and establish better understanding between the two groups.

10. Although relatively few Negro leaders and teachers show concern about the problem, white answers indicate that Negro teachers would encounter great difficulty in obtaining employment in mixed schools. To the extent that desegregation might proceed without parallel changes in attitudes towards the employment of Negro teachers in mixed schools, economic and professional hardships would be worked on the many Negro teachers of Florida.

11. Since 1940, and particularly since 1947, the State of Florida has made rapid and steady progress toward the elimination of disparities between white and Negro educational facilities as measured by such tangible factors as teacher salaries, current expenditure per pupil, teacher qualifications, and capital outlay expenditure per pupil.

12. In spite of the current ambiguity as to the future of dual, "separate but equal" school facilities the State is proceeding with an extensive program of construction of new school facilities for both white and Negro pupils, with a

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recommended capital outlay of $370 per Negro pupil and $210 per white pupil. Both this and the previous finding indicate that, while these steps have been taken within the framework of a dual educational system, there is a sincere desire and willingness on the part of the elected officials and the people of Florida to furnish equal education for all children.

13. Available achievement test scores of white and Negro high school seniors in Florida indicate that, at least in the upper grades, many Negro pupils placed in classrooms with white pupils would find themselves set apart not only by color but by the quality of their work. It is not implied that these differences in scores have an innate racial basis, but it seems likely that they stem from differences in economic and cultural background extending far beyond the walls of the segregated school, into areas of activity not covered by this decision.

14. Interracial meetings and cooperative activities already engaged in by teachers and school administrators in many counties demonstrate steps that can be, and are being taken voluntarily and through local choice to contribute to the development of greater harmony and understanding between whites and Negroes in Florida communities.

The specific findings of this survey regarding leadership opinion as expressed through mailed questionnaires are:

1. White groups differ greatly from each other in their attitudes towards the Court's decision, ranging from nearly unanimous disagreement to a slight predominance of favorable attitudes. (See Table 2, page 136, Appendix A)

2. White groups also differ from each other in willingness to comply with whatever courts and school boards decide to do regardless of their personal feelings. (See Table 4, page 139, Appendix A)

3. Peace officers are the white group most opposed to desegregation. (See Table 3, page 138, Appendix A)

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4. Almost no whites believe that desegregation should be attempted immediately. (Table 2, page 136, Appendix A)

5. A large majority of both Negro groups are in agreement with the Court's decision declaring segregation unconstitutional. (Table 3, page 138, Appendix A)

6. While only a small minority of both Negro groups believe that desegregation should be attempted immediately, an even smaller minority would oppose attempts to bring about desegregation or refuse to cooperate. (Table 2, page 136, Appendix A)

7. Only a minority of whites in all groups believe that opponents of desegregation would resort to mob violence in trying to stop it. A larger proportion, but still a minority, believe that serious violence would result if desegregation were attempted in their community in the next few years. (Table 5, page 140, Appendix A)

8. A yet smaller minority of both of the Negro groups anticipate mob violence or serious violence as a result of steps towards desegregation. (Table 5, page 140, Appendix A)

9. The majority of all white groups are not sure that peace officers could cope with serious violence if it did occur in their communities, replying either "no" or "don't know" to the question. (Table 6, page 141, Appendix A)

10. A much smaller proportion of both Negro groups expresses doubt as to the ability of law enforcement officials to deal with serious violence. (Table 6, page 141, Appendix A)

11. The majority of most of the white groups believe that peace officers could maintain law and order if minor violence occurred. (Table 7, Appendix A)

12. The Negro groups did not differ greatly from the white groups in the proportion believing that police could cope with minor violence. (Table 7, Appendix A)

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13. Only 13.24 per cent of 1669 peace officers believe that most of the peace officers they know would enforce attendance laws for mixed schools.

14. A majority of the members of all white groups except peace officers, (who were not asked): radio station managers; and ministers, believe that most of the people of Florida and most of the white people in their communities disagree with the Court's decision. (Table 8, Appendix A)

15. In the five white groups asked, from one-fourth to one-half of the respondents believed that most of the Negroes in their community were opposed to the desegregation ruling. (Table 8, Appendix A)

16. A much smaller proportion of both Negro groups believe that most of the people of Florida, most of the whites in their community, and particularly the Negroes in their communities are in disagreement with the principle of desegregation. (Table 8, Appendix A)

17. Only a small minority of all groups, white and Negro believe that immediate assignment of children to schools on the basis of geographical location rather than race would be the most effective way of ending public school segregation. (Table 9, Appendix A)

18. All groups think a gradual program of desegregation would be most effective. Negroes, however, prefer that the process start within the next year or two with immediate, limited integration much more frequently than do whites. The whites prefer a very gradual transition with no specified time for action to begin. (Table 9, Appendix A)

19. Whites who expressed an opinion believe that the primary grades and the colleges are the levels on which desegregation could be initiated most easily. On the other hand, almost as many Negroes believed that segregation should be ended on most or all grade levels simultaneously as believed it should be ended first at the lowest and highest grade levels.

20. The maintenance of discipline in mixed classes by Negro teachers is regarded as a potential problem by a

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majority of white principals, supervisors and PTA leaders. A much smaller proportion of Negroes regarded this as a problem, with a majority of Negro principals believing that colored teachers could maintain discipline in mixed classes. (Table 11, Appendix A)

21. A majority of all white groups believe that white people would resist desegregation by withdrawing their children from the public schools, but a much smaller proportion of Negroes, less than a majority believe that this would happen. (Table 11, Appendix A)

22. Almost two-thirds of white school officials—superintendents, board members, and trustees—believe that application of Negroes to teach in mixed schools would be rejected. (Table 11, Appendix A)

It should be noted at this point that this opinion is supported by the experience of other states where desegregation of schools has already taken place. The August 27, 1954, issue of U. S. News and World Report, page 35, states, "In the north, protests from white parents tend to drive Negro teachers out of the schools to which their children go. The same thing is expected in the South when desegregation comes to the schools there. An illustration of what happens in the North is shown by the experience of Jeffersonville, Indiana. The town lies in the southern part of the State, just across the Ohio River from Kentucky. A great deal of Southern tradition and many Southern customs have reached across the river. Jeffersonville is just completing desegregation of its schools. There have been few unhappy incidents. But there has been a greater problem with teachers than with children in the schools. There were 16 Negro teachers in Jeffersonville when desegregation was started in 1948. By 1951 their number had dwindled to 11 as school enrollments were consolidated. For the school year starting in autumn, 1951, only three Negro teachers were retained. They had achieved permanent tenure under State law, and could be discharged only for cause."

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Florida now employs 19,848 persons in instructional positions not including supervisors. 4,721 of these teachers are Negroes. (Biennial Report, Superintendent of Public Instruction, State of Florida, 1950-51)

23. Nearly three-fourths of school officials believe that it would be difficult to get white teachers for mixed schools. (Table 11, Appendix A)

24. Almost half of school officials and a little over 40% of white PTA leaders believe that the people of their communities would not support taxes for desegregated schools, but only about 20% of Negro PTA leaders believe that such support would not be forthcoming. (Table 11, Appendix A)

25. In the case of all potential problems on which both Negroes and whites were questioned a smaller proportion of Negroes than of whites indicate belief that problems would arise as a result of desegregation. (Table 11, Appendix A)

26. In the case of peace officers there is a positive relationship between personal disagreement with the decision and lack of confidence in the ability of peace officers to cope with serious violence. There is an even higher positive relationship between belief that segregation should be kept and belief that peace officers would not enforce school attendance laws for mixed schools. (Table 12, Appendix A)

Regional Variations. The responses to certain items of the two largest groups polled, the peace officers and the white school principals and supervisors, were analyzed by region of the state in which the respondents lived. The 67 counties of Florida were grouped into 8 regions defined by social scientists at the Florida State University in "Florida Facts" (Tallahassee, Florida; School of Public Administration, The Florida State University).

Clear-cut regional variations in attitudes and opinions are found to exist, as is indicated by the following findings;

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27. Although the majority of peace officers in all regions feel that segregation should be kept, the percentage feeling so varies from 83% in two regions to 100% in one region. (Table 14, Appendix A)

28. The percentage of white principals and supervisors who are in disagreement with the decision varies from 20% to 60% in different regions. (Table 15, Appendix A)

29. A large majority of white principals and supervisors in all regions indicate that they would comply with the decision regardless of personal feelings, but the percentage varies from 76% in Region VII to approximately 94% in Regions VI and VIII. (Table 16, Appendix A)

30. The percentage of peace officers predicting mob violence as a method of resisting desegregation varies from 20% in Region VIII to nearly 63% in Region VII (Table 17, Appendix A).

31. Percentages of both peace officers and white principals and supervisors predicting serious violence in the event desegregation is attempted vary widely between some regions (Table 18, Appendix A).

32. The majority of both peace officers and white principals and supervisors in all regions doubt that the police could maintain law and order if serious violence occurred, but there are some regional variations. (Table 19, Appendix A)

A Note on Responses of Legislators. Although the 79 members of the state legislature and legislative nominees who returned questionnaires constitute almost 45 per cent of the 176 legislators to whom the forms were sent, generalizations as to the entire membership of the legislature on the basis of their responses are entirely unwarranted. Any attempt to predict the action of the legislature at its next session would be even more presumptuous. The responses of these legislators to two special questions asked of them are presented below as a matter of interest, however.

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The legislators were asked to indicate which of five possible courses of action should be followed at the next session of the legislature. The percentage checking each course, and the details of the five courses of action, are shown in Table 20.

The legislators were also asked whether they believed that there is any legal way to continue segregation in Florida schools indefinitely. Of the 79 respondents, 34.20 per cent replied "Yes," 25.31 per cent replied "No," and 39.32 per cent answered "Don't Know," or gave no answer.

III. THE DADE COUNTY REPORT

A separate intensive study was made by the Attorney General's Advisory Committee under the immediate supervision and direction of a research team from the Department of Government of the University of Miami. This study was made of the greater Miami area and some outlying sections in neighboring counties in the belief that this part of Florida might have different problems of integration from other parts of the state due to its geographic location and density of population. The results of this study are included as a part of the overall project and set out in Appendix A.

IV. DISCUSSION

The implications found in the Florida survey are many and varied but it is significant that to a remarkable extent they verify and coincide with the conclusions and observations set forth in the book by Mr. Harry S. Ashmore, "The Negro and the Schools". The book is the result of an exhaustive research study sponsored by the Ford Foundation for the Advancement of Education of the problem of segregation in the south as the title implies.

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For example, Mr. Ashmore states (page 81, "The Negro and the Schools):

> "The most important factor in integration of the public schools in the non-South, finally, is community attitudes. *It is axiomatic that separate schools can be merged only with great difficulty, if at all, when a great majority of the citizens who support them are actively opposed to the move.* (Italics supplied) No other public activity is so closely identified with local mores. Interest in the schools is universal, and it is an interest that directly involves not only the tax-payer but his family, and therefore his emotions. Those who are indifferent to all other community affairs tend to take a proprietary interest in the schools their children attend, or will attend, or have attended. State influence in public education has grown in recent years in proportion to the increase in state aid, but state policies rarely are so important as local forces in the shaping of public educational policies and practices. . . .
>
> "The most meticulous house-to-house poll in any American community with a sizeable Negro population would doubtless turn up a negative response to a proposal to integrate the separate public schools. In the case of the whites this might reflect deep-seated race prejudice, or it might be no more than the normal, instinctive resistance to any marked change in the accustomed patterns of everyday living. In many cases the basis of objection might be the demonstrable fact that the great majority of American Negroes are still slum-dwellers; many a parent who proudly considers himself wholly tolerant in racial matters will object to having his child associate with classmates of inferior economic and social background. It is probable that some resistance to integration would even be recorded among Negroes, who might respond negatively out of simple fear of the unknown, or the desire to protect their children against possible overt discrimination by white classmates or teachers. The great problem for schoolmen who have been moved to consider integration by their own convictions, or by the prodding of higher authority, has been to determine whether the passive

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resistance which they can readily sense will be translated into active resistance once the issue is drawn.

"In any event the superintendent who is called to take his school system from segregation to integration must be prepared to function as a *'social engineer'* (Italics supplied). He will deal on a mass scale with delicate problems of human relationships involving not only pupils and teachers but the community at large.

"These case studies demonstrate that wherever there has been an active and well-planned program to 'sell' integration to the community at large it has succeeded —but here again there is no way to measure just how difficult the selling job really was. The most notable examples are to be found in New Jersey, where a well-staffed state agency made it its business to work closely with those communities which had long practiced segregation and appeared resistant to the change required by the new constitution. Although New Jersey's Division Against Discrimination was armed with the power to withhold state funds and even to bring misdemeanor charges against school officials who refused to comply, it accomplished the integration of 40 formerly segregated school districts without invoking these powers in a single instance...

"At the other end of the scale is Cairo, Illinois, where the effort of the NAACP to force a reluctant school board to accept the state ban on segregation led to violence. Cairo in almost every aspect of its community life, may be classified as a 'sick city,' and there is no indication of anything approximating an orderly interracial approach to the problem either before or after integration became an explosive issue.

"Between these two extremes lie most of the non-Southern cities. They are, for the most part, beyond the reach of any possible decision of the Supreme Court in the test cases, for segregation in the schools of the non-South is now rarely bolstered by law, and where it is it would hardly miss the legal prop if it were struck down. Desegregation is proceeding there at a rate determined by the willingness of individual communi-

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ties to accept the change—or by the willingness of community leaders to put the issue to the test."

The same recognition of the problems involved in desegregation and the obvious need for adequate time to give local school administrators an opportunity to devise plans and means of overcoming the problems is found in the thinking of almost all authorities who have made a study of the subject.

In discussing the Problems of Desegregation, Dr. Truman M. Pierce, Professor of Education, George Peabody College for Teachers, and Director of the Cooperative Program in Educational Administration (Southern Region) had this to say (see page 91 Journal of Public Law, Emory University Law School, Vol. 3, Spring 1954, Number 1).

"People respond well, in general, to the opportunity of discussing with each other mutual concerns and interests. Controversial subjects discussed in the public arena under skillful leadership can often be resolved with a minimum of conflict. Effective public forums on the community level provide experiences in self-government which can hardly be surpassed in satisfactions which they bring and in progress they stimulate. However, questions tinged with a high degree of emotionalism offer ready-made opportunities for rabble rousers and self-seekers to do serious harm. Consequently, the calm, sane and relatively objective approach, which can be expected from most of the substantial citizens of the average community, is essential in the types of discussion suggested. It is hardly necessary to point out that such public forums should avoid emotional binges and concentrate on the study of facts. The third principle is that responsible and public spirited citizens of both races should discuss together the facts concerning their school system and together make plans for its improvement. This does not imply that the board of education should be by-passed, for final policy must be determined by this legally constituted body.

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> *"Ill-advised and hasty action, determined without benefit of a period in which calm deliberation takes place* (Italics supplied) can do more harm than good. Urgency need never take precedence over wisdom. Piecemeal and stopgap policies are likely to prove unsound and wasteful in the long run. Therefore, the final principle which is suggested is that extensive policy setting based on thorough study and careful thought should provide the framework for a thorough and comprehensive program of work extending as far into the future as is practical."

Dr. Howard W. Odum,[1] in discussing "An approach to diagnosis and direction of the problem of Negro segregation in the public schools of the South" says (Journal of Public Law, Emory University Law School, Vol. 3, Spring 1954, No. 1, page 34):

> "Final assumptions must rest upon continuing exploration, education, testing grounds for federal and state programs, and for a working balance between voluntaristic and coercive action. For, from special studies, general observations, and recorded experiences, it must be clear that all our exhibits of evidence appear as a sort of tug of war, now moving this way, now that. The real definition of the situation comes back again and again to inferences about issues, cultural values that are characteristic of the region, and to exploration and survey, projection of trends and predictions, and potentials that can be identified with alternatives. In this dilemma it would seem that never have the old classical, 'On the one hand and on the other,' and 'but also,' appeared to carry such a multitude of dichotomies, paired contradictions, major premises assumed, 'ands,' 'ors,' and 'buts,' in the loom of interaction processes. And rarely ever have we run across so many generalizations based upon so little basic research or tested observations. All of this is

1. Professor of Sociology, University of North Carolina; past president of the American Sociological Society; editor, Social Forces; author, American Sociology (1951) and other books.

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relevant not only to the elemental cataloguing of facts and the appraisal of causal factors, but to the orientation of value judgments and strategy priorities."

Everyone concerned in the State of Florida with the problems inherent in any attempt to desegregate schools, whether he be a member of the legislature or a school official cannot help but be aware that any change which is undertaken from the status quo must be made with at least the passive approval of the people in the community who will be affected by the change. Mr. Ashmore (The Negro and the Schools, page 135) states:

> *"Finally, there is the hard fact that integration in a meaningful sense cannot be achieved by the mere physical presence of children of two races in a single classroom. No public school is isolated from the community that supports it, and if the very composition of its classes is subject to deep-seated and sustained public disapproval, it is hardly likely to foster the spirit of united effort essential to learning. Even those who are dedicated to the proposition that the common good demands the end of segregation in education cannot be unaware that if the transition produces martyrs they will be the young children who must bear the brunt of spiritual conflict."*

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D. Intangibles In Education

This Court has recognized the validity and significance of certain intangibles in education. Quoting from the Brown decision it said "In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school'.

"In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ' . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.'

"Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The legislature of Florida was motivated by the same consideration of "intangibles" in education when it enacted Section 242.46, Florida Statutes. This law prohibits secret societies including fraternities and sororities in the public schools. The legislature and school officials recognized that in some instances fraternities generated feelings

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of snobbishness on the part of the members and feelings of inferiority on the part of those not invited to join. It was considered that these feelings might in the words of the court "affect their hearts and minds in a way unlikely ever to be undone."

We believe that this Court should recognize the validity and significance in education of other "intangible considerations" which may result from a precipitate attempt to compel desegregated schools in all areas of Florida. It is obvious that children reflect in their attitudes much of the same deep-seated prejudices and antagonisms felt by their parents. In the many areas of Florida where these feelings are known to exist no school administrator could compel an immediate desegregation without the certain knowledge that he was placing the children in a situation which could only result in generating feelings of hatred, inferiority and bias which would "affect their hearts and minds in a way unlikely ever to be undone."

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E. Reason for Hope

There is some reason to believe that segregated schools can be ended in Florida in an equitable manner without destroying the school system itself. But there is no reason to believe that this can be accomplished hurriedly or through the legal coercion of school officials who would thus find themselves caught in the impossible dilemma of confronting on the one hand the irresistible force of a judicial edict which must be obeyed and on the other hand the immovable object of public opinion which cannot be altered. The only hope for a solution is for this Court to restrain the use of coercive measures where necessary until the hard core of public opinion has softened to the extent that there can be at least some measure of acceptance on the part of a majority of the people.

This recognition of the need for time and tact and wisdom in bringing about a true realization of the goal set by this Court, is shared by leaders of both the white and Negro races in Florida.

Dr. Mary McLeod Bethune, founder of Bethune-Cookman College at Daytona Beach, Florida, and a recognized leader of the Negro people throughout the nation for many years, stated in a press release soon after the announcement of this Court's decree in the Brown case:

> "... The High Tribunal has put a legal foundation under a belief many of us have long held and which is clearly and concisely stated in the most basic American ideal, 'All men are created equal.'

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"In quietness and patience, people of culture receive this news, realizing the inevitable has at last come about. They also realize, however, that the absorption into our daily life of this new decision—the putting of it into practice—must represent an organic cultural assimilation which, like all social processes, will take time. But eventually the wrongs and mistakes of history are righted and remedied and inhumanities are rectified. .... Let us enter into this integration calmly, with good judgment. Let us give and take, working out together the best possible means we can put into action so that there may be peace and understanding, and, may I say, the spirit of brotherhood.

"There is much for the Negro to do as well as the white. We must use tact and wisdom. It will take conferences, thinking and planning and working side by side. More largely than is realized, we are good, loyal, American citizens. And whether we be north, east, south or west, we shall put forth every effort to meet the requirements of our new status."

There is reason to believe that given the opportunity for voluntary local action and sufficient time an effort will be made on the part of educational leaders of both races in Florida to work together to achieve the goal set by the Court.

United States Senator Spessard L. Holland of Florida, speaking of desegregation, said in a press interview (Tampa Tribune, August 28, 1954, page 1):

"We cannot spend all our time in vain regrets, but rather time must be spent in trying, as apparently the State Cabinet has been doing along with officials and educators of both races at the local level, to learn how to bring it about."

On July 15 and 16, 1954, the Continuing Educational Council of Florida met in Tallahassee to consider the problem of desegregation. This Council is composed of representatives from virtually all civic, labor, veteran and edu-

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cational organizations in the state. Seventy members of the Council were present at the Tallahassee meeting and the future course of Florida schools in the light of the Court's decision in the Brown case was discussed for two days. At the end of its deliberations the Council adopted the following motion:

> "Based on information and reports at this time, the Council joins with the request of the State Cabinet, heretofore made, whereby the Attorney General of Florida take every step necessary to prepare and file a brief which Florida and several other states have been invited to submit when consideration is given this October to the 'when' and 'how' provisions of the Court's judgment in the recent decision holding segregation unconstitutional. It now appears that this brief should emphasize among other things the following: 1. The maximum time possible should be granted the states affected. 2. Compliance with regard to time should be on a local basis; the time requirement because of mores and conditions will vary within counties of each state. 3. Enforcement provisions of the judgment's requirements should be left to the Courts of first instance."

Additional agreements which were reached by a large majority of the Council in discussion of the Supreme Court decision on segregation were as follows:

1. "The public school system of Florida should be maintained and improved. Nothing should be done which will destroy these schools or cause them to retrogress in any way."

2. "The citizens of Florida will wish to abide by the laws of our nation, but time for necessary adjustments is essential if serious problems are to be avoided."

3. "The problems of adjustment are different in each county and in various communities within each county. Responsibility for solution of these problems rests with the citizens and authorities within these local areas."

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4. "A committee from the Continuing Educational Council, with outside representation as well, is to be appointed. Its function is to suggest multiple plans by which desegregation may be implemented. Among the ideas developed would be the suggestion that local groups of white and Negro citizens make careful appraisal of existing conditions with the idea of proceeding gradually and in an orderly manner toward compliance with our National Constitution."

5. "A committee of nine representatives from the Continuing Educational Council is to meet with a representative group of State Negro leaders for the purpose of developing a joint statement to serve as a guide to both races in working out the problems ahead."

On July 30th, 1954, fifty representative Florida Negro leaders met at Edward Waters College in Jacksonville to study the problem of integration of Florida schools. As a result of this meeting a committee of nine was selected to meet with a similar committee of the Continuing Educational Council of Florida for the purpose of studying ways and means of implementing the Supreme Court's decision in Florida.

On September 10, 1954, a committee representing the Continuing Educational Council, and a committee representing the Leadership Conference, a recently convened meeting of Negro leaders, met in Tallahassee to consider jointly some of the problems posed by the recent Supreme Court decision that segregation in the public schools is unconstitutional.

After lengthy consideration and frank discussions of the various viewpoints of both whites and Negroes, the joint committees agreed upon the following motion:

"1. THAT, in a democratic society, public education is of paramount importance;

THAT the State of Florida has made significant gains

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in recent years in the quality of its educational program and in the educational opportunities for all the youth of the State;

THAT the State of Florida cannot afford the educational or economic loss which would occur if we permitted a disruption of this program;

THEREFORE, we believe that we must maintain and support a strong system of public education for all the youths of the State and that the citizens of Florida in their local contacts, through constant education and study, should work for the general education of all the people as prescribed by the laws of our State and Nation.

2. THAT we endorse the filing of the proposed brief by the Attorney General for the purpose of preserving the system of public education in the State of Florida when a final interpretation has been rendered by the Supreme Court.

3. THAT we urge this Committee to continue to work on the processes necessary for ultimate compliance with the law;

THAT we encourage the organization of similar groups at the local level, i.e., school community by school community, to work toward the same objectives."

The motion was approved unanimously.

The Lakeland Ledger in an editorial August 29, 1954 said:

"In his annual speech to his home folk in Bartow on Friday, Senator Holland took occasion to talk about abolition of segregation in public schools...

"That attitude is the only one with which the problem now at hand can be solved, and it is the attitude of all clear thinking citizens in the South.

"If the process is not rushed, there will be a good chance of making the adjustment harmoniously over a period of years.

"If forces in the North that are unfamiliar with con-

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ditions in the South insist upon rushing matters, there is certain to be harmful friction.

"The level-headed view such as that expressed by Senator Holland must prevail."

The Tampa Morning Tribune in an editorial August 26, 1954, said:

"In the brief which he is preparing to submit to the Supreme Court by October 1, Attorney General Ervin asks the court to go slow in ordering actual compliance with its edict of May 17 outlawing segregation. Mr. Ervin said:

'My purpose in filing the brief is to try to show the court that Florida, from practical considerations, is not ready for desegregation immediately, but that if it must come eventually, it should come only after a reasonable period of time and then only on a county to county or local basis pursuant to administrative determinations made by local school authorities. It is entirely possible that if the court will authorize this course many of the situations will not be too difficult to solve, given time to work them out.'

"That, in our view, is sound sense and should appeal to the judgment of the high court. It is apparent that a change in the existing order can be effected only through careful and patient effort, on a local basis. Also it may prove necessary to have action by the Florida Legislature to properly implement the change. The essential issue is the dividing line between federal and state authority."

The St. Petersburg Times of August 27, 1954, reported a speech by County School Superintendent Floyd Christian of Pinellas County to a meeting of Negro school teachers, as follows:

"Pinellas County Negro teachers were urged as leaders of the community 'to work patiently, calmly and sensibly' on the segregation problem so that all can con-

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tinue working together for the growth of the community...

"We live under the law and must follow the law. Rioting, hatred and action would wreck our school system and is not the answer. Florida must never try to abolish public education. Turning the schools into private institutions is certainly not the answer. Any such action would prove disastrous to the quality of education and in the end would be judged by the Supreme Court as being an effort to circumvent the provisions of the Constitution of the United States.

"What I am saying is in my opinion Florida should not try to circumvent the law. Any such action would encourage an attitude of general disregard for law and in the long run will only increase the difficulties without contributing anything toward the solution of the problem...

"There is another reason why this problem will have to be approached with education and understanding. I don't believe that here in the South, where you have had separate schools for nearly a hundred years, that an immediate court decision to stop it and integrate the students can be done successfully. I don't believe you can legislate the people into doing this, they will have to be led by a systematic plan of education and this, of course, will take time."

The Ft. Myers News-Press in an editorial August 28, 1954, said:

"A number of Fort Myers citizens have received by mail this week circular letters purporting to come from the Ku Klux Klan which attempt to fan the flames of racial intolerance over the school segregation issue and make a bid for Klan recruits.

"The letters enclose an application blank for membership in the Klan returnable to an Orlando post office box. Whether they represent a bona fide recruiting drive by the Klan or just an effort of some crackpot or promoter trying to cash in on the current anxiety over prospective desegregation in the schools, the re-

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cipients have no way of knowing, although Orlando always has been a hotbed of Ku Kluxism and the application blank probably is genuine.

"There is nothing doubtful, however, about the hate literature enclosed with the KKK circulars. The fat envelopes—so bulky that most recipients had to pay an extra three cents postage due—were crammed with highly inflammatory articles against the Negro race and slanders against various public officials and individuals fit only for the sewer. In the delicate situation which now confronts both whites and Negroes arising from the Supreme Court anti-segregation ruling—a situation that calls for all the calmness and clear thinking that can be mustered—outpourings such as this are not only unhelpful but dangerous."

The Orlando Sentinel in an editorial August 19, 1954, said:

"As a result of a survey recently completed by an interracial committee appointed by the attorney general, it has been made perfectly clear that even in Florida many people of both groups are not ready to send their children to the same school together, and that law enforcement agencies are not prepared to enforce such laws or to prevent the violence which would arise under such circumstances.

"The problem varies from community to community just as it does from state to state and the difficulty increases in direct ratio to the number of Negroes present. It would be a relatively simple matter to enforce desegregation in a community where there would be only one or two Negroes in a classroom, as would be the case in most northern cities. It is not so simple where the numbers of the two races are more nearly equal.

"This happens to be the case in many of our smaller north and west Florida towns, as well as in most of the rural areas of South Carolina, Georgia, Alabama and Mississippi. In some Florida cities, however, particularly in South Florida, there are relatively few Negroes and the opposition to their admittance to white schools is not so prevalent.

"Clearly it would be unfair to expect public officials to overcome the problems of integration all at the same time without regard to the difficulties involved. The Supreme Court should take cognizance of the inherent differences among individuals as among communities and leave the problem of when desegregation can safely be accomplished to local authorities."

The Miami Herald in an editorial of May 24, 1954, said:

"Anticipating that the United States Supreme court might end segregation in the schools, as it did last week, Florida leaders have been quietly taking stock of the state's educational resources.

"They recognized that the change, when it came, would be the most momentous since the War Between the States, and no family would escape its effects.

"What this study showed was that Florida has made more progress in Negro education, probably, than any other state with segregation, and is in a better position to meet the challenge of the court ruling."

These meetings and examples of editorial opinion may appear insignificant but when considered in relation to the fact that they took place in a State which still has three counties where no Negroes have registered to vote (see page 178, Appendix A), and whose peace officers are overwhelmingly opposed to desegregation in any form (see Table 3, page 138, Appendix A), they should not be ignored. *We believe that any attempt to compel an immediate desegregation in Florida schools would constitute a shock treatment so drastic that any further efforts on the part of these and similar groups would be promptly nullified.* Such efforts on the part of citizens' committees of both races can only take place as voluntary manifestations of good citizenship. They cannot take place in an atmosphere of fear and coercion.

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F. Regional Variations

One of the most important factors which has emerged from our study of the segregation problem in Florida is the clear indication of marked regional variations in the intensity of the feelings of the people.

The State of Florida is unlike other Southern states in one significant respect. Geographically it is large and sprawled out over an area of a thousand miles extending from Pensacola in West Florida to Key West on the southernmost tip.

Between these two extremes can be found startling differences in the social customs and traditions of the people inhabiting the various counties.

Generally speaking, the influx of people from northern states has tended to settle in South Florida and this has altered to some extent the social pattern of South Florida counties, whereas North and West Florida counties have remained to a large extent populated by people of Florida or Southern ancestry who cling to Southern traditions and customs.

It must be emphasized, however, that this type of generalization is apt to be misleading because counties and communities may be found in South Florida where the degree of racial differences in feeling may be even more pronounced than in the northern part of the state.

These variations indicate that there may be communities

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in Florida where conditions are such that local school officials would feel justified in proceeding within a relatively short time to integrate the white and Negro schools. On the other hand, there are many counties, notably those having a large Negro population, where it is apparent that any attempt to bring about immediate desegregation would result in violence and bring the school system to a complete standstill.

These variations in community attitudes and conditions preclude the practicability of any overall, statewide detailed plan, time schedule or target date for desegregation which might be evolved. We believe that whatever plan and time schedule is adopted in each community must, if it is to be workable, have been produced through the efforts of the local school officials who understand the specific problems involved and who must be willing to undertake to make the plan work. We do not believe that the courts should undertake to perform the functions of local school boards and we do not believe that this Court should insist on a plan of action which, in its efforts to guard the rights of some, must necessarily forsake the rights of all others.

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G. Discussion

In suggesting an affirmative answer to question 4B, we have attempted to take into consideration the wide range and complexity of the problem. We know that from its common-sense practical aspects a successful implementation requires the blending of the best administrative and judicial techniques over a reasonable period of time which will vary in each school district or county, dependent upon the circumstances. Admitted that segregation has been held unconstitutional as a class discrimination, that does not mean that transition to the actuality of non-segregated education can be accomplished immediately or without planning and preparation and administrative actions.

The public welfare of the segregated states is involved in the transition along with administrative details. It would be unwise not to permit the exercise of reasonable regulations under the police power during the transitional period in the interest of peace in the community and good order and safety in the schools. The white people of the segregated states have too long relied upon the doctrines expressed in *Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896)* to be expected to accept complacently the new order. Our survey amply bears this out.

Therefore, we most earnestly and sincerely urge the Court to permit that degree of latitude necessary to the segregated states and the county school boards therein to bring about an effective gradual adjustment to integration so as to soften and ameliorate the transition and preserve peace and order in the communities and the

schools in the process and that these officials be accorded the discretion to make the transition successfully and *effectively* in good time and good order.

Even though it has been held the Negro child should not be discriminated against in his public education nor unduly postponed in his enjoyment of it, surely that right is not so absolute, so compelling in its nature, that reasonable administrative procedures necessary for the public welfare cannot be asserted during the transition period. If there ever was a condition which needs elasticity in the application of constitutional guaranties to meet it, certainly it is the transition period from the segregated school system to the non-segregated school system in the various schools of the South.

By a concurrent application of prudent and sensible administrative and judicial techniques the problem may eventually be solved. But the Court should always allow the states involved and their officials, both state and local, the opportunity to first work out the problem and accord to their determinations a wide degree of discretion and latitude in the integration. The Court has said in *Minersville School District v. Gobitis,* 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, (1940), it would not make itself the school board of the country. That does not mean the Court, beginning with the court of first instance, would not always reserve the judicial authority to review and probe. It would exercise this authority where in proper cases duly brought it was alleged the county school board had not made the requisite effort in good faith to desegregate in line with appropriate criteria or factors which we believe the Court will outline in its implementation decision. Parenthetically and most earnestly, we urge the Court to accept the factors we have outlined, believing them to be essential to successful implementation in the light of problems involved.

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Part Two

Specific Suggestions to the Court in Formulating a Decree

We do not suggest delay merely for the sake of delay itself. We do suggest that sufficient time be permitted for a gradual effective adjustment to desegregated schools to take place in each community.

The period of time required will vary in each community dependent upon its administrative problems and the attitude of its people. The length of this period of transition in each instance can only be determined by the local school authorities subject to the review of the courts of first instance when called upon to consider specific suits brought because of a disagreement with the school authorities over admission policies.

We do not believe that any court should at any time attempt to peremptorily compel school officials to integrate schools in a community when it is apparent that such action will create hostility and resentment to such a degree that the schools cannot be operated in an orderly manner.

We believe that any attempt to establish an overall specific plan for desegregation by the United States Supreme Court as a result of recommendations of a special master would be totally unrealistic and would in effect place this Court in the position of attempting to function as the county school board of the counties affected.

We believe that the courts of first instance should also avoid any attempt to exercise administrative powers normally delegated to school officials. They should not be

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required to spell out in specific detail the means by which they would require a school district to comply with the new requirements of the law. Rather, let them leave to responsible local school authorities the task of drafting plans for transition, and then apply to each such plan presented in the course of litigation the test of good faith.

Widespread white hostility to immediate, enforced integration of the public schools is a fact of life in Florida, and is just as real a factor in considering the future of public education as school finance, school construction or any other.

We ask only this; that school officials not be deprived of the right to recognize local factors related to the welfare of public schools and to exercise the same discretion in dealing with the feelings of the people regarding segregation that they would exercise in dealing with any other local condition or problem that directly affected the proper operation of the public schools.

We urge, therefore, that the Supreme Court remand these cases to the courts of first instance—in all but one of these cases federal district courts—and that it vest in the courts of first instance broad discretionary powers to determine as findings of fact (1) what should be a reasonable time for transition in any given case, and (2) whether or not specific plans for compliance with the Court's general directive prepared by responsible local school officials measure up to the broad test of good faith.

We offer the following specific suggestions for the consideration of the Court in the formulation of its decree:

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Specific Suggestions

I. It is suggested that the United States Supreme Court in its implementation decision or decree adopt the procedure contemplated in questions 4 (b) and 5 (d) as stated in the footnote in the Brown decision:

> "4 (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"
>
> "5 (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

II. It is suggested that the United States Supreme Court in its implementation decision in the Brown case direct that the courts of first instance consider all suits brought to gain admittance to a specific school and claiming discrimination because of color, in accord with the following general directions:

A. The petitioner must affirmatively show;

(1) That admission to the school in question was requested by the petitioner within a reasonable time before the beginning of the school term.

(2) That the petitioner resides within the limits set by normal geographic school districting of the school he seeks to enter.

(3) That admission to said school was denied by the local school authorities and that all other administrative remedies such as appeal to the State Board of Education (where provided by law) have been exhausted.

B. It is suggested that the court of first instance conduct hearings, take testimony, determine the merits of the petition and the answer thereto and the equitable reasons which may exist which would justify the school authorities in refusing to approve the petitioner's application for admission to the school in question. In conducting such proceedings, the court should consider:

(1) Evidence as to whether the state school authorities and legislature have had a reasonable amount of time to reorganize the legal provisions of the state school structure to comply with the Brown decision.

(2) Evidence of good faith on the part of the school authorities in seeking to comply with the Brown decision and integrate the public schools. Such evidence should include:

(a) Efforts previously made and in progress to overcome practical, administrative problems encountered in integrating schools as proclaimed by this Court.

(b) Efforts previously made and in progress to promote citizens' educational committees and interracial committees for the purpose of improving racial relations in the community and avoiding racial antagonisms in the schools.

(3) Evidence and recommendations submitted by interracial citizens' committees which may be organized pursuant to law for the purpose of assisting the local school authorities, or evidence and recommendations submitted by impartial survey and fact-finding teams which may be created by the State Board of Education pursuant to its administrative powers.

(4) Evidence of existing administrative problems

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of integration which have not as yet been solved and which would jeopardize the efficient operation of the school system if the petitioner's application for admission was granted immediately.

(5) Evidence of such a strong degree of sincere opposition and sustained hostility on the part of the public to the granting of the petitioner's application, as to give the school authorities reasonable grounds to believe that immediate approval of the petitioner's application would cause a disruption of the school system or create emotional responses among the children which would seriously interfere with their education. Such evidence should be carefully analyzed by the court to determine its validity and all evidence of this nature which might appear to be simulated or fabricated for the purpose of continuing segregated schools in the community should be rejected.

(6) Evidence that the petitioner's application was made in good faith and not for capricious reasons. Such evidence should demonstrate:

(a) That the petitioner personally feels that he would be handicapped in his education, either because of lack of school plant facilities or psychological or sociological reasons if his application for admission is denied.

(b) That the petitioner is not motivated in his application solely by a desire for the advancement of a racial group on economic, social or political grounds, as distinguished from his personal legal right to equality in public school education as guaranteed by the 14th Amendment. This distinction should be carefully drawn. This Court has ruled that segregated schools are forbidden by the 14th Amendment because they may deprive the Negro of an equal opportunity in acquiring an education. During the process of desegregating schools it should always be kept in mind that the sole legal purpose of public schools is to educate. The public school system has never been permitted under Florida law to extend its activities into the

field of public welfare or related purposes. It is not the purpose or within the legal authority of the Florida public school system to provide a direct means of improving the social, political or economic status of any group or individual except as such improvement may in time result from education itself. Public schools are not intended to provide experiments in race relations or to use children as sociological guinea pigs in the solution of problems in many walks of life which adults have not been able to solve by other means.

III. It is suggested that based upon the testimony and evidence submitted, the court of first instance may either:

(A) Order that the petitioner's application for admission to the school in question be granted forthwith, if it appears that the petition was made in good faith and that there exist no reasonable grounds for delay on the part of the school board in approving the petitioner's application for admission.

(B) Dismiss the petition if it appears that it was not made in good faith and well founded in law according to the interpretation of the 14th Amendment by this court in the Brown case.

(C) Order the school authorities to hold the petitioner's application in abeyance for a reasonable period of time to allow for further adjustment to a single school system if necessary, with directions to the school authorities to proceed to overcome as soon as possible the practical or psychological and sociological factors which prevent an immediate approval of the petitioner's application.

If the latter alternative is found to be necessary by the court it should include in its order the following:

(1) Fix a time for rehearing of the petitioner's application by the court within a stated reasonable time at which hearing additional testimony and evidence will be received and the circumstances justifying delay in approving the petitioner's application for

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admission will be re-evaluated by the court in the light of altered conditions and a supplemental order entered in the case in accord with the findings of the court.

(2) Direct the school authorities to formulate and submit to the court within a reasonable time a plan designed to overcome the practical and psychological obstacles which tend to prevent an immediate integration of the schools under their jurisdiction. The effectiveness of the plan submitted and the efforts which the school authorities have made in good faith to carry it out should be considered by the court on subsequent rehearing of the case in determining whether additional delay is justified in granting the petitioner's application for admission.

Part Three

Legal Authority of the Court to Permit a Period of Gradual Adjustment and Broad Powers of Administrative Discretion on the Part of Local School Authorities.

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A. Judicial Cases Permitting Time

Many decisions of the United States Supreme Court and the State Supreme Courts have recognized the necessity for granting a reasonable time in which to comply with the decree of the Court to avoid hardship or injury to public or private interests.

The present decision requires more consideration of the problem of *time* and adjustment than in the earlier cases since it is apparent that it involves a vast problem of human engineering, as contrasted to previous delays for adjustment granted in anti-trust cases, nuisance cases, and similar cases where economic problems of great magnitude confronted the courts.

I. *United States v. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911).* Recognizing the need for adjustment to its remedies in dealing with the unlawful combinations under the Sherman Anti-Trust Act, the Court, in order to avoid and mitigate possible injury to the interest of the general public, decreed the commercial combination to be illegal; and directed the Court below to hear the parties, ascertain, and determine a plan or method of dissolution, and to recreate a condition in harmony in law. To accomplish this, the Court granted a reasonable period (8 months) to effectuate its decree, while prohibiting any enlargement of the corporation's monopoly during this period.

Briefly stated, six months, with a possible extension of

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sixty days, was granted in which to work out a plan for dissolving a combination found to control the tobacco industry in violation of the Anti-Trust Act of July 2, 1890 *(26 State at L. 209, Ch. 647, USC Title 15, s1)*, and creating out of the elements composing it a condition which would not be repugnant to the prohibitions of the Act.

II. *In Standard Oil Co. v. U. S., 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1910)*, the Court again recognized the need for *time* in putting into effect its decision. In this case Chief Justice White stated that the magnitude of the interests involved and their complexity required that six months be given in which to execute a decree for the dissolution of a holding company controlling the oil industry in violation of the Anti-Trust Act of July 2, 1890, and for the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

In the area of nuisance litigation, the Supreme Court has often recognized the need for a period of gradual transition in order to effectuate decisions. In the Case of *New Jersey v. New York, 283 U. S. 473, 75 L. Ed. 1176, 51 S. Ct. 519, (1931)*, the State of New Jersey sued New York City in the United States Supreme Court for an injunction restricting the dumping of New York City's garbage into the ocean off the New Jersey coast. Injunction was granted in the opinion by Butler, J., affirming a special master's report. A decree was entered, declaring that the plaintiff State of New Jersey was entitled to an injunction as sought in the complaint; *but that before* (italics supplied) an injunction was issued, a *reasonable time would be accorded* to the defendant, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the waste materials which were being dumped off the New Jersey coast, or to provide other means to be approved by the decree for the disposal of such materials.

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Reasonable time was a question of fact to be decided upon by the same special master, after hearing and evaluating all witnesses' testimonies from each party or witnesses which the master may select to be heard. The master was then to report to the court his findings and a form of decree. On a rehearing of the case on *December 7, 1931, (284 U. S. 585, 75 L. Ed. 506, 52 S. Ct. 120)* a decree was entered by the Supreme Court prohibiting any further dumping of refuse, etc., into the ocean off the coast of New Jersey. Said decree was to become effective on and after *June 1, 1933,* and progress reports were to be filed with the clerk of the Supreme Court on April 1 and October 1 of each year beginning April 1, 1932, setting forth the progress made in the construction of incinerator plants, etc., for the final disposition of garbage and refuse, and also the amount of material dumped at sea during the periods covered by such reports.

Provision was also made in the decree that upon the receipt of said reports, and on due notice to the other party, either party to the suit could apply to the Court for such action or relief with respect to the *time* allowed for the construction, or method of operation of the proposed incinerator plants, or other means of final disposition of garbage, etc., as may be deemed appropriate. In other words, the flexibility of the decree permitted frequent re-evaluation to promote the greatest justice to all parties.

On May 29, 1933 *(289 U. S. 712)* Mr. Chief Justice Hughes announced a new order, based on the failure of New York City to comply with the decree of December 7, 1931. The defendant asked that the time for taking effect of the injunction be extended from June 1, 1933 to April 1, 1934. It was ordered that these applications be heard on November 6, 1933, that E. K. Cambell be appointed Special Master, empowered to hear witnesses, issue subpoenas, take evidence offered by interested parties, and also such as he may deem necessary to show:

(A) What shall have been done by defendant city, up to September 15, 1933, and the time reasonably required to enable it to comply with the decree.

(B) The amounts spent by the plaintiff New Jersey to prevent harm to its beaches, waters, etc., subsequent to June 1, 1933, and the damages sustained by them as a result of New York's failure to comply with the decree.

The Special Master's findings were subject to consideration, revision, or approval by the Court.

On December 9, 1935 *(296 U.S. 259, 80 L. Ed. 214, 56 S. Ct. 188)*, Mr. Justice Butler announced a new decree modifying in effect the decree of December 4, 1933. The latter decree enjoined New York City from dumping refuse off the New Jersey coast, stipulating a five thousand dollars ($5,000.00) a day penalty for failure to comply. On October 7, 1935, New York City sought a modification of the decree, and asked for a petition to have New Jersey show cause why a ruling could not be made to the effect that ten miles (10) off shore dumping is satisfactory as to non-floating material, or, in the alternative, why the Court should not modify its decree so as to permit the defendant to dump non-floating sewage as aforesaid.

Defendant's motion for leave to file was granted.

It should be noted that the original decree was handed down in 1931 and continued modification took place for some four (4) years in order to effectuate the original decree. Recognition for additional time was given each time the case reappeared before the Court.

III. The Supreme Court again recognized the need for a calm period of gradual transition to effectuate its decree, in the Gaseous Nuisance Cases in which it took some nine (9) years to implement its decrees.

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The first case was that of *Georgia v. Tennessee Copper Co., 206 U.S. 230, 51 L. Ed. 1038, 27 S. Ct. 618 (1907).* In this case the State of Georgia sought to enjoin the defendant copper companies from discharging noxious gases from their works in Tennessee over the plaintiff's territory. The State alleged that such discharges were destroying entire forest, orchard, and crop lands, and that irreparable injuries were being done and threatened in five counties of Georgia. A preliminary injunction was denied, but, as there were grounds to fear that great and irreparable damage might be done, an early day was fixed for the final hearing, and the parties were given leave, if so minded, to try the cases on affidavits. Mr. Justice Holmes held that if the State of Georgia adhered to its determination, there was no alternative to issuing an injunction, *after* allowing a *reasonable* time for the defendants to complete the structures then being built, and efforts the companies were making to stop the flow of fumes and gases into Georgia. The plaintiff Georgia was permitted to submit a form of decree on the coming in of the Court in the following October.

Eight (8) years later, on May 10, 1915, the Supreme Court again heard the same case, in the *State of Georgia v. Tennessee Copper Co.* and *Ducktown Sulphur, Copper, & Iron Co., Ltd., 237 U.S. 474, 59 L. Ed. 1054, 35 S. Ct. 631 (1915).*

This case is a continuation of the earlier one, supra (1907), in regard to the nuisance of gaseous fumes harming the property within the State of Georgia. In the earlier case, hope was entertained that some practical method of subduing the noxious fumes could be devised and by *consent,* the *time* for entering a final decree was enlarged. Both companies installed purifying devices. The original defendant, Tennessee Copper and Georgia, entered into a stipulation whereby the former undertook annually to supply a fund to compensate those injured by fumes from

its works, to conduct its plant subject to inspection in specified ways, and between April 10 and October 1, not to "operate more green ore furnaces than it finds necessary to permit of operating its sulphuric acid plant at its normal full capacity." The State of Georgia agreed to refrain from asking for an injunction prior to October, 1916, if the stipulation was fully observed. Ducktown Company and the State were unable to agree, and in February, 1914, the latter moved for a decree according a perpetual injunction. Consideration of the matter was postponed upon representation that conditions had materially changed since 1907, and leave was granted to present additional testimony "to relate solely to the changed conditions," if any, which may have arisen since the case was then decided. A decree was granted restraining the Ducktown Company from continuing to operate its plant other than upon the terms and conditions set out by the Court *(Decree set forth in 237 U.S. 678, 59 L. Ed. 1173, 35 S. Ct. 752 (1915)).*

A new decree was issued April 3, 1916 in *240 U. S. 650, 60 L. Ed. 846, 36 S. Ct. 465, (1916).* This decree modified the former decrees as to the escapement of fumes, as to records to be kept in regard thereto, and also as to expense of inspection and division of costs.

The three(3) cases, dealing with the problem of escaping nuisances, cover a span of nine (9) years (from 1907 to 1916). It illustrates how long a period is required to adjust to incorporeal changes and strongly suggests that human changes obviously require greater periods, since human emotions are not as easily controlled as are gaseous materials from sulphur and copper plants. Recognition of the need of calm planning in good faith to reconcile difficult problems has often been illustrated by the Court in contexts of economic and social changes as a result of its decisions.

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IV. In *People of the State of New York v. State of New Jersey and Passaic Valley Sewerage Commissioners, 256 U.S. 296, 65 L. Ed. 937, 41 S. Ct. 492 (1921),* at page 313, Mr. Justice Clarke, in refusing to grant injunction relief against the operation of sewerage disposal by New Jersey into New York Harbor, wisely stated:

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of Representatives of the States so vitally interested in it than by proceedings in any Court however constituted."

This quotation strongly suggests the need for time to work out these difficult intangible relations, in an atmosphere of cooperation and reason, rather than a tremendous disruption of social and economic conditions.

V. In the case of *Martin Bldg. Co. v. Imperial Laundry Co., 220 Ala. 90, 124 So. 82,* the Supreme Court of Alabama recognized the need for time in the use of injunctive relief. In a suit by the owner of an office building to enjoin a laundry from emitting smoke over the complainant's premises, the basis of the suit was the discomfort to the building's tenants, endangering of their health, and the resulting loss of tenants. The question of the abatement of the nuisance by improved technological laundry methods had to be further considered before the Court would grant or refuse injunctive relief, in view of suggested means of reducing amount of smoke by use of stokers. This acted to delay the force of the injunctive relief sought.

B. Administrative Discretion Cases

The use of administrative discretion and its limits have often been spelled out by the Court in the areas of administrative agencies. The Court has consistently emphasized that supervision and discretion should lie with the administrative agencies in the conducting of their functons as economic and political governing boards. Such emphasis is closely related to the administrative discretion which should exist in school boards, also.

I. In *United States v. Paramount Pictures, 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915, (1948),* Mr. Justice Douglas reviewed a decree in an injunction suit by the United States under the Sherman Act to eliminate or qualify certain business practices in the motion picture industry. A provision in the decree that films be licensed on a competitive bidding basis was eliminated by the Supreme Court *as not likely to bring about the desired end as involving too much judicial supervision to make it effective.* This elimination was held to require reconsideration by the district court of its prohibition of the expansion of theatre holdings by distributors and provisions for divesting existing holdings. The propriety of including in the decree a provision for voluntary arbitration of questions arising thereunder was indicated, and denial of applications for leave to intervene by persons challenging the eliminated provision for competitive bidding was upheld.

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Mr. Justice Douglas was strongly opposed to the judiciary administrating industry, and favored voluntary arbitration: At page 163 he stated:

> "It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective."

The implications of Mr. Justice Douglas's opposition to judicial administration of intricate and detailed rules in the economic field could readily apply to the social relationship and problems created by the recent holding in the Brown case.

II. Further evidence of the broad discretion that was permitted by the Supreme Court in administrative agencies is evidenced in the case of *Alabama Public Service Commission v. Southern Railway Company, 341 U. S. 341, 95 L. Ed. 1002, 71 S. Ct. 762, (1951).* A railroad, prohibited by state law from discontinuing trains without permission of the state public service commission was denied such permission on the ground that though the trains were being operated at a loss there was a public need for the service. Alleging that irreparable loss would result either from continued operation of the trains or from incurring the penalty imposed by state law for discontinuance without the commission's permission, the railroad sought and obtained an injunction in a federal district court against the enforcement of the statute.

The U. S. Supreme Court, through Chief Justice Vinson,

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reversed the district court, and held that the federal court's exercise of such jurisdiction should, on considerations of comity, be withheld on the ground that the state law provided for review of the commission's order in the state courts and for its stay pending such review.

Some persuasive language in support of state administrative discretion appears at pages 347-348:

> "The Alabama Commission, after a hearing held in the area served, found a public need for the service. The court below, hearing evidence *de novo,* found that no public necessity exists in view of the increased use and availability of motor transportation. We do not attempt to resolve these inconsistent findings of fact. We take note, however, of the fact that a federal court has been asked to intervene in *resolving* the *essentially local problem* of balancing the loss to the railroad from continued operation of trains . . . with public need for that service . . . directly affected. . . ." (Italics supplied).

More support to the *finality* of the discretion of the commission is found on page 348:

> " . . . and whatever the scope of review of commission findings when an *alleged denial* of *constitutional* rights is in issue, it is now settled that a *utility has no right to relitigate factual questions* on the ground that constitutional rights are involved. *New York v. United States, 331 U.S. 284, 334-336 (1947). . . .*" (Italics supplied)

More directly in point, at pages 349-350 is found the following:

> " . . . as adequate state court review of an administrative order based upon predominantly *local* factors is available to appellee intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted, only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state

governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case...." (Italics supplied)

And again at page 351, "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states...."

III. Further evidence of the broad discretion permitted by the Supreme Court to state administrative agencies is found in the case of *Burford v. Sun Oil Co., 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)*. In this case the Sun Oil Co. attacked the validity of an order of the Texas Railroad Commission granting the petitioner Burford a permit to drill oil wells on a small plot of land in the East Texas oil fields. The U. S. District Court for the western district of Texas dismissed the suit by the Company; the Circuit Court of Appeals reversed the District Court. The Supreme Court through Mr. Justice Black reversed the Circuit Court of Appeals, and affirmed the District Court.

The Supreme Court held that a federal equity court may properly decline to exercise its jurisdiction invoked because of diversity of citizenship of the parties and alleged infringement of constitutional rights; to determine the validity of a state commission order, made under the authority of a conservation statute, granting a permit to drill oil wells on certain property, adjacent to lands owned by the complainant, where the state has provided a uniform method for the formation of policy and determination of cases by

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the commission and the state courts; and where the judicial review of the commission's decisions in the state courts is expeditious and adequate; and where intervention by the lower federal courts is likely to cause delay and conflicting interpretation of the state law, dangerous to the success of state domestic policies.

The Court, at page 320, explicitly states:

> "The primary task of attempting adjustment of these diverse interests is delegated to the Railroad Commission, which Texas has vested with 'broad discretion' in administering the law."

The Court points out that the Texas courts have the power of thorough judicial review of the decisions of the Railroad Commisson; and that the Texas courts are working partners with the Commission in the business of creating a regulatory system for the oil industry. The Commission is charged with *principal responsibility* for *fact finding* and for *policy making* and the courts expressly disclaim the administrative responsibility. On the other hand, orders of the Commission are tested for "reasonableness" by trial de novo before the state court, and the Court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. The state court may even formulate new standards for the Commission's administrative practice, and suggest that the Commission adopt them.

The Supreme Court recognized that the existence of problems throughout the oil regulatory field creates a possibility of serious delay which can injure the conservation program; and that it may be necessary to stay federal action pending authoritative determination of difficult state questions. It recognized that questions of state regulation of the oil industry so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.

IV Concrete evidence of the Supreme Court's adherence to complete administrative discretion is found in the case of *Far Eastern Conference, United States Lines Co., States Marine Corporation, et al. v. United States and Federal Maritime Board, 342, U. S. 570, 96 L. Ed. 576, 72 S. Ct. 492 (1952)*. The suit was brought by the government to enjoin the dual rate system established by an association of steamship companies known as the Far East Conference. The companies never submitted the rates to the Federal Maritime Board for approval, as provided for in §15 of the Shipping Act *(46 USC §814)*. The defense, that the issues involved were of such a technical nature calling for the application of administrative exercise as to make it improper to bypass the Board, was upheld by the Court through Justice Frankfurter.

It was held that the administrative agencies should not be bypassed by the Courts in cases raising issues of fact not within the conventional experiences of judges or in cases requiring the exercise of administrative discretion, even though the facts, after they have been appraised by specialized competence, serve as a premise for legal consequences to be judicially defined.

V. "But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in social origins and religious alliances. *So to hold would in effect make us the school board for the country." Minersville School District v. Gobitis, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), at 310 U. S. 598* (Italics supplied).

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Parenthetically, the Court, in this case recognizes its limitations in the abstract sciences, with this language at page 597:

> "The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence."

Constitutional guarantees of personal liberty are not always absolutes. Government has the right to maintain public safety and good order.

Keeping the control of public education close to the local people is perhaps the strongest tradition in American education. One of the predominant characteristics of American education is the variation in local policies and procedures in terms of unique local conditions. This is in sharp contrast to the highly centralized national system of education of other countries.

VI. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) at 312 U. S. 574.*

VII. Speaking of the 14th Amendment, the U. S. Supreme Court in *Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923 (1885),* said at page 31:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, *education and good order of the people...*" (Italics supplied)

VIII. In *Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926),* it said at page 387:

> "Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary or oppressive . . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation . . . Laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare."

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C. Remarks

The aforesaid summary shows the wise recognition by the Supreme Court in the past of the need for time in effecting certain economic changes in our society in order to allow a period of healthy adjustment in sensitive areas. The cases also show a recognition of the need for adequate *local* discretion in the same areas. This line of reasoning should be applied to the even more sensitive area of desegregation which presents a vast problem of human engineering to resolve the social changes sought.

Samuel Gompers, one of America's greatest labor leaders recognized this fact some years ago when he stated:

> "One fact stands out in bold relief in history of men's attempts for betterment. That is that when compulsion is used, only resentment is aroused, and in the end nothing is gained. Only through moral suasion and appeal to men's reason can a movement succeed."

Part Four

Considerations Involved in Formulating Plans For Desegregation

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A. Changes in the Law

Dr. Rupert B. Vance, Professor of Sociology, University of North Carolina, past president of the American Sociological Society, writing in the Journal of Public Law, Emory University Law School, Vol. 3, Spring 1954, Number 1, page 42, says:

> "National prohibition offers an example of a change in law which did not carry through to change in the collective behavior and attitudes of society. In spite of our respect for the Constitution, resistance increased and law enforcement was insufficient to bring about social change. This resistance assumed the form of violations, as well as evasions, of the law. Under this situation it can be said that the 18th Amendment was repealed in order to preserve respect for the law. This occurred in spite of the fact that the initial change had the support of public opinion as represented in the (1) affirmative vote of legislatures of the states, and was implemented both by (2) federal legislation, as in the Volstead Act, and (3) supporting legislation in many states. For students of social change, the contrast with a decision of the Supreme Court is impressive.
>
> "Thus, while students of law realize that social change can be and has been implemented by legal enactment and judicial decision, it is also realized that resistance to social change is of many types. Here we can say that jurisprudence, as a social science, has shared in the responsibility of determining the extent to which any desired social change is enforceable by law. Laws may be violated, and they may be evaded. Evasion

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carries the implication of driving a course through gaps in the law, if not actually breaking it. Important to the courts, to public order, and to the profession is the whole field of conflict of laws. Oftentimes, the change ordered by legal enactment and judicial decision is so limited in scope that no actual evasion is drawn upon to block social change. Some times modes of adjustment may exist within the choice of individuals and groups—alternatives sanctioned in legal codes. It is in this borderline between public and private spheres of life that the doctrine of social change is of most importance to students of jurisprudence. It must be remembered that issues will be decided, not on the basis of an assumed code of ethics, *but on the basis of what is enforceable within the system of legality.*" (Italics supplied)

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B. Plans for Integration

The problem involves, among other things, the collective conscience or mores of our white citizens regarding segregation. That conscience simply stated, although of varying degrees of intensity, is that our people are not ready for desegregation. This was demonstrated conclusively by the survey which was made in Florida. This conscience is ingrained because it was nurtured and cherished throughout many generations as a way of life. It is deep-seated and its roots rest in fears of inter-marriage of the races, racial differences, superstitions, history, traditions and customs.

This community conscience until the Brown case had long years of legal sanction in the field of public education. Elimination of this legal sanction by no means eradicates the underlying collective conscience of the people in this field. *This attribute of the problem simply cannot be successfully solved overnight.*

This the Court undoubtedly appreciated by not making its desegregation decision immediately effective. Its questions and its delay of implementation indicate that it is conscious of what may be termed the equities of transition. The Court, we believe, is imbued with the need for gravity and for prudent concern in dealing with this collective conscience.

We think it realizes the need for social engineering, time, patience and community understanding. It senses the need for conditioning and education if implementation is ever to be a real success.

Free men are not automatons capable of being molded

and transformed forthwith by a new and revolutionary judicial concept which does not square with their collective conscience.

The enormity of the problem of compliance gives great pause. We do not deal with implementation of a decree against a single individual or even a minority. A successful response to the judgment requires reconciliation to it of a great majority of our people. The Court on its part needs for the enforcement of its decree the amelioration of time which is said to be a great Healer. It needs the rallying of those who will stand by the law of the land because it is such whether they agree with it or not and the patience of wise administration which eschews haste, precipitate action and premature procedures.

The Court stands not in need of the whip and the scourge of compulsion to drive our people to obedience, but rather the rational solution of time in which the loyalty, patience and understanding of the law-abiding will come forward and lead the way to peaceful, reasonable and successful compliance.

Not only to be considered is the need of reconciling this collective conscience to desegregation but others of importance to be considered include the safety of school children, the peace of the community, the mutitudinous administrative problems affected, the impact upon teachers' jobs, particularly Negro teachers', the transportation of school children, the revisions of laws and regulations, the redistricting of attendance areas, the reallocation of physical school plant facilities and others involved in the transition from a segregated school system to a non-segregated system. All require time, wise administration and patience for their solution.

Gradual effective adjustment to integration presupposes that there will be a plan. But because there is a wide variety of local conditions, no specific plan can be outlined which

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would be acceptable under all conditions and in all communities.

We think integration must proceed in Florida on a county by county basis because of the fundamental differences in various areas of the state which we have attempted to demonstrate in this brief.

A great many plans for integration have been developed in Florida and other states and all of them have their adherents. A plan of gradual integration starting with the first grade and working on up through high school over a 12 year period is believed by some advocates to be the answer for their community but it is rejected in other places.

Another plan for beginning the integration process at the college level and gradually working down to the first grade can be supported by valid arguments, but it too is rejected by many educational leaders as being unworkable in some communities.

Other plans which have been advanced include a gradual reorganization of school attendance areas; designated schools whose students will be composed of volunteers from both races during the transition period; a simultaneous integration of all school grades over a period of time based on the scholastic level of the students as determined by examinations. These and many other plans are being considered by school authorities whose job it will be in the final analysis to devise a plan which will be accepted and will work in their particular school districts.

The one factor which all of these plans share in common is the need for *sufficient time* to carry them out and the one point on which agreement can be reached by school authorities who are willing to undertake a program of integration is that the plan adopted for their specific area must be unique in that it will take into consideration the exact problems of that area and no other.

If this planning and action is permitted by the Court, we believe that local school authorities should take into consideration two primary factors: first, the material aspects of integration which include the use of present school buildings, the construction of new buildings, transportation, teachers' jobs and assignments, school populations within attendance areas and the administration impracticabilities and inequities that would arise in these dislocations in any effort to effect a too hasty non-segregation; second, the intangible considerations including community thinking, customs, mores, overt acts that might result from the impact of premature integration, the scholastic standards of the schools and the feelings of children.

We realize that objection has been made to gradualism in seeking methods of integrating white and Negro schools, that delay might tend to create feelings of hostility and encourage organized opposition. The advocates of this theory apparently feel that the shock treatment is to be preferred and that if a difficult job has to be done, the quicker it is done, the better.

In this belief we are positive they are mistaken. Strong opposition already exists in the South to desegregation. It will be intensified in direct proportion to the amount of hasty precipitation and coercion that is applied.

Already there is springing up in our state opposition organizations, some of which through their literature encourage violence. Burning of crosses and circulation of hate literature are becoming more and more prevalent. But minimizing these manifestations of defiance are thousands of law-abiding citizens of both races, many influential newspapers and loyal organizations who are trying to meet the situation calmly and patiently. But their attitudes have always been buttressed on the assumption of gradualism and local autonomy. If that assumption is cut from under them by a decree of immediate desegregation or even a decree of a period of short delay which does not permit a

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large degree of local determination, we frankly doubt whether we can save our public school system. This objection to gradualism may be valid in Northern states where segregation has been practiced but where the people as a whole do not share the intense feelings on racial differences which have become an ingrained part of the culture of the South.

There is no reason to think that sufficient delay in integration of the schools of Florida to allow for a period of gradual adjustment would create new problems or intensify those already existing.

The problems are already here and must be recognized realistically by anyone conscientiously seeking a solution. There is every logical reason to believe that any attempt to use the shock treatment of immediate compulsory integration of schools in Florida would only result in translating the present passive intellectual differences in thought and emotional feelings to an active, positive and violent physical resistance.

When all is said and done, it may be that about the best advice on the subject was contained in a speech by Governor David S. Walker of Florida in 1867 to a meeting of Freedmen in Tallahassee[1].

Governor Walker said:

> "The great question now to be solved, is whether two different races can live in peace together under the same government with equal political rights. In my reading of history, I do not remember any instance in which this has ever been done. But God has placed the work upon us and with His blessing we must try our best to accomplish it. In the first place, therefore, I say let each one of us of all colors resolve to cultivate kindly relations with one another and never allow our-

1. Semi-weekly Floridan, Tallahassee, Florida, April 23, 1867, page 2.

selves to be arrayed in hostility to each other—let us always speak kindly to and of one another. I have never known a man in my life who had the true principles of a Christian gentleman in him, who would wantonly wound the feelings of any human being, however humble."

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Part Five

CONCLUSION

There are two ways in which the Brown decision may be viewed by history. First, it may be considered as a seismic shock which struck without warning and engulfed a large part of the nation in a tidal wave of hate and inflamed emotions and carried away a public school system which took half a century and billions of dollars to build, or

Second, it may be looked upon as a high goal which this Court has fixed for men of good will to strive to attain and which they may attain in due course if rational consideration is given to human frailty and faith is maintained in the slow but sure upward movement of democracy.

Many think that our democracy is now face to face with the toughest job in practical government it has ever had to tackle without going to war. Some way must be found to protect the constitutional rights of a minority without ignoring the will of the majority. We think the only answer is time and the patient efforts of those who value democracy more than their personal longings and private prejudices. We hope that this court will accept this answer.

RICHARD W. ERVIN
Attorney General of the State of Florida

RALPH E. ODUM
Assistant Attorney General, State of Florida

(Appendix A)

Results of a Survey of Florida Leadership Opinion on the Effects of the U. S. Supreme Court Decision of May 17, 1954 Relating to Segregation in Florida Schools

NO PAGE NUMBER

Introduction

As a result of the decision of the United States Supreme Court of May 17, 1954, declaring unconstitutional racial segregation in public education, Florida and other southern states are confronted with problems of tremendous gravity and complexity.

While it enunciated a new principle of law, the Court did not prescribe the manner in which this principle should be translated into action in the states and communities affected. Instead, it restored the cases to the docket for further argument as to the method of adjustment which should be called for in subsequent decrees, inviting the Attorneys General of states requiring or permitting segregation in public education to appear as *amici curiae*.

In anticipation of the preparation of a brief for submission in response to this invitation, the Attorney General of the State of Florida requested the assistance of social scientists and other educators in compiling facts concerning the problems which the State of Florida would encounter in complying with the decision of the Court.

This is their report.

RICHARD W. ERVIN

Attorney General

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ATTORNEY GENERAL'S RESEARCH ADVISORY COMMITTEE FOR THE STUDY OF PROBLEMS OF DESEGREGATION IN FLORIDA SCHOOLS

The committee was chosen by the Attorney General to assist him in conducting a survey to determine leadership opinion among Florida citizens regarding problems created by the U. S. Supreme Court's decision of May 17, 1954, abolishing segregation in the public schools.

The individuals asked to serve on this committee were chosen on the basis of their professional standing in the field of education; their specialized knowledge and training which would be of value in conducting such a survey; and their reputation for civic-mindedness and impartiality. The committee selected Dr. Lewis Killian, Associate Professor of Sociology at Florida State University, to act as director of research and coordinator for the project. While certain parts of this report were written by Dr. Killian and others, the entire report and all its findings have been reviewed and approved by the entire membership of the committee.

Mr. Richard W. Ervin
Attorney General
(Ex Officio)

Dr. Sarah Lou Hammond
School of Education
Florida State University

Mr. Thomas D. Bailey
State Superintendent of Public Instruction
(Ex Officio)

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Department of Political Science
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Dr. Lewis M. Killian
Department of Sociology
Florida State University
(Coordinator of Research)

The Report and the Conclusions*

Just as the effects of segregation, held by the Court to be discriminatory, are essentially psychological, the problems of desegregation are also social and psychological as much as they are legal.

An eminent student of race relations in the South, Guy B. Johnson, has said, "*Anyone who thinks that the transition from segregation to racial co-education can be made without problems, tensions, and even personal tragedies is a fool. Anyone who thinks that the transition means the end of civilization is also a fool.*"[1]

The purpose of this study was to delineate as far as is possible the problems, the tensions and, perhaps, the tragedies, which might be expected to arise in the course of this transition in Florida communities. This was a fact finding, research study. There was no intent to predict whether this transition will take place nor to make value-judgments as to whether it should or should not occur.

Prediction of the problems which might arise if desegregation of public schools were undertaken in the near future are based upon four types of data. These are:

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* Prepared by Dr. Lewis Killian, Department of Sociology, Florida State University.

1. "The Impending Crisis of the South," *New South*, VIII, No. 5 (May, 1953), (Atlanta: Southern Regional Council), 5.

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1. The expressed attitudes of various groups of leaders, both white and Negro, toward the Court's decision and toward the possible implementation of it in Florida.

2. An historical analysis of the way in which Negroes have availed themselves of a privilege from which state restrictions were removed by a similar federal court decision, the privilege of voting in primary elections.

3. An analysis of relevant information pertaining to school administration, instructional services, and the quality of education as they might be affected by desegregation.

4. The experience of other states and communities in which programs of desegregation have been undertaken.

In the study of human behavior it is impossible to ask all of the questions which are relevant to that behavior. The selection of questions always implies certain assumptions concerning the situation being studied, and these assumptions should be made explicit.

The basic assumptions of this study are:

1. That the Court will desire a minimum of intergroup conflict and public disorder in any program of desegregation which might be undertaken. On this assumption, information indicative of the likelihood of conflict and widespread disorder in various situations becomes highly important.

2. That expressed attitudes are to some extent and in certain types of situations indicative of later behavior. This is particularly important when it is the attitudes of occupants of key positions in the power structure of a group which are concerned.

3. That the attitudes of people in leadership, power, and prestige roles are of more importance as determinants of

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social change than are the attitudes of larger numbers of people not occupying such roles.

4. That the behavior of people in one situation is to some extent indicative of the behavior of the same or different people in similar but not identical situations.

The conclusions of this study are based on the findings of several separate, but related, constituent studies which, together, constitute the general research project. Each study is presented in detail in a separate subsection of the report. The general conclusions, drawn from all of these studies, are found in the chapter preceding the detailed reports of the separate studies.

The sub-studies, in order of presentation, are:

1. An attitude-opinion poll, based on mailed questionnaires, of 9 white and 2 Negro groups of leaders throughout the state. (Page 113)

2. An attitude-opinion poll, based on personal interviews, of white leaders in 10 selected counties and Negro leaders in 8 of these counties. (Page 153)

3. An historical analysis of trends in Negro voter registration in Florida, 1940-1954. (Page 177)

4. An analysis of relevant information pertaining to school administration and instructional services as they might be affected by desegregation. (Page 185)

5. An intensive study, utilizing various methods, of leadership attitudes and opinions in a metropolitan area and a rural area in southeastern Florida. (Page 201)

GENERAL CONCLUSIONS

1. On the basis of data from all relevant sources included in this study, it is evident that in Florida white leadership opinion with reference to the Supreme Court's decision is far from being homogeneous. Approximately three-fourths

of the white leaders polled disagree, in principle, with the decision. There are approximately 30 per cent who violently disagree with the decision to the extent that they would refuse to cooperate with any move to end segregation or would actively oppose it. While the majority of white persons answering opposed the decision, it is also true that a large majority indicated they were willing to do what the courts and school officials decided.

2. A large majority of the Negro leaders acclaim the decision as being right.

3. Only a small minority of leaders of both races advocate immediate, complete desegregation. White leaders, if they accept the idea that segregation should be ended eventually, tend to advocate a very gradual, indefinite transition period, with a preparatory period of education. Negroes tend to advocate a gradual transition, but one beginning soon and lasting over a much shorter period of time.

4. There are definite variations between regions, counties, communities and sections of communities as to whether desegregation can be accomplished, even gradually, without conflict and public disorder. The analysis of trends in Negro registration and voting in primary elections, shows similar variations in the extent to which Negroes have availed themselves of the right to register and vote. At least some of these variations in voting behavior must be accounted for by white resistance to Negro political participation. This indicates that there are regional variations not only in racial attitudes but in overt action.

Regional, county and community variations in responses to questionnaires and interviews are sufficiently marked to suggest that in some communities desegregation could be undertaken now if local leaders so decided, but that in others widespread social disorder would result from immediate

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steps to end segregation. There would be problems, of course, in any area of the state, but these would be vastly greater in some areas than in others.

5. While a minority of both white and Negro leaders expect serious violence to occur if desegregation is attempted, there is a widespread lack of confidence in the ability of peace officers to maintain law and order if serious violence does start. This is especially true of the peace officers themselves, except in Dade County. This has important implications. While it is true that expressed attitudes are not necessarily predictive of actual behavior, there seems little doubt that there is a minority of whites who would actively and violently resist desegregation, especially immediate desegregation. It has been concluded from the analysis of experiences with desegregation in other areas, "A small minority may precipitate overt resistance or violent opposition to desegregation in spite of general acceptance or accommodation by the majority."[2]

6. Opposition of peace officers to desegregation, lack of confidence in their ability to maintain law and order in the face of violent resistance, and the existence of a positive relationship between these two opinions indicates that less than firm, positive action to prevent public disorder might be expected from many of the police, especially in some communities. Elected officials, county and school, also show a high degree of opposition. Yet it has been pointed out, again on the basis of experience in other states, that the accomplishment of efficient desegregation with a minimum of social disturbance depends upon.

A. A clear and unequivocal statement of policy by leaders with prestige and other authorities;

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2. Kenneth B. Clark, "Findings," *Journal of Social Issues*, IX, No. 4 (1953), 50.

B. Firm enforcement of the changed policy by authorities and persistence in the execution of this policy in the face of initial resistance;

C. A willingness to deal with violations, attempted violations, and incitement to violations by a resort to the law and strong enforcement action;

D. A refusal of the authorities to resort to, engage in or tolerate subterfuges, gerrymandering or other devices for evading the principles and the fact of desegregation;

E. An appeal to the individuals concerned in terms of their religious principles of brotherhood and their acceptance of the American traditions of fair play and equal justice.

It may be concluded that the absence of a firm, enthusiastic public policy of making desegregation effective would create the type of situation in which attitudes would be most likely to be translated into action.[4]

7. In view of white feelings that immediate desegregation would not work and that to require it would constitute a negation of local autonomy, it may be postulated that the chances of developing firm official and, perhaps, public support for any program of desegregation would be increased by a decree which would create the feeling that the Court recognizes local problems and will allow a gradual transition with some degree of local determination.

8. There is a strong likelihood that many white children would be withdrawn from public schools by their parents and sent to private schools. It seems logical, however, that this practice would be confined primarily to families in the higher income brackets. As a result, a form of socio-economic class segregation might be substituted for racial segregation in education.

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4. Experience shows that when the steps listed above have been taken, predictions of serious social disturbance have not been borne out.

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9. It is evident that a vast area of misunderstanding as to each other's feelings about segregation exists between the races. White leaders believe Negroes to be much more satisfied with segregation than Negroes are and Negro leaders believe that whites are much more willing to accept desegregation gracefully than whites proved to be. Hence a logical first step towards implementing the principle set forth by the Court, and one suggested by both whites and Negroes, would seem to be the taking of positive, cooperative steps to bridge this gap and establish better understanding between the two groups.

10. Although relatively few Negro leaders and teachers show concern about the problem, white answers indicate that Negro teachers would encounter great difficulty in obtaining employment in mixed schools. To the extent that desegregation might proceed without parallel changes in attitudes towards the employment of Negro teachers in mixed schools, economic and professional hardships would be worked on the many Negro teachers of Florida.

11. Since 1940, and particularly since 1947, the State of Florida has made rapid and steady progress toward the elimination of disparities between white and Negro educational facilities as measured by such tangible factors as teacher salaries, current expenditure per pupil, teacher qualifications, and capital outlay expenditure per pupil.

12. In spite of the current ambiguity as to the future of dual, "separate but equal" school facilities the State is proceeding with an extensive program of construction of new school facilities for both white and Negro pupils, with a recommended capital outlay of $370 per Negro pupil and $210 per white pupil. Both this and the previous finding indicate that, while these steps have been taken within the framework of a dual educational system, there is a sincere

desire and willingness on the part of the elected officials and the people of Florida to furnish equal education for all children.

13. Available achievement test scores of white and Negro high school seniors in Florida indicate that, at least in the upper grades, many Negro pupils placed in classrooms with white pupils would find themselves set apart not only by color but by the quality of their work. It is not implied that these differences in scores have an innate racial basis, but it seems likely that they stem from differences in economic and cultural background extending far beyond the walls of the segregated school, into areas of activity not covered by this decision.

14. Interracial meetings and cooperative activities already engaged in by teachers and school administrators in many counties demonstrate steps that can be, and are being taken voluntarily and through local choice to contribute to the development of greater harmony and understanding between whites and Negroes in Florida communities.

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Leadership Opinion By Questionnaire ...and Conclusions*

Although all of the people of Florida would be affected, directly or indirectly, by any move to end racial segregation in the public schools, some groups have a more direct and intense involvement in the situation than do others.

People connected with county school systems such as school board members, school trustees, superintendents, principals, teachers and supervisors would play key roles in putting any plan for desegregation into effect. Police officers, judges and county attorneys would be required to deal with cases of conflict and disorder which might arise. Parents are deeply involved not only as parents but as voters and taxpayers. As moulders of public opinion newspaper editors, radio station managers and ministers have an important relationship to any developing social change. Legislators and county commissioners would be faced with the task of formulating new state and county policies relating to this significant legal and social change.

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* Prepared by Dr. Lewis Killian, Department of Sociology, Florida State University.

In an attempt to get at the attitudes and opinions of these important segments of the population, questionnaires were mailed to the following groups:

1. All members of the Florida Peace Officers Association.
2. School principals, white and Negro, and school supervisors.
3. Negro PTA presidents, white PTA presidents, council chairmen and board members.
4. School board members and school trustees.
5. County judges, circuit judges, state attorneys, county solicitors and county commissioners.
6. Newspaper editors.
7. Radio station managers.
8. Members of the state legislature.
9. Ministers (a 10 per cent sample of certain denominations).

Practical considerations precluded polling certain other groups. The large number of teachers, white and colored, in the state and the fact that so many would be away from home at the time of the survey made a poll of their opinions impractical. It was practical, however, and perhaps more important, to question principals and supervisors, as school people who work intimately with the teachers in positions of leadership and authority. Similarly, the parent group polled was limited to PTA officers because of the tremendous number of parents involved and the non-availability of any list from which a sample could be drawn.

The ministers presented a special problem. The size of the population of ministers, which could only be estimated, was obviously large. At the same time it was extremely difficult to obtain comprehensive mailing lists for even part of the multitude of denominations to which these ministers

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might belong. Mailing lists were obtained for the following denominations: Baptist, Methodist, Episcopal, Roman Catholic, Presbyterian, and Assembly of God. Questionnaires were mailed to a 10 per cent sample of the clergymen on each of these lists. Forms were also sent to a sample of Negro Methodist and Baptist ministers, but the returns were too small for use. In many cases they were returned marked "Unclaimed" or "Moved, Left No Address."

The Questionnaires.

Nine different questionnaires were used in this survey. Questions designed to elicit the following information were included on all of them:

1. The position held by the subject and the section of the state in which he lived and worked.

2. The subject's personal feelings about the rightness of the Court's decision and action which should be taken as a result of it.

3. The subject's estimate of the likelihood of resistance to desegregation in his community, the forms this resistance might take, and the ability of law enforcement officers to maintain law and order in the event of serious violence.

The questionnaire sent to the peace officers sought also an estimate of the likelihood that peace officers would enforce school attendance laws for mixed schools. All other questionnaires included questions concerning the following additional items:

4. The subject's estimate of the feelings about the decision and its implementation of other groups in the state and in his community.

5. The subject's opinion as to the method which would be most effective in ending public school segregation.

6. Opinions as to the grades in which it would be easiest

to start admitting colored and white children to the same schools.

Finally, principals and supervisors, school officials, legislators and PTA officers were asked whether certain things which might constitute either aids or obstacles to desegregation might happen in the event schools are desegregated in the next few years.

Questionnaire Returns and Method of Analysis.

A total of 7,749 questionnaires were mailed. Time did not permit a follow-up wave, but an effort was made to increase returns by prefacing each form with a personal appeal from the Attorney General and by enclosing a stamped, self-addressed envelope.

Useable questionnaires returned number 3,972, 51.26 per cent of the number mailed. The number and percentage of returns for each group are shown in Table 1. The lowest percentage of returns is seen to be that for the Negro PTA presidents, 21.5 per cent. The rate of return for all groups may be regarded as satisfactory since it has been found that in mail polls usually less than 20 percent of the questionnaires are returned.[3]

Practical considerations, of which there are many in what is essentially "action research," precluded the use of standard techniques for control of the sample by ascertaining the characteristics of non-respondents. Hence extreme caution must be exercised in generalizing from these data to any population.

It is possible to speculate as to some of the reasons for non-returns. It is known that some forms did not reach the subject for one reason or another. Unfortunately

3. Katz, Daniel, and Hadley Cantril, "Public Opinion Polls," *Sociometry*, I (1937), 155-179.

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237 questionnaires were returned too late for tabulation. In the case of refusals other possible reasons must be considered. In some groups, a relatively low degree of education may have characterized persons who did not respond. It is known that in some cases public officials, particularly judges, failed to reply because they felt it was unethical for them to answer such an inquiry, even though anonymity was promised them. Some questionnaires were returned not completed but with a brief comment. The nature of many of these comments suggests that many of the white subjects who refused to respond were violently opposed to desegregation.

On the basis of these speculations, it seems likely that the prevalent bias of white non-respondents is in the direction of opposition to the Supreme Court's decision and to attempts to implement it. In the case of Negroes, it is more likely that distrust of the motives of the research and fear of expressing their opinions were the causes of failure to reply.

All questions were of the check-list type. Questionnaires were coded, punched on cards, and machine tabulated.[4] For purposes of analysis, the subjects were regarded as populations not necessarily representative of any larger populations. Hence percentages are presented but no tests of statistical significance have been made. Conclusions are based, therefore, only upon gross differences in responses.

Even though these respondents cannot be regarded as a representative sample, the nature of their selections makes them important as groups. In spite of its scientific limitations, this poll constitutes the most comprehensive

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4. Statistical work was done by the Sociology Research Laboratory of the Florida State University, under the direction of Prof. Robert McGinnis and Dr. John M. Haer. All responsibility for interpretation of the results is assumed by the Research Advisory Committee, however.

and extensive assessment of public opinion in Florida through the use of scientifically devised instruments that is available. The fact that approximately one-half of such groups of leaders, in the case of whites, and approximately one-third, in the case of Negroes, expressed the opinions indicated below is of itself important.

Findings.

Bearing in mind the caution which should be used in generalizing to larger populations, the following conclusions may be drawn from the responses of those subjects who did return questionnaires:

1. White groups differ greatly from each other in their attitudes towards the Court's decision, ranging from nearly unanimous disagreement to a slight predominance of favorable attitudes.

In Table 2 there can be seen the percentages of respondents in each group who selected each of the choices indicative of his personal feelings. Table 3 shows combinations of these choices into categories of "Agreement," "Neutral," and "Disagreement." From these tables it can be seen that peace officers are overwhelmingly opposed to the principle that segregation should be ended. On the other hand, a slight majority of white principals, supervisors and ministers indicate agreement with the principle established by the court, although they vary in their opinions as to when it should be implemented. Other groups ranking high in disagreement with the decision are county officials, school officials and white PTA leaders.

2. White groups also differ from each other in willingness to comply with whatever courts and school boards decide to do regardless of their personal feelings.

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In Table 4 combinations of choices shown in Table 2 are presented to show willingness to comply with official policy or intention to resist or refuse to cooperate. In this case elected officials, including county officials, school officials, and legislators, rank high in intention to oppose action to bring about desegregation, as do white PTA leaders. White principals and supervisors rank very low in intention to oppose desegregation.

3. Peace officers are the white group most opposed to desegregation. (Table 3).

4. Almost no whites believe that desegregation should be attempted immediately. (Table 2).

5. A large majority of both Negro groups are in agreement with the Court's decision declaring segregation unconstitutional. (Table 3).

6. While only a small minority of both Negro groups believe that desegregation should be attempted immediately, an even smaller minority would oppose attempts to bring about desegregation or refuse to cooperate. (Table 2).

7. Only a minority of whites in all groups believe that opponents of desegregation would resort to mob violence in trying to stop it. A larger proportion, but still a minority, believe that serious violence would result if desegregation were attempted in their community in the next few years.

Table 5 shows the predictions of the occurrence of mob violence and serious violence by all groups. It is evident that "mob violence" and "serious violence" do not mean exactly the same thing to the subjects. It may be noted that the peace officer group ranks highest in percentage predicting both mob violence and serious violence.

8. A yet smaller minority of both of the Negro groups

anticipate mob violence or serious violence as a result of steps towards desegregation. (Table 5).

9. The majority of all white groups are not sure that peace officers could cope with serious violence if it did occur in their communities, replying either "No" or "Don't Know" to the question.

Table 6 shows the percentage of each group replying either "No" or "Don't Know" to the question, "Do you think the peace officers in your community would be able to maintain law and order if serious violence is started?" Again it may be noted that the peace officer group ranks highest in percentage showing doubt as to the ability to avoid or minimize violence.

10. A much smaller proportion of both Negro groups express doubts as to the ability of law enforcement officials to deal with serious violence. (Table 6).

11. The majority of most of the white groups believe that peace officers could maintain law and order if minor violence occurred.

Table 7 shows the percentage of respondents in each group who answered "Yes" to the question, "Do you think the peace officers in your community would be able to maintain law and order if minor violence is started?" The white PTA leaders differed markedly from other groups, only 34.13 per cent answering "Yes."

12. The Negro groups did not differ greatly from the white groups in the proportion believing that police could cope with minor violence. (Table 7).

13. Only 13.24 per cent of 1669 peace officers believe that most of the peace officers they know would enforce attendance laws for mixed schools.

14. A majority of the members of all white groups except peace officers, who were not asked; radio station managers;

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and ministers, believe that most of the people of Florida and most of the white people in their communities disagree with the Court's decision.

Table 8 shows the percentage of the 10 groups asked to assess the feelings of other people who felt that most of the members of the groups about which they were asked disagreed with the decision.

15. In the five white groups asked, from one-fourth to one-half of the respondents believed that most of the Negroes in their community were opposed to the desegregation ruling. (Table 8).

16. A much smaller proportion of both Negro groups believe that most of the people of Florida, most of the whites in their community, and particularly the Negroes in their communities are in disagreement with the principle of desegregation. (Table 8).

It was seen earlier that only a small minority of the Negro respondents personally disagreed with the decision. It may be seen now that only a small minority of these Negroes think that other Negroes in their communities are in disagreement with the court. Furthermore, a much smaller proportion of Negroes than of whites think that most white people in Florida are in favor of segregation as a legal principle.

17. Only a small minority of all groups, white and Negro, believe that immediate assignment of children to schools on the basis of geographical location rather than race would be the most effective way of ending public school segregation.

Table 9 shows the percentage of each of 8 groups choosing as the most effective method immediate desegregation, a very gradual transition, and either or both of two gradual but relatively early methods of ending segregation. While the peace officers were not asked this

question, their answers to the question on "personal feelings about the decision" (Table 2) indicate almost unanimous opposition to immediate desegregation.

18. All groups think a gradual program of desegregation would be most effective. Negroes, however, prefer that the process start within the next year or two with immediate, limited integration much more frequently than do whites. The whites prefer a very gradual transition with no specified time for action to begin. (Table 9).

19. Whites who expressed an opinion believe that the primary grades and the colleges are the levels on which desegregation could be initiated most easily. On the other hand, almost as many Negroes believed that segregation should be ended on most or all grade levels simultaneously as believed it should be ended first at the lowest and highest grade levels.

20. The maintenance of discipline in mixed classes by Negro teachers is regarded as a potential problem by a majority of white principals, supervisors and PTA leaders. A much smaller proportion of Negroes regarded this as a problem, with a majority of Negro principals believing that colored teachers could maintain discipline in mixed classes.

Table 11 shows the percentage of each group queried as to possible problems who indicated definite belief that certain things would or would not happen, thereby creating problems for mixed schools.

21. A majority of all white groups believe that white people would resist desegregation by withdrawing their children from the public schools, but a much smaller proportion of Negroes, less than a majority, believe that this would happen. (Table 11).

22. Almost two-thirds of white school officials—superintendents, board members, and trustees—believe that ap-

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plications of Negroes to teach in mixed schools would be rejected. (Table 11).

23. Nearly three-fourths of school officials believe that it would be difficult to get white teachers for mixed schools. (Table 11).

24. Almost half of school officials and a little over 40 per cent of white PTA leaders believe that the people of their communities would not support taxes for desegregated schools, but only about 20 per cent of Negro PTA leaders believe that such support would not be forthcoming. (Table 11).

25. In the case of all potential problems on which both Negroes and white were questioned a smaller proportion of Negroes than of whites indicate belief that problems would arise as a result of desegregation. (Table 11).

26. In the case of peace officers there is a positive relationship between personal disagreement with the decision and lack of confidence in the ability of peace officers to cope with serious violence. There is an even higher positive relationship between belief that segregation should be kept and belief that peace officers would not enforce school attendance laws for mixed schools.

Table 12 shows the number of peace officers who feel that the police could or could not maintain law and order if serious violence occurs, according to their attitude towards the decision and its implementation. Table 13 shows belief as to whether peace officers would enforce school attendance laws by attitude towards the decision. The officers who answer "Don't know" to these questions are omitted from these tables. While peace officers were asked what they thought *other* law enforcement officials could or would do and were not asked what they themselves would do, it is evident that these subjects are projecting their own feelings and, perhaps, their intentions into other peace officers.

Regional Variations.

The responses to certain items of the two largest groups polled, the peace officers and the white school principals and supervisors, were analyzed by region of the state in which the respondents lived. The 67 counties of Florida were grouped into 8 regions defined by social scientists at the Florida State University in *Florida Facts.*[1] These regions and the counties each includes are:

Region	*Counties*
I	Bay, Escambia, Gulf, Okaloosa, Santa Rosa (Extreme northwest Florida).
II	Baker, Calhoun, Citrus, Columbia, Dixie, Franklin, Gadsden, Gilchrist, Hamilton, Hernando, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Suwannee, Taylor, Wakulla, Walton, Washington. (Northwest and north central Florida).
III	Alachua, Bradford, Clay, Putnam, Union. (Northeast Florida, inland).
IV	Lake, Marion, Orange, Osceola, Polk, Seminole, Sumter. (Central Florida, inland, largely rural).
V	Brevard, Duval, Flagler, Indian River, Nassau, St. Johns, Volusia. (Northeast and Middle Florida coastal region, includes Jacksonville metropolitan area).
VI	Charlotte, Collier, Hillsborough, Lee, Manatee, Pasco, Pinellas, Sarasota. (Southwest coastal, includes Tampa-St. Petersburg, Bradenton-Sarasota metropolitan area).
VII	DeSoto, Glades, Hardee, Hendry, Highlands, Okeechobee. (South central, inland, rural, many migrant farm laborers).
VIII	Broward, Dade, Martin, Monroe, Palm Beach, St.

1. Tallahassee, Florida: School of Public Administration, The Florida State University.

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Lucie. (Southeast coastal, contains Miami metropolitan area and some migratory labor areas).

Clear-cut regional variations in attitudes and opinions are found to exist, as is indicated by the following findings:

27. Although the majority of peace officers in all regions feel that segregation should be kept, the percentage feeling so varies from 83 per cent in two regions to 100 per cent in one region.

Personal feelings of peace officers about the decision are presented, by region, in Table 14. The variation in the number of respondents in the different regions seems to be explainable in terms of the number of counties in the different regions and the size of population. While it was impossible to ascertain the number of questionnaires mailed to each region, the distribution of returns of peace officer questionnaires approximates the distribution of population by region. It should be noted that Region VII ranks highest in percentage of peace officers who oppose desegregation, while Regions I and VIII rank lowest.

28. The percentage of white principals and supervisors who are in disagreement with the decision varies from 20 per cent to 60 per cent in different regions.

The percentage of white principals and supervisors agreeing and disagreeing with the decision, by region, is shown in Table 15. Again Region VII ranks highest in amount of opposition and Region VIII ranks lowest.

29. A large majority of white principals and supervisors in all regions indicate that they would comply with the decision regardless of personal feelings, but the percentage varies from 76 per cent in Region VII to approximately 94 per cent in Regions VI and VIII. (Table 16).

30. The percentage of peace officers predicting mob violence as a method of resisting desegregation varies from

20 per cent in Region VIII to nearly 63 per cent in Region VII. (Table 17).

31. Percentages of both peace officers and white principals and supervisors predicting serious violence in the event desegregation is attempted vary widely between some regions. (Table 18).

32. The majority of both peace officers and white principals and supervisors in all regions doubt that the police could maintain law and order if serious violence occurred, but there are some regional variations. (Table 19).

Responses of Legislators.

Although the 79 members of the state legislature who returned questionnaires constitute almost 45 per cent of the 176 legislators and legislative nominees to whom the forms were sent, generalizations to the entire membership of the legislature on the basis of their responses are entirely unwarranted. Any attempt to predict the action of the legislature at its next session would be even more presumptuous. The responses of these legislators to two special questions asked of them are presented below as a matter of interest, however.

The legislators were asked to indicate which of five possible courses of action should be followed at the next session of the legislature. The percentage checking each course, and the details of the five courses of action, are shown in Table 20.

The legislators were also asked whether they believed that there is any legal way to continue segregation in Florida Schools indefinitely. Of the 79 respondents, 34.20 per cent replied "Yes", 25.31 per cent replied "No", and 39.32 per cent answered "Don't Know", or gave no answer.

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CONCLUSIONS

1. It is evident that white respondents drawn from different areas of leadership vary sharply in their feelings about the rectitude of the Supreme Court's decision of May 17, 1954. At least this small, but not unimportant, segment of leaders in Florida is far from unanimous in allegiance to the principle of segregation in public education.

2. There are definite regional variations in attitudes towards the decision, in predictions of the likelihood that serious violence may occur if desegregation is attempted, and in confidence in the ability of the police to maintain law and order if serious violence does occur.

3. A majority of all groups except Negro principals do not feel confident that the police in their communities could cope with serious violence. This is particularly true of the peace officers themselves. At the same time, serious violence is anticipated by only a minority of all groups, although by almost 50 per cent of the peace officers.

4. Withdrawal of white children from the public schools, the maintenance of discipline in mixed classes by Negro teachers, refusal to employ Negro teachers for mixed schools, and difficulty in obtaining white teachers are the outstanding potential problems found to be expected.

5. It is evident that the white and Negro groups view the decision and the problem which desegregation might create quite differently, and that they do not understand each other's attitudes. The majority of the whites are, in various degrees, opposed to the decision; the Negroes are in favor of it. Yet the whites believe that the Negroes are opposed to desegregation to a much greater extent than those Negro groups polled are found to be. Furthermore, the white and Negro groups assess Negro opinion differ-

ently, a much larger proportion of whites than Negroes believing that most Negroes prefer segregated schools.

The whites view the effecting of desegregation as a much more difficult and dangerous problem than do the Negroes, many more of them foreseeing serious problems and even violence. On the other hand, the Negroes have more confidence in the ability and the willingness of the whites to adapt to desegregation than do the whites themselves.

6. The majority of all groups, white and Negro, believe that desegregation should be put into effect gradually rather than abruptly and immediately. More Negroes than whites, however, are in favor of early integration on a limited scale and beginning in the next year or two. The whites favor a more indefinite and remote form of gradualism, if they will countenance the idea of desegregation at all.

7. The existence of a positive relationship between the attitudes of peace officers towards the decision and their predictions of the inability of police to control serious violence suggests the existence of a tendency to project their own feelings into situations which might arise and into other persons involved. Such highly subjective predictions are very likely to be indications of what the respondent himself would do, or feels he could do, in the situation. Such predictions might very well take on the character of "self-fulfilling prophecies."[2] If police officers do not believe that they or others would be able to maintain law and order if serious violence occurs, the likelihood that they will attempt wholeheartedly to do so is accordingly reduced.

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2. An outstanding American sociologist, Robert K. Merton, has defined the "self-fulfilling prophecy" as a "false definition of the situation evolving a new behavior which makes the originally false conception come true." See his article, "The Self-Fulfilling Prophecy," *The Antioch Review*, VIII (Summer, 1948), 193-210.

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SAMPLE QUESTIONNAIRE

COUNTY SUPERINTENDENTS, SCHOOL BOARD MEMBERS, SCHOOL TRUSTEES:

1. In what county do you serve?.....

2. How long have you served in public school work? (Check one)
   1)—less than 2 years; 2)—3-4 years; 3)—5-8 years; 4)—9-12 years; 5) over 12 years.

3. Check the sentence that most nearly describes your feelings toward the Supreme Court decision declaring segregation in public schools unconstitutional:
   1)—Firmly in favor of the decision, and believe that schools should be immediately opened to both races throughout Florida.
   2)—Firmly in favor of the decision; feel schools should be gradually combined, taking into consideration places which need more preparation.
   3)—Feel that such a decision should have been made eventually, but believe we are not ready for it. Feel we must move very slowly and cautiously.
   4)—Neither in favor of nor against the decision; will agree with whatever the courts and the school officials do.
   5)—Against the decision, but will agree with whatever the courts and school officials do.
   6)—Firmly against the decision; will not cooperate in ending public school segregation.
   7)—Firmly against the decision; will actively oppose any attempt to end segregation in Florida schools.

4. .....Which one of the above statements do you think describes the feelings of most of the people in Florida? (Write the answer in the blank)

5. .....Which describes the feelings of most of the school teachers and administrators in your county?

6. .....Which describes the feelings of most of the white parents in your county?

7. .....Which describes the feelings of most of the colored parents in your county?

Suppose that in the next few years the court ordered school officials to admit colored and white children to the same schools.

8. Do you think anyone in your community would try to stop this? Yes..... No.....

9. If they did, what would they do? (Check your answers)

   1)—Petition to stop combining schools
   2)—Hold protest meetings
   3)—Keep their children home from school
   4)—Start individual violence
   5)—Take part in mob violence

10. Would you resign rather than carry out such court order? Yes..... No..... Don't know.....

11. Do you think there would be violence in your community if colored and white children are admitted to the same schools in the next few years? (Check one)

   1)—Serious violence 3)—No violence
   2)—Minor violence 4)—Do not know

Do you think your peace officers would be able to maintain law and order if: (Check yes, no, or don't know)

12. Serious violence is started? 1).....Yes 2).....No 3).....Don't know

13. Minor violence is started? 1).....Yes 2).....No 3)..... Don't know

14. Check the method you believe would be most effective in ending public school segregation:

   1)—Immediate action to assign all children to school on basis of geographical location rather than race.

   2)—Keeping existing school boundaries for the time being, but immediately letting children who want to, go to the closest school regardless of race.

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3)—A one or two year period of preparation before any schools are integrated.

4)—A very gradual transition over a period of years.

15. In what grades do you think it would be easiest to start admitting colored and white to the same schools? (Check your answer)

1)—Grades 1, 2 and 3
2)—Grades 1 through 6
3)—High school
4)—All grades 1 through 12
5)—College and university
6)—Don't know

Suppose in the next few years a few colored children wanted to go to the nearest school, a white school. What do you think would happen: (Check yes, no, or don't know)

	Yes	No	Don't Know
16. Would the School Board admit them readily?	.....	.....	.....
17. Would the School Board admit them only to certain schools?	.....	.....	.....
18. Would the School Board admit them if a court ordered it?	.....	.....	.....
19. Would the School Board try to fight a court order?	.....	.....	.....

Suppose schools are integrated in the next few years. What do you think would happen? (Check yes, no or don't know)

	Yes	No	Don't Know
20. Would it be harder to get white teachers?	.....	.....	.....
21. Would it be harder to get colored teachers?	.....	.....	.....
22. Would applications of colored teachers to teach in mixed schools be accepted?	.....	.....	.....
23. Would many white teachers treat colored children unfairly?	.....	.....	.....
24. Would many colored teachers treat white children unfairly?	.....	.....	.....
25. Would colored teachers be able to discipline white children?	.....	.....	.....
26. Would higher school taxes be needed for the integrated schools at first?	.....	.....	.....

27. Would your community support taxes for integrated schools?	.....	.....	.....
28. Would school bus drivers treat colored children fairly?	.....	.....	.....
29. Would school bus drivers encourage white students to treat colored children fairly?	.....	.....	.....
30. Are there any accredited private schools in your community other than kindergartens?	.....	.....	.....
31. Would people try to start private schools?	.....	.....	.....

32. If you like, comment on the problems the Supreme Court decision brings, and make any suggestions, using back of this sheet.

SAMPLE QUESTIONNAIRE

FLORIDA PEACE OFFICERS:

1. Check the position you hold:

—Deputy Sheriff —Constable
—State Highway Patrolman —Town Marshal
—City Chief of Police —Other
—City Policeman

2. In what county do you serve?.....

3. The U. S. Supreme Court recently declared segregation in public schools unconstitutional. Which do you think: (Check one)

1)—That segregation in schools should be kept
2)—That schools should be gradually opened to both races over a period of years?
3)—That colored children who want to go to white schools should be admitted immediately?

4. Suppose that in the next year or two the Court ordered school officials to admit colored and white children to the same schools.

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a. Would anyone in your community try to stop this? Yes..... No.....

b. If they did, what would they do? (Check your answer)

1)—Petition to stop combining schools
2)—Hold protest meetings
3)—Keep their children home from school
4)—Start individual violence
5)—Take part in mob violence

5. Would there be violence in your community if colored and white children are admitted to the same schools? (Check one)

1)—Serious violence
2)—Minor violence
3)—No violence
4)—Do not know

a. Would your existing law enforcement staff be able to maintain law and order if

1) *serious* violence is started

a)—Yes
b)—No
c)—Do not know

2) *minor* violence is started

a)—Yes
b)—No
c)—Do not know

6. Would most of the peace officers you know enforce school attendance laws for mixed schools? (Check one)

1)—Yes
2)—No
3)—Do not know

7. If you want to say more or make suggestions about law enforcement and segregation, please use the back of this sheet.

TABLE 1

QUESTIONNAIRES SENT AND RETURNED, BY GROUPS

Group	Number Sent	Number Returned	Per Cent Returned
Peace Officers	3200	1669	52.16
Principals and Supervisors (white)	1216	771	63.40
PTA Leaders (white)	751	375	49.93
Newspaper Editors	219	118	53.88
Radio Station Managers	78	54	69.23
County Officials	533	230	43.15
School Officials	500	309	61.80
Legislators	176	79	44.89
Ministers	191	101	52.89
Negro Principals	485	180	37.11
PTA Leaders (Negro)	400	86	21.50
TOTAL	7749	3972	51.26

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TABLE 2

PER CENT EXPRESSING VARIOUS

Groups and Number	1	2	3	4
Peace Officers (N-1669)	.5	9.2		
Principals and Supervisors (W) (N-762)	.4	13.2	38.4	4.9
PTA (W) (N-375)				
Editors (N-54)	.8	14.4	33.9	4.2
Radio Station Managers (N-54)	1.8	14.8	24.0	7.4
County Officials (N-224)		2.7	18.3	.9
School Officials (N-309)		2.9	20.0	.6
Legislators (N-79)		7.5	22.8	2.5
Ministers (N-101)	1.0	34.6	26.7	4.0
Principals, (N) (N-177)	11.9	55.4	11.3	8.5
PTA Negro (N-86)	12.8	44.2	8.1	5.8

* The attitudes indicated by number are as follows:

1. Firmly in favor of the decision; believe that schools should be immediately opened to both races. (For peace officers, "Colored children who want to go to white schools should be admitted immediately.")
2. Firmly in favor; feel schools should be gradually combined, taking into consideration places which need more preparation. (For peace officers, "Schools should be gradually opened to both races over a period of years.")
3. Feel that such a decision should have been made eventually, but believe we are not ready for it. Feel we must move very slowly and cautiously.
4. Neither in favor of nor against the decision; will agree with whatever courts and school officials do.

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ATTITUDES TOWARDS DECISION, BY GROUPS

Attitude*							
5	6	7	8	9	10	11	Total
				89.3		1.0	100.0
26.8	4.9	7.9	.8	.9	1.4	.4	100.0
20.0	14.4	29.3	.8	2.4	1.1	1.6	100.0
16.1	6.8	16.1	.8	3.4	2.5	.8	99.8
20.4	11.1	11.1	1.8		1.8	5.6	99.8
22.8	12.0	30.4		5.8	3.1	4.0	100.0
21.7	9.7	34.6		4.9	2.9	2.6	99.9
16.4	5.1	38.0	1.3	5.1		1.3	100.0
8.0	10.0	11.9		2.0		1.0	99.2
1.1	1.1		5.6	1.7	2.2	1.1	99.9
2.3	4.6	4.6	5.8	1.2	5.8	4.6	99.8

5. Against the decision, but will agree with whatever courts and school officials do.
6. Firmly against; will not cooperate in ending segregation.
7. Firmly against; will actively oppose any attempt to end segregation.
8. Any combination of 1, 2, or 3 indicating agreement with decision.
9. Any combination of 5, 6, or 7 indicating disagreement with decision. (For peace officers, "Segregation in schools should be kept.")
10. Any other combination.
11. No information.

TABLE 3

PER CENT AGREEING OR DISAGREEING WITH THE DECISION, BY GROUPS

Group and Number	Agree	Neutral	Dis-agree	No Infor-mation	Total
Peace Officers (N-1669)	9.7		89.3	1.0	100.0
Principals and Sup. (W) (N-762)	52.9	4.9	40.4	1.8	100.0
PTA (W) (N-375)	29.6	1.6	66.1	2.7	100.0
Editors (N-118)	50.0	4.2	42.4	3.4	100.0
Radio Station Mgrs (N-54)	42.6	7.4	42.6	7.4	100.0
County Officials (N-224)	21.0	.9	70.9	7.1	99.9
School Officials (N-309)	23.0	.6	70.9	5.5	100.0
Legislators (N-79)	31.6	2.5	64.6	1.3	100.0
Ministers (N-101)	62.3	4.0	31.9	2.0	100.2
Negro Principals (N-177)	84.2	8.5	3.9	3.4	100.0
PTA (Negro) (N-86)	70.9	5.8	12.7	10.4	99.8

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TABLE 4

PER CENT WILLING OR UNWILLING TO COMPLY WITH COURTS AND SCHOOL OFFICIALS, BY GROUPS

Group and Number*	Would Comply	Would Not Comply	No Information	Total
Principals and Sup. (W) (N-762)	84.5	13.6	1.8	99.9
PTA (W) (N-375)	51.2	46.1	2.7	100.0
Editors (N-118)	70.3	26.3	3.4	100.0
Radio Station Mgrs. (N-54)	70.4	22.2	7.4	100.0
County Officials (N-224)	44.6	48.2	7.1	99.9
School Officials (N-309)	45.3	49.2	5.5	100.0
Legislators (N-79)	50.6	48.1	1.3	100.0
Ministers (N-101)	74.3	23.9	2.0	100.2
Negro Principals (N-177)	93.7	2.8	3.4	99.9
PTA (Negro) (N-86)	79.0	10.4	10.4	99.8

* These combinations could not be made for peace officers.

TABLE 5

PER CENT OF EACH GROUP PREDICTING MOB VIOLENCE AND SERIOUS VIOLENCE

Group and Number	Predict Mob Violence	Predict Serious Violence
Peace Officers (N-1669)	29.2	46.6
Principals and Sup. (W) (N-771)	8.9	22.8[1]
PTA (W) (N-375)	17.3	33.7[2]
Editors (N-118)	8.5	20.3
Radio Station Managers (N-54)	11.1	18.5
County Officials (N-230)	23.0	35.3[3]
School Officials (N-303)	31.0	44.9
Legislators (N-79)	27.8	39.2
Ministers (N-101)	10.9	13.9
Negro Principals (N-180)	4.4	4.5[4]
PTA (Negro) (N-86)	5.8	8.1

1. N-762.
2. N-371.
3. N-224.
4. N-174.

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TABLE 6

PER CENT OF EACH GROUP DOUBTING ABILITY OF PEACE OFFICERS TO COPE WITH SERIOUS VIOLENCE

Group and Number	Answered "No"	Answered "Don't Know"	Answered "No" or "Don't Know"
Peace Officers (N-1669)	55.7	26.8	81.0
Principals and Sup. (W) (N-762)	34.7	40.7	72.4
PTA (W) (N-375)	42.1	36.0	78.1
Editors (N-118)	35.6	24.6	60.2
Radio Station Man. (N-54)	33.3	22.2	55.5
County Officials (N-224)	41.1	25.4	66.5
School Officials (N-303)	49.2	27.4	76.6
Legislators (N-79)	49.4	21.5	70.9
Ministers (N-101)	23.8	40.7	64.5
Negro Principals (N-177)	11.3	31.6	42.9
PTA (Negro) (N-86)	18.6	33.7	52.3

TABLE 7

PER CENT OF EACH GROUP WHO BELIEVE PEACE OFFICERS COULD COPE WITH MINOR VIOLENCE

Group and Number	Answered "Yes"
Peace Officers (N-1669)	50.9
Principals and Sup. (W) (N-362)	52.1
P.T.A. (W) (N-375)	34.1
Editors (N-118)	74.6
Radio Station Man. (N-54)	59.3
County Officials (N-224)	51.3
School Officials (N-303)	41.6
Legislators (N-79)	60.8
Ministers (N-101)	64.4
Negro Principals (N-177)	61.0
P.T.A. (Negro) (N-86)	46.5

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TABLE 8

PER CENT OF GROUPS POLLED WHO BELIEVE MOST OF OTHER SPECIFIED GROUPS DISAGREE WITH THE DECISION

Group and Number*	Specified Group: Most People in Florida	Whites in Community	Negroes in Community
Principals and Sup. (W) (N-756)	65.6[1]	73.0	25.1
P.T.A. (W) (N-375)	61.6	87.5	42.5
Editors (N-118)	59.3	69.5	**
Radio Station Man. (N-54)	42.6	72.3	**
County Officials (N-224)	74.8[2]	80.8	47.8
School Officials (N-303)	75.7[3]	85.5	52.5
Legislators (N-79)	69.1	78.6	39.1
Ministers (N-101)	48.6*	48.6	**
Negro Principals (N-180)	7.8	26.7	8.9
P.T.A. (Negro) (N-86)	16.3	37.2	15.1

1. N-770.
2. N-230.
3. N-309.

* For ministers, this question asked how most of the members of their congregation felt.

**This group not asked how Negroes as a separate group felt.

TABLE 9

PER CENT OF EACH GROUP DESIGNATING VARIOUS METHODS OF ENDING SEGREGATION AS MOST EFFECTIVE

Group and Number	METHOD				
	Immediate	Very Gradual	Other Gradual*	No Information	Total
Peace Officers (N-1669)	.5	9.2		90.3[1]	100.0
Principals and Sup. (W) (N-771)	3.1	71.7	19.5	5.4	99.7
P.T.A. (W) (N-375)	4.3	65.1	13.7	17.0	100.1
Editors (N-118)	5.1	60.2	19.5	15.3	100.1
Radio Station Man. (N-54)	14.8	46.3	25.9	12.9	99.9
County Officials (N-230)	5.2	49.1	16.0	29.6	99.9
School Officials (N-309)	4.9	62.8	9.7	22.6	100.0
Legislators (N-79)	11.4	49.4	17.7	21.5	100.0
Ministers (N-101)	5.9	47.5	33.7	12.9	100.0
Negro Principals (N-174)	9.8	31.6	55.7	2.9	100.0
P.T.A. (Negro) (N-86)	13.9	26.7	46.5	12.8	99.9

* "Other gradual" includes "Keeping existing school boundaries for the time being, but immediately letting children who want to do so go to the closest school regardless of race," and "A one or two year period of preparation before any schools are integrated."
1. These peace officers gave no information or answered "Segregation should be kept."

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TABLE 10

PER CENT OF EACH GROUP DESIGNATING SPECIFIED GRADE LEVELS AS EASIEST PLACE TO START DESEGREGATION

Group and Number*	GRADE LEVEL Grades 1-3	College	1-3 and College	All Other	Don't Know or No Inf.	Total
Principals and Sup. (W) (N-771)	34.2	33.6	12.1	10.0	10.0	99.9
P.T.A. (W) (N-375)	36.5	23.5	4.5	5.3	30.1	99.9
Editors (N-78)	37.3	16.9	7.6	15.2	22.9	99.9
County Officials (N-230)	26.1	18.3	3.5	10.0	42.2	100.1
School Officials (N-309)	30.4	23.3	4.2	7.4	34.6	99.9
Legislators (N-79)	22.8	34.2	5.1	10.1	28.0	100.2
Ministers (N-101)	29.7	19.8	8.9	18.9	22.9	100.2
Negro Principals (N-180)	23.3	13.9	11.1	43.9	7.8	100.0
P.T.A. (Negro) (N-86)	23.3	16.3	1.2	40.7	18.6	100.1

* These combinations could not be made for peace officers.

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TABLE 11

PER CENT OF EACH GROUP DESIGNATING VARIOUS PROBLEMS AS BEING LIKELY TO ARISE

Problem Area	Principals & Sup. (W) (771)	PTA (W) (375)	School Officials (303)	Principals (N) (180)	PTA (N) (86)
Discipline by White Teachers	16.7	.....	.....	3.9	.....
Discipline by Negro Teachers	55.2	65.9	66.2	6.7	20.9
Lowering of Academic Standards	48.6	.....	.....	11.7	.....
Unfairness by White Teachers	17.0	31.2	22.3	6.7	19.8
Unfairness by Negro Teachers	15.8	26.3	16.6	10.6	11.7
Unfairness to Negroes by Bus Drivers	22.6	.....	25.3	14.4	.....
Development of Private Schools	61.1	70.4	64.3	12.2	18.6
Withdrawal of Whites from Public Schools	55.4	57.6	63.4	12.2	18.6
School Officials Resigning	.....	.....	32.3	.....	.....
Difficulty in Hiring White Teachers	.....	.....	72.2	.....	.....
Rejection of Negro Teacher Applications	.....	.....	62.8	.....	.....
Lack of Tax Support for Mixed Schools	.....	41.3	49.4	.....	19.8

TABLE 12

CONFIDENCE OF PEACE OFFICERS IN ABILITY TO COPE WITH SERIOUS VIOLENCE, BY ATTITUDE TOWARDS DESEGREGATION*

Attitude	Belief that Police Could Maintain Order If Serious Violence Started		
	They Could	They Couldn't	Total
Segregation should be kept	193	836	1029
Segregation should be ended, gradually or immediately	54	64	118

$r_t = +.45$

* Peace officers who answered "Don't Know" have been omitted from this table.

TABLE 13

CONFIDENCE OF PEACE OFFICERS THAT POLICE WOULD ENFORCE SCHOOL ATTENDANCE LAWS FOR MIXED SCHOOLS, BY ATTITUDE TOWARDS DESEGREGATION*

Attitude	Judgment of Willingness of Police to Enforce Attendance Laws		
	They Would	They Wouldn't	Total
Segregation should be kept	151	796	947
Segregation should be ended, gradually or immediately	67	36	103

$r_t = +.65$

* Peace officers who answered "Don't Know" have been omitted from this table.

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TABLE 14

PER CENT OF PEACE OFFICERS EXPRESSING VARIOUS ATTITUDES, BY REGION

Region	Attitude Expressed				
	Keep Segregation	Desegregate Gradually	Desegregate Immediately	No Inf.	Total
I (N-133)	83.5	15.0		1.5	100.0
II (N-130)	93.1	4.6	.8	1.5	100.0
III (N-83)	86.7	12.0		1.2	99.9
IV (N-269)	92.9	6.3	.7		99.9
V (N-269)	94.8	3.3	.7	1.1	99.9
VI (N-335)	90.1	9.2		.6	99.9
VII (N-27)	100.0				100.0
VIII (N-423)	83.4	14.2	.9	1.4	99.9

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TABLE 15

PER CENT OF WHITE PRINCIPALS AND SUPERVISORS AGREEING OR DISAGREEING WITH THE DECISION, BY REGION

Region	Agree	Disagree	Neutral	No Inf.	Total
I (N-71)	53.5	42.2	1.4	2.8	99.9
II (N-151)	38.4	54.3	6.6	.7	100.0
III (N-38)	60.5	36.8	2.6		99.9
IV (N-135)	47.4	46.7	3.7	2.2	100.0
V (N-99)	47.5	40.4	8.1	4.0	100.0
VI (N-117)	65.0	30.8	3.4	.8	100.0
VII (N-30)	33.3	60.0	6.7		100.0
VIII (N-121)	71.9	20.7	5.0	2.5	100.1

TABLE 16

PER CENT OF WHITE PRINCIPALS AND SUPERVISORS WILLING OR UNWILLING TO COMPLY, BY REGION

Region	Would Comply	Would Not Comply	No Inf.	Total
I (N-71)	81.7	15.5	2.8	100.0
II (N-151)	78.1	21.2	.7	100.0
III (N-38)	78.9	21.1	....	100.0
IV (N-135)	80.0	17.8	2.2	100.0
V (N-99)	84.8	11.1	4.0	99.9
VI (N-117)	94.0	5.1	.8	99.9
VII (N-30)	76.7	23.3	....	100.0
VIII (N-121)	93.4	4.1	2.5	100.0

TABLE 17

PER CENT OF PEACE OFFICERS PREDICTING MOB VIOLENCE, BY REGION

Region	Per Cent Predicting Mob Violence
I (N-133)	33.8
II (N-130)	36.1
III (N-83)	26.5
IV (N-269)	39.9
V (N-269)	31.2
VI (N-335)	27.5
VII (N-27)	63.0
VIII (N-423)	20.6

TABLE 18

NUMBER AND PER CENT OF PEACE OFFICERS AND WHITE PRINCIPALS AND SUPERVISORS PREDICTING SERIOUS VIOLENCE, BY REGION

Region	GROUP			
	Peace Officers		Principals and Supervisors	
	No.	Per Cent	No.	Per Cent
I	75	56.4	20	28.2
II	81	62.3	55	36.4
III	39	47.0	10	26.3
IV	144	53.5	28	20.7
V	129	48.0	20	20.2
VI	159	47.5	16	13.7
VII	16	59.3	13	43.3
VIII	135	31.9	12	9.9

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TABLE 19

NUMBER AND PER CENT OF PEACE OFFICERS AND WHITE PRINCIPALS AND SUPERVISORS DOUBTING THAT PEACE OFFICERS COULD COPE WITH SERIOUS VIOLENCE, BY REGION*

Region	Peace Officers		Principals and Supervisors	
	Number	Per Cent	Number	Per Cent
I	105	78.9	53	74.6
II	109	83.8	111	73.5
III	74	89.2	27	71.1
IV	223	82.9	110	81.5
V	230	85.5	73	73.7
VI	265	79.1	76	65.0
VII	24	88.9	22	73.3
VIII	314	74.2	80	66.1

* Based on total of respondents who answered "No" or "Don't Know" to question, "Do you think the peace officers in your community would be able to maintain law and order if serious violence is started?"

TABLE 20

NUMBER AND PER CENT OF LEGISLATORS FAVORING EACH OF FIVE POSSIBLE COURSES OF LEGISLATIVE ACTION

Course of Action	Number	Per Cent
Legislation to preserve segregation indefinitely by whatever means possible	32	40.5
Legislation to preserve segregation for a few more years, contemplating eventual integration but permitting time for development of public acceptance	8	10.1
Legislation permitting voluntary compliance with Court's decision by local school officials, after consultation with patrons	4	5.1
Setting up legal machinery to permit gradual adjustment on a local option basis with provision for interracial committees, group discussions by school patrons and other means to bring about harmonious and peaceful compliance over a requisite period of time	18	22.8
No legislative action	10	12.7
No information given	7	8.8
Total	79	100.0

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Leadership Opinion By Personal Interview ...and Conclusions*

While the mail questionnaire method may produce a large volume of data in a short time, this method has many disadvantages. One of the most important is the difficulty encountered in analyzing the answers to open-ended questions, questions which the subject may answer in his own words. Another limitation is the difficulty encountered in reaching subjects who are not included on some mailing list, such as informal, non-official leaders in a community power structure. Hence the mail questionnaire study of leadership opinion in the state was supplemented by a study of leadership opinion in 10 selected counties by the use of personal interviews.

Selection of Counties.

The 10 counties selected by the Research Advisory Committee for intensive study included: Charlotte, Hillsborough and Pinellas, in the southwest coastal region; Orange and Lake, in the central, so-called "Ridge Section" of the

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* Prepared by Dr. Lewis Killian, Department of Sociology, Florida State University.

peninsula; Duval, in the northeast coastal region; Lafayette, a rural, inland county in the the north central portion; Gadsden, a rural county in the northwest part of the state; and Washington, a rural county, and Escambia, an urban county, in the extreme northwest portion of the panhandle of Florida.

In the selection of these counties, the following factors were considered:

1. Representation of the different sections of the state. (The southeast section was not included because an intensive study was made in Dade County and nearby areas by the University of Miami).

2. Inclusion of both rural and urban counties.

3. Inclusion of counties with less than 10 per cent Negro population (2) or more than 50 per cent (1). The state has 5 counties in the former category and 2 counties in the latter.

4. Inclusion of certain counties which, on the basis of preliminary evidence, appeared to be areas of relatively high or relatively low resistance to desegregation.

Method of Study.

Interviews were conducted by 16 public school employees from various counties, 12 white and 4 Negro principals or supervisors. No interviewer was assigned to work in his home county. For unavoidable practical reasons, no interviews with Negro subjects were obtained in two counties, and in three other counties only a limited number were obtained, these by white interviewers.

The interviewers, all carefully chosen for the task, were given one day of intensive training in the selection of subjects for interview, interviewing techniques, and interview recording. A schedule consisting of thirteen open-ended questions, similar to the structured questions used on the

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mail questionnaire and supplemented by suggested probing questions, was furnished. The interviewers were also given a list of community leaders, official and non-official, whom they should attempt to interview. It should be noted that the field workers were instructed to follow the advice of local informants in selecting subjects, both white and Negro, considered to be important figures in the power structure of the community.

Each interviewer wrote, at the completion of his field work, an independent analysis of the situation in the county he studied. In addition, a content analysis was made of all interviews by a team of eight analysts, four white and four Negro, from the State Department of Education, the Florida A. and M. University, and the Florida State University. In this analysis the interviews were coded for IBM tabulation.[1] After analysis and coding were completed, approximately one-half of the interviews were coded for two items a second time by another member of the team, white and Negro members exchanging interviews. A reliability check on these items revealed a high degree of reliability between ratings by separate analysts, indicating that personal and racial biases in the interpretation of the interview protocols were slight.

Findings.

Interviews were obtained from a total of 460 white subjects and 195 Negro subjects. Of the white subjects, 263 were official leaders (County, city and school officials, judges, peace officers, and school employees) and 197 were non-official leaders (business, professional, civic club, re-

1. Statistical analysis of the interview data was done in the Sociology Research Laboratory of the Florida State University, under the direction of Prof. Robert McGinnis and Dr. John M. Haer. Responsibility for the interpretation of the results is assumed by the Research Advisory Committee.

ligious, labor, youth). There were 42 Negro subjects who were school employees, and 153 non-official Negro leaders, including a large number of insurance men, undertakers, and independent business men.

Distribution of the interviews by counties, for Negro and white, are shown below:

County	*White*	*Negro*
Charlotte	34	None
Duval	47	31
Escambia	40	64
Gadsden	27	7
Hillsborough	79	43
Lafayette	20	None
Lake	43	7
Orange	47	21
Pinellas	90	13
Washington	33	9

On the basis of statistical analysis of the interviews and the impressions reported by the field staff, the findings indicated below were reached. Although a different method of study was used, these findings do not differ significantly from those of the questionnaire study.

These findings are:

1. The majority of white subjects (67.7 per cent) are in disagreement with the decision, but only 4.1 per cent of the Negroes interviewed disagreed.

Even white subjects who thought the decision was right expressed, for the most part, fear that violence would occur if desegregation were not worked out gradually or if, in the words of some, "it is crammed down our throats." Some whites violently opposed to the decision made such statements as, "The decision is an outrage; it is wrong and will never work," and "These colored children should be treated in such a way that they would not want to come back to school."

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On the other hand, a Negro interviewer summarized the opinions of Negroes in one county in the words, "God is behind the court's decision. He will see that it is carried out, but he doesn't want us to hasten," and in another county in the words, "This problem should have been met squarely years ago. There is no need attempting to circumvent, but settle the problem once and for all instead of passing it into the laps of our children."

2. Slightly less than half (45.7) per cent of the whites indicated that they would not cooperate with the decision of the courts or local school officials as to how to effect desegregation, only 16 per cent indicating that they would actively oppose attempts to end segregation.

Caution must be exercised in inferring that a major segment of the white leadership represented here would "go along" with any plan for desegregation, regardless of its nature. It must be considered that many informants may have been indicating willingness to comply with what they thought the courts and, particularly, the school officials would do, but not with anything that they might possibly decide.

3. One reason given by white subjects for disagreement with the decision was that it is a violation of "states' rights" and, in effect, a negation of local autonomy.

4. White leaders are almost unanimously opposed to any immediate steps to end segregation in their communities, only 4 out of 460 favoring such steps.

5. Of the Negro leaders, only 28.2 per cent favor immediate ending of all segregation in public education in their communities, but 58.9 per cent believe that the transition should begin within the next three years.

6. Whites and Negroes differ sharply in their assessment of white community opinion on the decision, 77 per cent of the white leaders believing most of the white people in their

communities disagree with the decision, but only 25.1 per cent of the Negroes believing this.

7. Whites and Negroes differ sharply in their assessment of Negro opinion in their communities, 54.3 per cent of the white leaders believing that most Negroes disagree with the decision, but only 6.1 per cent of the Negro leaders believing so.

8. While only 30 per cent of the whites believe that even a few Negro children could be admitted now to a previously all white school without resulting violence, 76.4 per cent of the Negroes believe that this could be done without causing violence.

9. Of the subjects answering the question (210 white, 82 Negro), a majority of Negroes (89 per cent) believe that peace officers could and would maintain law and order if violence started, but only 46.7 per cent of the whites believe this. A great many subjects in both groups did not answer this question.

10. While many white leaders seem to expect trouble and even violence to occur if desegregation is attempted, there was no definite group or category of people which was specified by more than 10 per cent of the respondents as being likely to cause this trouble.

11. White leaders designated the primary grades and the colleges and universities most frequently as the best place to start desegregation if it were undertaken (primary—31.7 per cent; college—13.3 per cent; both—8.5 per cent) but Negro leaders designated all grades from primary through high school most often (32.3 per cent).

12. Specific problems other than violence which might arise from desegregation were identified by a greater proportion of whites than of Negroes, although only a minority of each group designated any given eventuality as a likely problem. The problems most often designated by whites were: getting white teachers to teach in mixed schools; using Negro teachers in mixed schools; maintaining discipline on school busses and in classes; getting white parents to

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send their children to mixed public schools; keeping present academic standards; and getting tax support for mixed schools.

13. In no county does it appear that more than a small segment of whites is ready to accept immediate and abrupt desegregation. In two counties, however, a majority of the white leadership interviewed (in one, 59.5 per cent, in the other, 72.4 per cent) believe that desegregation can be accomplished peacefully and effectively if it is done over a period of years, with a preparatory program of education, and at a rate determined by the local citizens.

14. In one county, the high frequency of belief among white leaders that segregation should be kept, that violence would result from desegregation, and that peace officers could not cope with such violence, makes it appear very likely that conflict and disorder would result if an attempt to start desegregation by any means was undertaken even within from five to ten years from the present.

15. Inspection of the interview protocols and the reports of the field staff reveal that even within counties there is wide variation in readiness by whites of different communities to accept desegregation.

In one county there is one community in which both Negro and white leaders fear serious violence, in which organized, violent opposition to desegregation is anticipated, and in which, indeed, organized but peaceful opposition has already appeared. In the same county is a community in which, in the judgment of both white and Negro interviewers, gradual but effective desegregation could be accomplished in the next few years. Similar situations exist in all but two of the counties, both predominantly rural but differing in region and proportion of Negroes in the population.

16. Concrete suggestions for effective first steps towards gradual desegregation offered by subjects include a period of education preparatory to the first steps, and the working together in interracial committees of adults who would study together the problems confronting their community.

THE PERSONAL INTERVIEW SCHEDULE

Position:

How Selected:

1. Just what do you understand the Supreme Court decision to mean?

2. How do you feel about the decision?
   Probing:

   Feel it was right?
   Feel it was wrong?
   Feel it was neither right nor wrong—just not sure?

   If right,
   Not at this time?
   We need time?
   We should try to end segregation immediately?

   If wrong,
   Should cooperate because it is the law?
   Will not cooperate in ending segregation?
   Will actively oppose the action?

   If neutral,
   Will do whatever the courts and school officials say?

3. How do you think most of the people of Florida feel about it?

4. How do you think most of the people of this community feel about it?

   Probing:
   How do white people feel about it?
   How do colored people feel about it?

5. Do you think there are any people in this community who feel differently about this?

   If yes, probing:
   How do they feel about it?
   What kind of people are they? (General descriptive terms)
   Are they organized in any way?

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What kinds of things do you think they would do to put across their viewpoint?

6. Now, suppose the local school board decided in the next few years that it had to let a few colored children who lived in a mostly white attendance area go to the nearest school. What do you think would happen?

   Probing:

   What would people in this community do?
   Would anyone try to keep them from attending the school?

   If so, who would they be? (*Not* by name—just a general description) What kinds of things would they do?
   Who would be the leaders?
   Who would participate?
   Would the existing law enforcement staff of this community be able to prevent violence from occurring?
   Under what conditions would they be able to prevent violence, and under what conditions would they not be able to?

7. Now, suppose that in the next few years a few colored persons in your county applied for admittance to a white school and a court ordered that they be admitted. What do you think would happen?

   Probing:

   What would people in this community do?
   What would the school board do? (Admit them immediately? Try to fight the court order? Resign?)
   If they decided to admit them, would anyone try to keep them from attending school?
   (Continue as in question 6)

8. Suppose the local school board decided that it had to let all children go to the school nearest their home. What do you think would happen?

   Probing: (Same as for question 6)

9. If segregation in the schools were done away with in the next few years, what problems do you think would come up?

Probing:

In the employment of white teachers?

In the employment of colored teachers?

In transportation of children to school?

In getting public support for school finance programs?

In keeping order among the children in the classroom and on the playground?

In getting parents, white and colored, to send their children to mixed schools?

In getting fair treatment by teachers of all children regardless of race?

In keeping high teaching standards in the schools?

10. What ways can you suggest for handling any of the problems you have mentioned?

11. Suppose public school segregation had to be ended sooner or later. What do you think would be the best way to do it?

Probing:

There just isn't any way?

Assign all children to school on the basis of geographical location immediately?

Keep present school boundaries at first and let children who want to do so go to the closest school?

Have a one or two year period of preparation before any steps are taken to end segregation?

Try to work it out over a period of years?

12. If it had to be done in the next few years, in what grades do you think it would be easiest to start admitting colored and white to the same schools?

13. Is there anything I haven't touched on in my questions which you would like to comment on?

Personnel Interviewed

A. *Leaders* (Officials)

County Commissioners, Chairman
Mayor or City Manager
Sheriff
Chief of Police

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County Judge
County Solicitors
Superintendent of Schools
County Health Officer
County Board of Public Instruction, Chairman
County School Trustees, Chairman
County Commissioners
City Commissioners
Deputies
Police Officers
Circuit Judge
State Attorney
Judge, Court of Criminal Record
County Board of Public Instruction, Members
County School Trustees, Members

B. *Leaders* (Non-officials)

School principals
School supervisors
Teachers
PTA leaders
Women's Club leaders
Chamber of Commerce president
Civic and Veterans' organizations leaders
Newspaper editor or publisher
Bankers
Lawyers
Doctors
Realtors
Labor union leaders
Undertakers
Insurance men
Leading business men
Directors, housing projects
Other leaders designated by respondents as:

(1) Being in a position to know what people in the community are thinking and doing.

(2) Being important in influencing what people in the community think and do.

RELIABILITY OF JUDGMENTS IN THE ANALYSIS OF RECORDED INTERVIEWS ON THE SUBJECT OF THE SUPREME COURT'S SEGREGATION DECISION*

Eight trained social scientists—four Negro, four white—made the analysis of 657 interviews recorded on the subject of the Supreme Court decision declaring segregation unconstitutional. Each judge analyzed approximately 80, using a scale devised for the specific case at hand.

To indicate the reliability of ratings by the judges, two items were arbitrarily selected for analysis. The two items selected were thought to offer representative difficulties to the judges. The judges were paired—one white and one Negro—and each judge independently re-rated half of his partner's interviews on the two items.

The first item concerned a judgment of the personal feeling of the respondent on the following scale:

1. Firmly in favor of the decision, and believe that schools should be immediately opened to both races throughout Florida.

2. Firmly in favor of the decision and feel schools should be gradually combined, taking into consideration places which need more preparation.

3. Feel that such a decision should have been made eventually, but believe we are not ready for it. Feel we must move very slowly and cautiously.

4. Neither in favor of or against the decision; will agree with whatever the courts and school officials do.

5. Against the decision, but will agree with whatever the courts and school officials do.

---

* Prepared by Fay-Tyler M. Norton, graduate psychologist.

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6. Firmly against the decision; will not cooperate in ending public school segregation.

7. Firmly against the decision; will actively oppose any attempt to end segregation in Florida schools.

8. Other; Pro-segregation

9. Other; anti-segregation

0. Don't know

x. No information

The second item concerned a judgement on the "general tone of the interview." The scale consisted of the following:

(1. Will oppose.
(2. It won't work.
(3. Indecisive.
(4. Can be worked out, but will take time.
(5. Integration can take place soon.

The plan for statistical analysis included percent of agreement between judges, Chi square, and the contingency coefficient for each of the eight sets of paired judgements.

For purposes of reporting and analysis, it was deemed more meaningful to combine categories in both items to form a directional scale. A preliminary check revealed that the categories were probably too finely drawn to be highly reliable as specific categories. In the first item, categories 1, 2, 3, and 9, and categories 5, 6, 7, 8, were used to indicate "in favor" or "against" the decision, respectively. In the second item, categories 1 and 2, and categories 4 and 5 were used to indicate "unfavorable" and "favorable", respectively. There were no interviews rated as 0 or x.

Table 1 shows (1) the percent of agreement between the pairs of judges on both items and (2) the total number of paired judgments made by each pair. The consistency of the judges is evident.* It is especially important that con-

* Note that the probability for agreement on only *one* interview is 1/9.

sistency of judgment was found between white and Negro judges.

Tables 2-5 indicate the ratings given the personal attitude of the interviewees by the four pairs of judges.

Each of the extremely high values of Chi square would occur much less than .001 times by chance alone. Inspection of the tables will show the positive relationship of the judges' ratings. The contingency coefficients indicate the degree of association.

Tables 6-9 indicate the classifications of the interviews according to "general tone." Here again each of the extremely high values of Chi square would occur much less than .001 times by chance alone. The relationship of the judges' classifications is also a positive one, the contingency coefficients indicating the degree of association.

Note must be made of violation of an assumption basic to the use of the Chi square statistic. Several of the theoretical cell frequencies in each table are less than 5. In this case the violation is not as serious as it might be, because the values of Chi square are extremely high. Reference is made to the article on the Chi-square test by Lewis and Burke.[1]

The four independent indicators of reliability for each of these items are acceptably high. The extension of acceptable reliability to other items of the interview analysis must be made on logical grounds alone.

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1. Lewis, Don, and Burke, C. J. The use and mis-use of the Chi-square test. *Psychol. Bull.*, 1949, 46, 433-489.

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TABLE 1

PER CENT AGREEMENT BETWEEN JUDGES

I. RATINGS OF INTERVIEWEE FEELING

Judges*	Per Cent	Total No.
I & II	94	89
III &IV	93	86
V & VI	92	60
VII & VIII	89	82

II. RATINGS OF INTERVIEWS AS A WHOLE

Judges*	Per Cent	Total No.
I & II	85	85
III & IV	80	84
V & VI	66	61
VII & VIII	80	80

*Judges I, III, V, VII—Negro
Judges II, IV, VI, VIII—White

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TABLE 2

FREQUENCIES OF RATINGS OF INTERVIEWEE FEELING BY JUDGES I & II

		Judge I			
		In favor of Supreme Court decision	Neutral	Against the Supreme Court decision	Total No. of cases
Judge II	In favor of Supreme Court decision	37	1	2	
	Neutral	0	5	0	
	Against the Supreme Court decision	1	1	42	
	Total No. of cases				89

Chi square=75.9711; P less than .001
C=.68

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TABLE 3

FREQUENCIES OF RATINGS OF INTERVIEWEE FEELING BY JUDGES III & IV

		Judge III			
		In favor of Supreme Court decision	Neutral	Against the Supreme Court decision	Total No. of cases
Judge IV	In favor of Supreme Court decision	50	0	1	
	Neutral	1	0	1	
	Against the Supreme Court decision	2	1	30	
	Total No. of cases				86

Chi square=79.368; P less than .001
C=.69

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TABLE 4

FREQUENCIES OF RATINGS OF INTERVIEWEE FEELING BY JUDGES V & VI

		Judge V			
		In favor of Supreme Court decision	Neutral	Against the Supreme Court decision	Total No. of cases
Judge VI	In favor of Supreme Court decision	17	0	1	
	Neutral	1	1	2	
	Against the Supreme Court decision	1	0	37	
	Total No. of cases				60

Chi square=44.436; P less than .001
C=.65

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TABLE 5

FREQUENCIES OF RATINGS OF INTERVIEWEE FEELING BY JUDGES VII & VIII

		Judge VII			
		In favor of Supreme Court decision	Neutral	Against the Supreme Court decision	Total No. of cases
Judge VIII	In favor of Supreme Court decision	55	1	7	
	Neutral	0	1	0	
	Against the Supreme Court decision	1	0	17	
	Total No. of cases				82

Chi square=50.5192; P less than .001
C=.62

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TABLE 6

FREQUENCIES OF CLASSIFICATION OF INTERVIEWS BY JUDGES I & II

		Judge I			
		Unfavorable	Neutral	Favorable	Total No. of cases
Judge II	Unfavorable	24	1	6	
	Neutral	0	0	1	
	Favorable	4	1	48	
	Total No. of cases				85

Chi square=51.067; P less than .001
C=.61

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TABLE 7

FREQUENCIES OF CLASSIFICATION OF INTERVIEWS BY JUDGES III & IV

		Judge III			
		Unfavorable	Neutral	Favorable	Total No. of cases
Judge IV	Unfavorable	16	1	3	
	Neutral	4	1	4	
	Favorable	2	3	50	
	Total No. of cases				84

Chi square=48.511; P less than .001
C=.50

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TABLE 8

FREQUENCIES OF CLASSIFICATION OF INTERVIEWS BY JUDGES V & VI

		Judge V			
		Unfavorable	Neutral	Favorable	Total No. of cases
Judge VI	Unfavorable	24	1	8	
	Neutral	4	0	7	
	Favorable	0	1	16	
	Total No. of cases				61

Chi square=21.395; P less than .001
C=.41

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TABLE 9

FREQUENCIES OF CLASSIFICATION OF INTERVIEWS BY JUDGES VII & VIII

		Judge VII			
		Unfavorable	Neutral	Favorable	Total No. of cases
Judge VIII	Unfavorable	3	0	0	
	Neutral	5	3	3	
	Favorable	7	1	58	
	Total No. of cases				80

Chi square=25.4613; P less than .001

C=.47

Analysis of Negro Registration and Voting in Florida 1940-1954*

This is a study of the trend of Negro registration for voting for the years 1940-1954, an example of the way Negroes have begun to take advantage of a privilege from which State restrictions were removed by a federal court decision.

The reliability of figures on registrations is questionable. In many instances supervisors have failed to keep accurate and up-to-date records, and in several instances the report made to the Secretary of State differs from that made to the Attorney General. It is impossible to compare the percent of negroes over 21 registered with the percent of whites over 21 registered; many counties report more white registrants than there are adults over 21 according to the 1950 census.

Immediately evident from graphs of the number of Negroes registered is the tremendous increase in registration following 1944 when the decision in Smith v. Allwright (321 U.S. 649) was made applicable to Florida through further litigation.

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* Prepared by Dr. Malcolm B. Parsons and Dr. J. A. Norton, School of Public Administration, Florida State University.

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Evident from a county-by-county report is the great variation among counties in the percentage of non-whites over 21 who are registered.

There is also a variation in the time when Negro registrants increased. The following table shows the time pattern for counties with no Negroes registered.

Number of Counties with No Negro Registrants

1940—51
1944—36
1946— 4—Madison, Liberty, Lafayette, Union, Hendry (2)
1948— 4—Madison, Liberty, Lafayette, Union (1), Hendry
1950— 5—Madison, Liberty, Lafayette, Union, Calhoun
1952— 4—Madison, Liberty, Lafayette, Union
1954— 3—Liberty, Lafayette, Union

The counties which have had no Negroes registered since 1946 have all been in north Florida, except for Hendry which left this group in 1950.

Madison county is a good example both of how rapidly situations can change and the techniques necessary to produce a change. Madison County had no Negro registrants until just before the 1954 primaries. At this time 586 Negroes went to the courthouse *en masse* and were registered. According to the supervisor of registration most of the registrants exercised their franchise.

In 1952, the counties in North Central Florida (the plantation-South culture) showed a generally uniform pattern of a low percentage of Negro registrants. All 4 counties with no Negroes registered are in this bloc.

Very interesting are the Florida counties, especially in North Florida, showing a high percentage of Negroes registered. These reports would bear close examination in light of participation reports and other studies. Where urban machines are known to operate the pattern is not surprising. In other counties the explanations do not come easily.

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Graphs showing absolute numbers of Negro registrants from 1940 through 1954, and the percent of adult Negroes registered for those years, are attached for each of the 12 counties under interview scrutiny.

"We don't mind for our niggers to register, but we don't let 'em vote", a North Florida official is quoted as saying. The questionnaire sent to supervisors furnishes the only information on the number of Negroes who actually vote. Many of these figures were plainly labelled "estimates", others probably are.

Many reports must be interpreted in one of two ways:

(1) They are either poor guesses, or

(2) Any Negro who dares register is determined to exercise his right to vote.

This evaluation is made because the percentage of registered Negroes who vote is much higher than one would estimate on the basis of the social-economic levels which correlate with voting interest. The evaluation applies with somewhat less force to the counties under interview scrutiny, but it is not clear why.

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SUMMARY SHEET OF ATTORNEY GENERAL'S QUESTIONNAIRE, JULY 15 1954

County	Non-white Registrations reported by Secretary of State	Non-white Registrations reported by County Supt. of Registration	1954, 1st Primary Negro vote as estimated by County Supt. of Registration	1954, 2nd Primary Negro vote as estimated by County Supt. of Registration	Non-white Population 1950
Alachua	2,740	2,726	817	914	16,551
Baker	184	187	164	148	1,546
Bay	2,414	2,396	1,026	1,071	7,165
Bradford	684	636	367	413	2,800
Brevard	1,780	1,780	?	?	6,001
Broward	4,337	4,348	1,839	1,656	21,359
Calhoun	136	147	62	58	1,119
Charlotte	237	239	140	119	672
Citrus	486	486	283	248	1,555
Clay	946	968	796	742	2,105
Collier	526	526	319	306	1,986
Columbia	956	986	496	378	6,124
Dade	20,179	20,108	?	?	65,392
DeSoto	739	739	272	345	2,002

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SUMMARY SHEET OF ATTORNEY GENERAL'S QUESTIONNAIRE, JULY 15, 1954 (Continued)

County	Non-white Registrations reported by Secretary of State	Non-white Registrations reported by County Supt. of Registration	1954, 1st Primary Negro vote as estimated by County Supt. of Registration	1954, 2nd Primary Negro vote as estimated by County Supt. of Registration	Non-white Population 1950
Dixie	91	91	85	85	562
Duval	25,774	25,817	11,876	10,585	81,840
Escambia	6,545	6,553	1,834	2,096	25,123
Flagler	4	4	2	0	1,534
Franklin	309	309	244	193	1,496
Gadsden	8	8	3	?	20,468
Gilchrist	10	10	4	4	346
Glades	342	247	107	118	898
Gulf	426	414	284	226	2,007
Hamilton	212	238	150	100	3,790
Hardee	282	282	155	157	750
Hendry	550	551	300	237	1,580
Hernando	420	420	252	252	1,539
Highlands	1,276	1,270	557	613	3,466

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SUMMARY SHEET OF ATTORNEY GENERAL'S QUESTIONNAIRE, JULY 15, 1954 (Continued)

County	Non-white Registrations reported by Secretary of State	Non-white Registrations reported by County Supt. of Registration	1954, 1st Primary Negro vote as estimated by County Supt. of Registration	1954, 2nd Primary Negro vote as estimated by County Supt. of Registration	Non-white Population 1950
Hillsborough	4,003	4,003	2,400	2,800	38,315
Holmes	145	127	49	58	609
Indian River	289	289	112	153	2,962
Jackson	2,310	2,313	1,375	1,375	11,574
Jefferson	141	225	125	75	6,513
Lafayette	0	0	0	0	325
Lake	1,404	1,404	350	200	8,542
Lee	1,430	1,475	313	216	4,694
Leon	4,150	4,013	2,840	2,459	20,381
Levy	358	358	119	119	3,603
Liberty	0	0	0	0	581
Madison	586	585	?	?	6,477
Manatee	1,290	1,250	500	400	7,916
Marion	4,040	4,043	1,474	1,581	14,594

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SUMMARY SHEET OF ATTORNEY GENERAL'S QUESTIONNAIRE, JULY 15, 1954 (Continued)

County	Non-white Registrations reported by Secretary of State	Non-white Registrations reported by County Supt. of Registration	1954, 1st Primary Negro vote as estimated by County Supt. of Registration	1954, 2nd Primary Negro vote as estimated by County Supt. of Registration	Non-white Population 1950
Martin	516	516	345	310	2,203
Monroe	1,214	1,214	925	596	3,221
Nassau	1,032				4,007
Okaloosa	363	375	187	185	2,198
Okeechobee	291				641
Orange	2,687	2,695	1,139	787	22,766
Osceola	239	239	171	150	1,492
Palm Beach	5,198	5,179	2,043	2,244	34,797
Pasco	633	700	100	75	2,776
Pinellas	3,408	3,426	939	975	18,712
Polk	3,685	3,716	†	†	25,577
Putnam	1,433	1,433	409	536	8,608
St. Johns	2,515	2,515	785	618	8,327
St. Lucie	1,464	1,476	545	566	6,394

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SUMMARY SHEET OF ATTORNEY GENERAL'S QUESTIONNAIRE. JULY 15. 1954 (Continued)

County	Non-white Registrations reported by Secretary of State	Non-white Registrations reported by County Supt. of Registration	1954, 1st Primary Negro vote as estimated by County Supt. of Registration	1954, 2nd Primary Negro vote as estimated by County Supt. of Registration	Non-white Population 1950
Santa Rosa	613	613	547	511	1,584
Sarasota	707	639	132	164	4,611
Seminole	1,581	1,624	978	993	11,940
Sumter	520	619	464	464	3,052
Suwannee	438				4,985
Taylor	99	109	0	0	3,181
Union	0	0	0	0	3,231
Volusia	4,537	4,637	2,376	2,358	16,385
Wakulla	139	145	15	22	1,627
Walton	1,721				1,958
Washington	570	581	340	325	2,119

Existing Public School Facilities in Florida ...and Factors of School Administration and Instructional Services Affecting Segregation*

The 1950 census revealed that Florida had grown in population since 1940 more than any state east of the Rocky Mountains. This rapid growth has probably been most sharply observable in the public schools. The present rate of growth in school population from year to year is about 8 per cent. Present school population for the year ended June 30, 1954 was 650,285 (507,276 white; 143,009 Negro) up from 603,665 the year before (467,762 white; 135,903 Negro).

There were 81 schools in 18 counties forced to run double sessions during 1953-54 as against 66 schools in 15 counties the year previous.

The classroom situation is acute. Although 671 classrooms were constructed between July 1, 1953 and July 1,

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* Prepared by Dr. Robert E. Lee, Florida State Department of Education, assisted by Thomas N. Morgan, Florida State Department of Education.

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1954, bringing existing classrooms up to about 18,000, it would require 5000 new classrooms this year to eliminate double sessions, relieve congested classrooms, take care of expanding enrollment and replace obsolete classrooms which should be abandoned.

The need for teachers is equally critical. Conservative estimates place the teacher need for the year 1953-54 at a figure between 4500 and 5000.

During 1953-54 Florida's 2212 school buses manned by 2038 drivers (including 359 Negro drivers) traveled 30,910,944 miles to transport 209,492 pupils at a cost of $4,506,667. The magnitude of this operation can be more readily appreciated by comparing it with that of commercial bus passenger lines which reveals that in miles traveled school buses probably equaled or exceeded the total mileage of all commercial passenger bus lines in the state in the latest recorded corresponding year.

The total cost of operating Florida's public schools for the year 1952-53 is given in Table 1, classified by major items of expenditure.

The level of support of public education in Florida underwent a substantial advance with the establishment of the 1947 Minimum Foundation Program Law. Prior to that year, the assessed value of property within a county was the primary determinant of financial support; since then the extensive tax resources of the entire state have made possible adequate financial support for the education of all the children, regardless of location or color. This structure of school finance can be described as a partnership between each county and the state, whereby the county levies taxes according to its financial ability and the state contributes to each county primarily on the basis of need. Since 1947 the gaps of inequality between the races and between rural and metropolitan areas have been steadily narrowed.

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Table 2 shows that the pronounced discrepancies between white and Negro salaries existing in 1930 and 1940 were reduced to a difference of 21% in 1947 and only 7.0% in 1952-53. In like manner the percentage of discrepancy between Current Expenditure Per Negro Pupil and Current Expenditure Per White Pupil in 1930-31 was 71%, but by 1952-53 this per pupil dollar expenditure for Negroes had risen almost tenfold to where the per cent difference was only 16% less than the corresponding expenditure for whites.

During the fourth and fifth decade, the majority of Negro teachers had less than four years college training. By 1952-53, 94.7% of all Negro teachers compared to 95.6% of all white teachers had at least four years college training.

Capital Outlay Expenditures have reflected not only the inflation of enrollment, but the inflation of new residents and the inflation of construction costs. From 1937 to 1953 Capital Outlay Expenditure for Negroes amounted to $28,975,000, and for white schools the amount was $129,-246,000. The total value of public school property in Florida has been estimated at $300,000,000. Capital Outlay Expenditures Per Negro Pupil were greater than for whites in 1952-53 because of greater needs. During the two decades up to 1947 a limited State Aid Program provided some financial support without specification as to race. Starting in 1947, State Aid under the Minimum Foundation Program was allocated to the counties in such a way that no shifting of salary funds from one race to another could take place. In some counties of Florida, the Expenditures Per Negro Pupil are greater than the Expenditures Per White Pupil. This often happens when the Negro teachers as a group have either greater training or longer service than the white teachers.

Florida provides annually $400 per instruction unit for

Capital Outlay needs which for the 67 counties totaled $9,451,600 in 1953-54 and has been computed at $10,199,448 for the 1954-55 estimate. This money is spent in each county according to the needs recommended by a state conducted school building survey. With the help of these individual county surveys it was estimated as of January, 1954 that $97,000,000 will be needed to provide facilities for white children and $50,000,000 will be needed to provide facilities for Negro children. Since the activation as of the effective date January 1, 1953 of a Constitutional Amendment providing for the issuance of revenue certificates by the State Board of Education against anticipated state Capital Outlay funds for the next thirty years more than $43,000,000 in state guaranteed bonds have been issued to provide additional facilities for both races. By the fall of 1954 there will have been a total of $70,000,000 of these bonds issued and in the foreseeable future the total will be $90,000,000 to $100,000,000. At the present time 2182 classrooms are under construction as a result of the issuance of these bonds.

The growth of Florida's school population in the past five years has far exceeded all expectations and predictions. The combination of a large birth rate during the latter forties and a steadily increasing migration rate is reflected in Table 3.

It is significant that Florida was the only one of the thirteen southern states to show an increase in the age 10-14 Negro population during the last decade. While the general pattern in the South during 1940-50 was a migration of Negroes to the North and West, Florida registered a 2.5% net migration increase and a natural increase of 14.9%. The corresponding rate for the white population for this decade was a net migration increase of 40.6% and a natural increase of 16.1%. It is clear then, that Florida's Negro population, though increasing in both measures, is actually becoming a smaller and smaller minority. The per cent of

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non-white population decreased from 27.2% in 1940 to 21.8% in 1950. As in the other states, a wide range of concentration is found among the 67 counties of Florida. The accompanying two maps of Florida counties show the amount and per cent of non-white population in 1950 and the distribution of Negro enrollment in 1952-53, and illustrate the diversity of Florida's pattern. In only two counties of North and West Florida do the Negroes outnumber the whites. In only one county do the Negroes comprise less than 5% of the county's population. With the exception of Jacksonville, the major metropolitan areas are inhabited by a much smaller proportion of Negroes than the state average.[1]

The shifting of Negro population into the southern coastal counties and into Northeast Florida is contrasted with the out-migration of Negroes from the West Florida non-urban counties. Statewide, twenty-seven counties (or 40%) registered actual losses in Negro population from 1940 to 1950; and the heaviest losers were Dixie (82%), Gilchrist (46%), and Liberty (37%).

Achievement Test Scores

If a significant difference in preparation and achievement level exists between white and Negro students, additional academic problems can be expected in the process of desegregation. It is not inferred that these differences are explained by racial differences.

In Florida, the statutes provide 1,050 scholarships of $400 each for students desiring to train for the teaching profession. Awarding of the scholarships is done on a basis

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1. Dietrich, T. Stanton, Statistical Atlas. Florida's Population: 1940 and 1950: Research Report No. 3. Fla. State University, June, 1954.

of county representation, race, and competitive test scores of psychological and scholastic aptitude. A compilation of the scores of the 740 white twelfth grade applicants in the spring of 1954 yielded an average score of 340. Compilation of the 488 Negro twelfth grade applicants yielded an average score of 237. In the previous year, 1953, 664 white applicants made a mean score of 342 while the 503 Negro applicants made an average score of 237. This difference is classified as very significant and should be interpreted as meaning that factors other than chance explain the different results between white and Negro scores.

In addition, a comparison of the performance of white and Negro high school seniors on a uniform placement-test battery given each spring in the high schools throughout the State of Florida is shown in Table 4. The number of participants corresponds with the total twelfth grade membership during the five-year period, 1949-1953. This table shows, for example, that on all five tests 59% of the Negroes rank no higher than the lowest 10% of the whites. On the general ability scale, the fifty percentile or mid-point on the white scale corresponds with the ninety-five percentile of the Negro scale. In other words, only 5% of the Negroes are above the mid-point of the white general ability level.

Studies of grades at the University of Florida indicate that white high school seniors with placement test percentile ranks below fifty have less than a 50% likelihood of making satisfactory grades in college. While factors such as size of high school, adequacy of materials, economic level, and home environment are recognized as being contributing factors, no attempt is made here to analyze or measure the controlling factors.

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Counties With No Negro High Schools

An examination of facilities provided by the sixty-seven counties reveals that no senior high schooling was offered for Negroes in eight counties in 1953. Transportation to an adjacent county high school is provided in each county. In six of these eight counties the membership available for a 7-12 grade high school is less than seventy-five.

Table 5 shows the estimated number of Negroes eligible for grades 7-12, the number and organization of white high schools, the white average daily membership, the full capacity of the high schools, and the possible space available. If the ban on Negro pupils were lifted, space would be available in six of these eight counties.

Examples of Inter-Racial Cooperation

The tradition of separate schools for Negro children has in effect separated the Negro teachers from association with white teachers. Until recent years, duplicate meetings of teachers during pre-school conferences were held in every county. When specialists and consultants were brought into the county to improve instruction, two presentations instead of one had to be made. Considering the growing demands for efficiency and effective administration that were promulgated by the 1947 Minimum Foundation Program, the administrations in several counties have found it advantageous to schedule a single program of activities during the two week pre-school conference period for instruction personnel. Collier, Monroe, Sarasota, Hardee, and Dixie are counties that have already combined the races for pre-school conferences. This action, it might be noted, has been carried out as a result of voluntary local level initiative without any directive or suggestion from the state administration.

There are other examples of inter-racial cooperation at the county level. In Dade and Duval Counties, Negro supervisory personnel have offices in the same building as their fellow professional staff members. In a number of counties, including Santa Rosa, Leon, Sarasota, Pinellas, Hillsborough, and Hernando, regular principals' meetings are held without regard to race. Negro representatives have participated in the County PTA Council in Hillsborough County. In many counties the development of a Parent Teacher Association in Negro schools has been possible as a result of the personal interest and sponsorship of white PTA leaders. Invitations to be guests and speakers at PTA meetings have not been entirely unilateral.

The State Department of Education has Negro consultants, and staff and division meetings are held at regular intervals in the Capitol with no distinction as to race.

The members of the Florida Resource Use Education Committee are appointed by the Governor and include both races. The purpose of the committee is to promote instruction in the wide use and development of the natural resources in our community, state, and nation.

The Florida Council on Elementary Education and the Florida Council on Secondary Education are each composed of professional educators in Florida and have representation from both races. Membership is by appointment of the State Superintendent of Public Instruction and the purpose of each Council is to conduct studies which will make possible the continued improvement of the school's product.

For the past two years, a week-long Negro Principal's Work Conference has taken place at Bethune-Cookman College with a participation of more than half of all Negro Principals. Speakers, consultants, and specialists were largely drawn from white educators in Florida.

The examples of normal association between the races

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cited herewith are confined largely to professional educators and those citizens deeply concerned about public education.

TABLE 1

SUMMARY OF EXPENDITURES—ALL FUNDS—BOTH RACES, 1952-53

General Control	$ 2,367,825.41
Instruction	78,233,563.93
Operation of Plant	6,540,853.16
Maintenance	4,031,471.75
Auxiliary Agencies	6,585,529.70
Fixed Charges	2,810,762.18
Current Expenses (Day Schools)	100,570,006.13
Other Schools	1,527,768.39
Total Current Expenses (All Schools)	102,097,774.52
Capital Outlay	28,013,835.59
Debt Service	8,783,513.04
Total Expenditures (All Funds)	$138,895,123.15

TABLE 2

SIGNIFICANT TRENDS IN THE GROWTH OF FLORIDA SCHOOLS UNDER DUAL SYSTEM OF EDUCATION 1930 TO 1953

	1930-31	1940-41	1947-48	1952-53
Average Daily Attendance:				
White	203,002	240,388	272,084	380,800
Negro	74,785	87,570	96,503	118,162
Average Annual Salary:				
White	$907	$1,202	$2,770	$3,457
Negro	403	605	2,191	3,215
Teacher Preparation (Per Cent Four Years or More):				
White	38.81%	61.48%	76.72%	95.62%
Negro	15.18	31.90	62.53	94.74
Current Expenses Per Pupil in ADA (All Funds):				
White	$61.26	$72.40	$175.14	$209.42
Negro	17.91	28.80	110.39	176.24
Capital Outlay Per Pupil in ADA (All Funds):				
White	$3.12	$7.36	$42.60	$54.92
Negro	0.35	0.57	10.65	60.09
State Aid Per Pupil in ADA:				
Both Races	$15.28	$39.60	$106.70	$123.39

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TABLE 3

ENROLLMENT
(Includes Kindergarten and Junior Colleges)

Year	White	Negro	Total
1953-54	507,276	143,009	650,285
1952-53	467,762	135,903	603,665
1951-52	428,405	129,695	558,100
1950-51	401,083	126,091	527,174
1949-50	375,295	120,368	495,663

The over-all rate of growth during the past two years has been more than 8%; (9% for white pupils; 5% for Negro pupils.)

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TABLE 4

COMPARISON OF PERCENTILE RANKS FOR WHITE AND NEGRO EXAMINEES IN THE FLORIDA STATEWIDE TWELFTH-GRADE TESTING PROGRAM SPRING 1949 THROUGH SPRING 1953

White Percentile Rank	Corresponding Percentile Rank for Negroes					
	Psychological (General Ability)	English	Social Studies	Natural Science	Mathematics	All Five Tests
01	31.4	18.8	15.6	11.2	09.8	17.36
05	57.4	50.4	44.8	32.4	33.0	43.60
10	70.8	67.4	60.4	50.0	46.8	59.08
20	82.8	81.6	78.4	69.8	67.2	75.96
30	88.6	88.6	86.4	80.2	79.2	84.60
40	92.6	93.0	91.4	87.8	86.2	90.20
50	95.4	95.6	94.4	92.4	90.6	93.68
60	97.2	97.0	96.4	95.0	94.4	96.00
70	98.2	98.0	97.6	97.0	96.4	97.44
80	98.75	99.0	98.6	98.4	97.25	98.40
90	99.0		99.0	98.5	98.5	98.75
95				99.0	99.0	99.0

Number of Seniors Tested: White—69,909
Negro—10,675

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TABLE 5

COUNTIES WITH NO NEGRO HIGH SCHOOL — 1952-53

County	NEGRO		WHITE			
	Elem. ADM (1-6)	Est. 7-12 ADM Based on Ratio of .50	No. and Grade of Hi School	ADM (7-12)	Capacity	Space Available
1. Baker	288	144	3(1-12)	499	660[1]	161
2. Charlotte	70	35	1(1-12)	234	300[1]	66
3. Dixie	68	34	1(7-12)	300	330[2]	30
4. Glades	102	51	1(1-12)	119	180	61
5. Hardee	136	68	1(9-12)	803	890	87
6. Holmes	104	52	4(1-12)	1222	1080	....
7. Lafayette	42	21	1(7-12)	283	330[1]	47
8. Union Co. Hi.	230	115	1(1-12)	255	280	25

1. Allows 60 additional capacity for Homemaking, Science, Agriculture, and Physical Education facilities.
2. Allows 90 additional capacity for Agriculture, Science, Homemaking and Gymnasium facilities.

TABLE 6

STATUS OF ELEMENTARY PRINCIPALS* 1953-54

(Percentage)

	Male		Female	
	W	N	W	N
Training				
Rank I	9.60		6.19	
Rank II	68.80	46.15	55.75	46.90
Rank III	20.00	51.30	36.28	53.12
No Information	1.60	2.60	1.76	
Number	125	39	226	32
Years as Principal				
0	1.60		.90	
1 - 5	45.60	30.80	31.85	25.00
6 -10	17.60	33.33	22.12	21.90
11-15	12.80	15.40	16.81	18.80
16-20	8.00	15.40	8.84	15.62
21-25	4.80	2.60	8.84	3.12
26-Over	9.60	2.60	9.73	15.62
No Information			.90	
Number	125	39	226	32
Salary 10 Months (Dollars)				
2500-2999	1.60	2.60		
3000-3499	.80	17.94	1.32	
3500-3999	9.60	17.94	3.53	12.50
4000-4499	19.20	15.40	18.60	18.80
4500-4999	12.80	10.25	22.12	25.00
5000-5499	20.80	17.94	28.80	12.50
5500-5999	16.80	10.25	11.06	12.50
*Not Applicable (12 mos.)	16.80	5.12	10.61	18.80
No Information	1.60	2.60	4.00	
Number	125	39	226	32

*Compiled by Sara DeKeni, School of Education, Florida State University.

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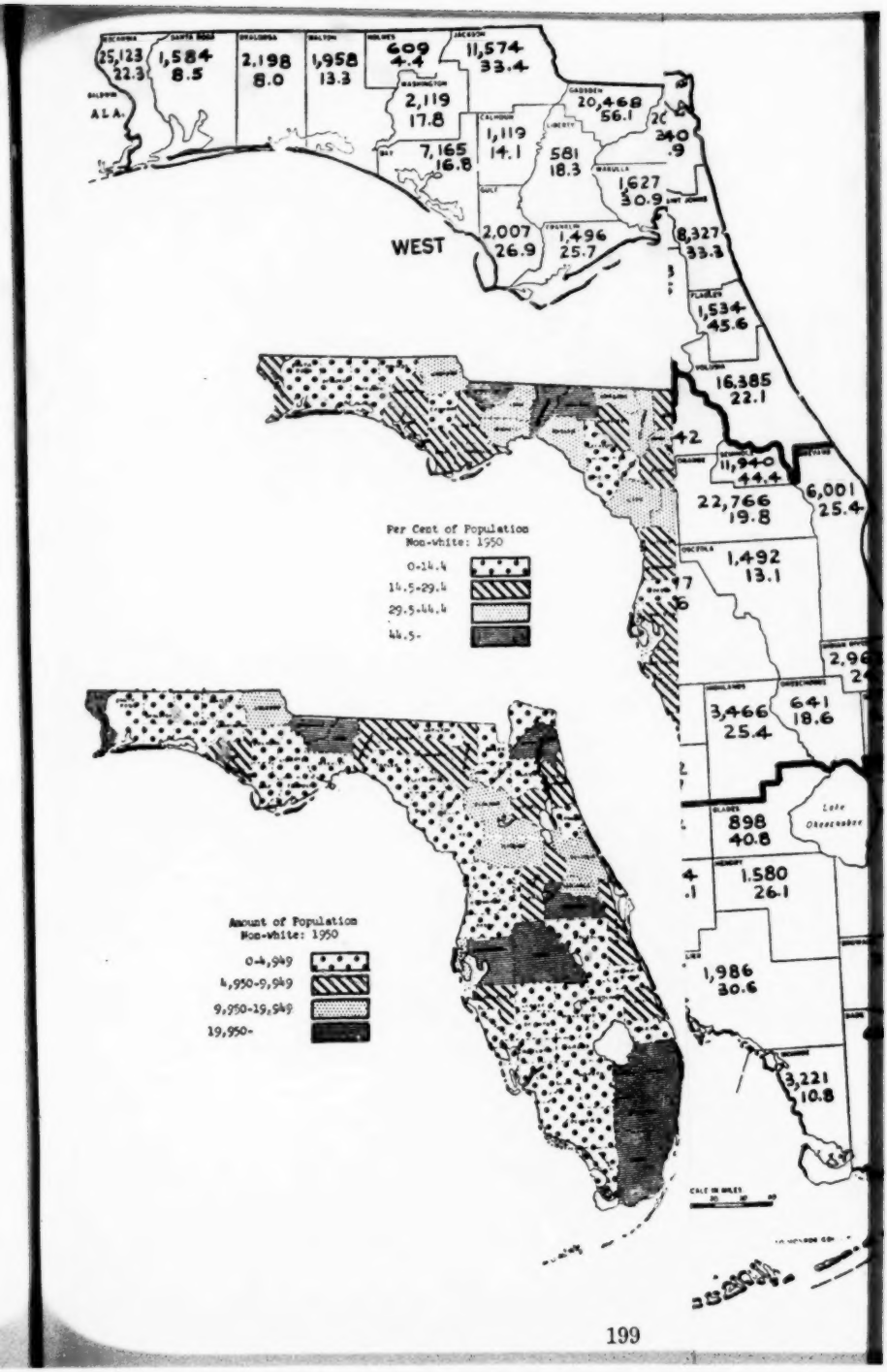

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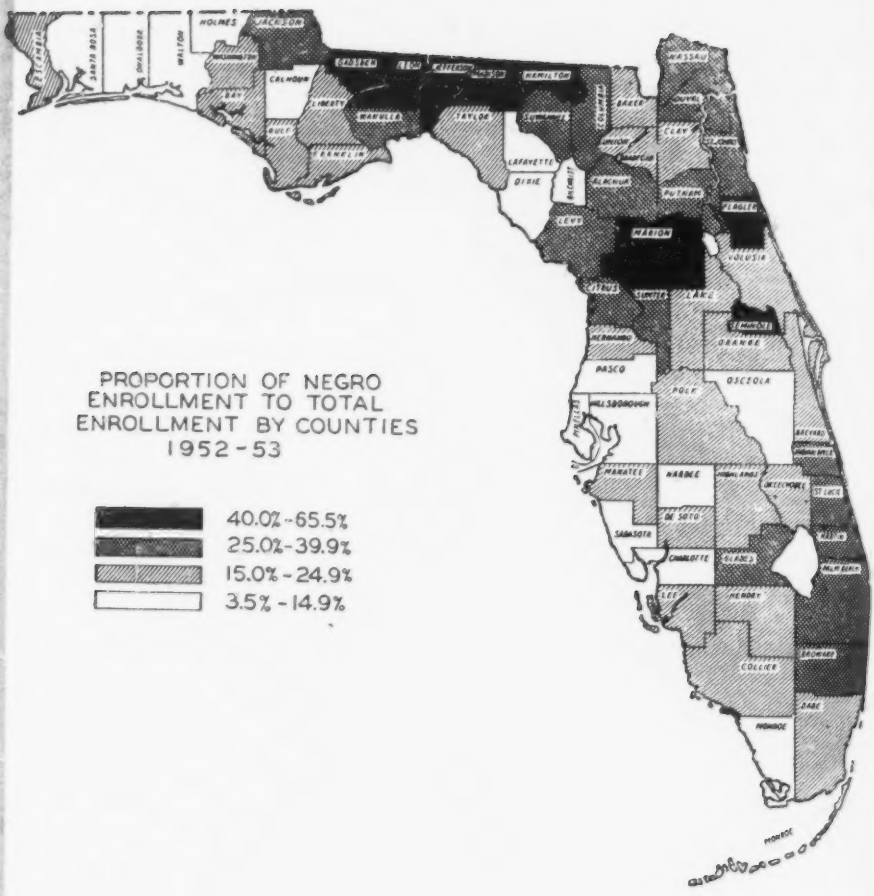

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An Intensive Study in Dade County and Nearby Agricultural Areas ...and Conclusions*

GENERAL CONCLUSIONS

A majority of those polled believed that most of the white population of Dade County are opposed to the Court's decision as a matter of principle. There seems to be reason to believe, however, because of the relative lack of discussion about the decision and its attendant problems and of the calm acceptance of the decision itself that the attitude on the part of many is not a deep-seated, emotionally formed one. If the process of integration is handled gradually (after a few years of preparation) and wisely and with firm leadership, a very large majority of this group will abide by the decision. The distinct possibility remains that many of this group with loosely formed convictions can be driven into active opposition by early and abrupt transition.

Some reluctance has been noted on the part of the School Board and other public officials to plan and lead, and on the

* Prepared by Dr. D. R. Larson, Dr. Edward Sofen, and Dr. T. J. Wood, Government Department, University of Miami.

part of the newspapers to encourage the same. The problem of obtaining leadership outside official circles for the transitional steps will be made more difficult by the tendency or perhaps organized campaign of the more violent pro-segregationists to identify such leadership with the Communist Party. On the other hand, a number of ministers have indicated that they will advise their congregations to follow the Court's decision.

Virtually complete agreement exists among those polled as to the most explosive area—the northwest section of the county which is low in the white socio-economic strata and which contains the greatest percentage of southern-born whites. The elected officials foresaw the next greatest amount of trouble (although not violent in nature) from those communities such as Coral Gables and Miami Shores which are high on the socio-economic scale. Community leaders, the teachers, newsmen, police and labor leaders failed to mention this in any significant numbers; this failure may be explained in part by disposition to think of difficulties only in terms of violence.

Almost all elected officials, journalists, police chiefs and labor leaders agreed that serious violence in several areas was inevitable if large-scale integration were to be attempted within the next year or two; such violence would be perpetrated by a small segment of the population and would take the form of the bombing of homes, hit-and-run shooting and individual beatings rather than lynchings and other more openly organized activities. Among the community leaders there was less unanimity, although a majority expects violence in some form in the most difficult areas.

Roughly half of the above categories of interviewees believed that some scattered violence was inevitable no matter how slowly the integration was accomplished. Only

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33% of the teachers expect violence under such circumstances.

These same categories thought that boycotts in all parts of the County were inevitable whenever integration was undertaken but few estimates were made of their dimensions. A substantial move toward private schools among the well-to-do was agreed upon. There was a marked absence of mention of the Byrnes-Talmadge Plan of removing the state's direct connection with education; only a few of those who expressed personal opposition to the decision thought that this was a practical solution.

The consensus of the various categories of whites polled with regard to the attitude of the Negro population on the timing of integration is that a gradual approach over a period of several years is desired. Although Negro school teachers are not a representative cross-section of the Negro population, it should be noted that by an extremely large majority they wanted speedier integration and that they reported, although by a smaller majority, that their students agreed.

The small sampling of Negro leaders indicates that most of the hitherto effective Negro leaders are prepared not to demand, by means of suits or otherwise, immediate action if there is indication on the part of the state and local officials that they are planning in good faith and with reasonable promptitude the method of implementation decreed by the Supreme Court.

Although no such specific question was posed, significant numbers in all categories minimized the difficulties that might arise among the younger children; but it was recognized that violent parental attitudes might change the situation radically. At the same time the belief was widely expressed that social activities in junior and senior high schools would give rise to considerably more trouble, if

not among the students, then certainly among the parents. Any consideration of a scheme to initiate integration in the first grade would be forced to take into account the fact that among the white teachers polled the first grade teachers were most resistant to the idea of integration.

The two special agricultural areas checked must be considered a problem of an entirely different order owing to the high concentration of Negroes, the Negroes' low socio-economic status, and the relative absence of whites drawn from northern metropolitan areas. The feeling against the Negro, particularly in one of these areas is more intense and more structured than that in the Greater Miami area.

Factors Indicating a Gradual Approach as the Solution to this Problem

1. Despite the fact that a majority of the white population of Dade County is opposed to the Court decision as a matter of principle, they nevertheless indicate that they will abide by the decision if integration is handled gradually, with an adequate period of preparation.

2. The present reluctance to assume positive leadership on the part of public officials and of any substantial number of groups outside official circles indicates great difficulty if an attempt is made to move too quickly.

3. A general belief exists that serious violence will occur if the decision is pushed by any minority group, white or colored.

4. A similar belief that some violence is inevitable no matter how gradual the transition, but with a firm belief that the more gradual the transition the more moderate and less frequent would be the outbreaks of violence.

5. In spite of some interracial activity among school personnel, it is a fact that Negro and white teachers have

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never met together in Dade County—not even for "Fellowship Day." Interracial cooperation through joint activity would seem to be a must before school integration could be put into operation.

6. Many leaders interviewed agreed that if the NAACP, or any other organized groups, should seek to push the decision by test cases this fall immeasurable harm would be done to the entire cause of the integration of the schools.

7. With a majority of white population disagreeing with the Supreme Court's decision in principle, a state legislator was, without question, correct when he said that what is needed is a "mental change" in the community. Such changes obviously require time.

8. A small minority in the Negro community, without question, opposes integration in the schools. Others who strongly favor the decision in principle are concerned about the practical problems of the decision as it affects Negroes. A gradual solution would thus ease the tension experienced by both these groups of Negroes.

9. A sizeable percentage of the Negro leadership group checked stated that they believe a gradual approach is best. They would accept this gradual approach as long as the white community acts in good faith and with reasonable speed toward a solution.

10. Research indicates that in the two special South Florida agricultural areas checked the problems of community acceptance and general leadership make the problem of integration even more difficult than in the metropolitan area, and thus these two sections must be granted an opportunity to proceed more slowly and perhaps in an entirely different manner.

11. The greatest difficulty in integration would probably be caused at the junior and senior high school levels due to

social activities and athletic and other extracurricular events. Time allowed for preparation for integration would permit the gradual use of non-social, extracurricular activities as a way of preparing students for eventual school integration.

12. Up to 60% of the white teachers polled favored a long transitional period, and another 20-30% favor at least a one or two year period of adjustment.

13. The School Board and top school administrative personnel in the school system have given little attention to the problems raised by the decision and would require time to simply handle the mechanical problems involved in the transition. It would also give these groups time to develop positive leadership which will be required for a peaceful and smooth transition.

14. The need for careful preparation in the process of integration was urged again and again by all groups polled. It is agreed that leadership and proper educational preparation will be all-important in a transition of this nature. Both require time for full development.

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Acknowledgments

To complete a survey of the scope of this *Study of the Problems of School Desegregation in Florida* in less than three months was a task demanding the utmost effort on the part of many people. The time-table during the entire period of the research was such that a delay or a mistake in even the simplest task could prove disastrous. It is a tribute to the untiring diligence of everyone connected with the project that no such disaster occurred, and acknowledgment of their separate contributions is highly appropriate.

At all stages of the research, the members of the Research Advisory Committee, all of them busy with important duties, contributed of their time and their best thinking to make this a sound piece of research. The committee included:

Mr. Richard W. Ervin, Attorney General (Ex Officio)
Mr. Thos. D. Bailey, State Superintendent of Public Instruction (Ex Officio)
Mr. Ralph E. Odum, Assistant Attorney General
Dr. Ralph Eyman, Dean, School of Education, Florida State University
Dr. Sara Lou Hammond, School of Education, Florida State University
Mr. Robert Gates, Department of Education
Dr. Robert E. Lee, Department of Education
Mr. Ed Henderson, Executive Secretary, Florida Education Association
Dr. Gilbert Porter, Executive Secretary, Florida State Teachers Association
Dr. J. B. White, Dean, School of Education, University of Florida
Dr. Manning J. Dauer, Department of Political Science, University of Florida
Dr. Don Larson, Department of Political Science, University of Miami
Dr. George Gore, President, Florida Agricultural and Mechanical University
Mr. Angus Laird, Director, State Merit System
Dr. Richard Moore, President, Bethune-Cookman College
Dr. R. L. Johns, School of Education, University of Florida

Dr. Mode Stone, School of Education, Florida State University
Mr. D. E. Williams, Department of Education
Dr. T. J. Wood, Department of Political Science, University of Miami
Dr. Lewis M. Killian, Department of Sociology, Florida State University (Coordinator of Research)

Some members of the committee made further contributions to the study. Dr. Larson and Dr. Lee prepared reports which constitute important subsections of the study, and Dr. Dauer prepared an independent report on the experience of other states with desegregation. Dean Eyman, Dean White and President Gore, as well as President Doak S. Campbell, of The Florida State University, released much-needed members of their staffs to assist in the research at various times. Dr. Robert Gates was a constant source of advice and support to the Coordinator.

A special debt is owed to Mrs. Fay-Tyler M. Norton, who served as Assistant Coordinator and Statistical Consultant for the entire period of the research. Her contribution was far greater than the tasks called for in her contract with the Committee, and without her the study could not have been completed.

Dr. J. A. Norton and Dr. Malcolm Parsons, of the School of Public Administration, the Florida State University, conducted the study of Negro voting registration while carrying full teaching loads at the University, but with no additional compensation.

Voluntarily making a vital contribution, as a public service, were Prof. Robert McGinnis and Dr. John Haer of the Sociology Research Laboratory, the Florida State University. Under their direction the laborious task of punching both the questionnaire and the interview data on IBM cards and tabulating these data was carried out.

The field interviewers who worked in ten selected counties, all public school workers drawn away from other important duties and asked to work without personal compensation, revealed a fine sense of duty. The manner in which they carried out their important part of the study indicates that they were well chosen. These interviewers are:

Edwin G. Artest, Tampa
Henry W. Bishop, Gainesville
Mrs. Patricia Carter, Gainesville
John B. Cox, Tampa
Paul F. Davis, Bradenton
Thomas J. Hill, Gainesville
Leroy G. Hooks, Clearwater

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Elton L. Jones, Ocala
R. LeRoy Lastinger, Bartow
Mills Lord, Orlando
Julian E. Markham, Sebring
Thord Marshall, Tallahassee
William J. McEntee, Gainesville
Erby Nixon, Panama City
Willie J. Reid, Pensacola
C. C. Washington, Panama City

At a critical point in the study, a small team of workers was called upon to put forth an almost impossible effort in coding a large mass of interview data just received from the field. At great personal sacrifice, they rose to this demand, completing the task in an incredibly short time. One member of this team, Dr. C. U. Smith, of Florida A. and M. University, had already made an important contribution in helping to brief the interviewers before they went into the field. The team of analysts included, in addition to Dr. Smith, the Coordinator of Research, and Mrs. Norton, the following people:

Mr. Robert Gates, State Department of Education
Dr. Robert E. Lee, State Department of Education
Mr. James Condell, Florida A. and M. University
Dr. Henry Cobb, Florida A. and M. University
Mr. Henry Warner, Florida A. and M. University

Mrs. Lillian Walker and Miss Winifred Kitching, of the Office of the Attorney General, shouldered without complaint the additional burden of the major part of the clerical and accounting work incidental to such a comprehensive study. Their contributions were just as vital as those of any of the professional research staff.

Working far harder than they may have expected to when they accepted summer employment, the following young ladies in the Office of the Attorney General did a vast amount of detailed and often dull clerical work for which the research staff is indebted. It is entirely fitting that the youth of Florida should have played a significant part in this public service. These young ladies, all high school or college students, are:

Miss Kathleen Kirk
Miss Maribelle Garris
Miss Pat Gunn
Miss Sonya Fletcher
Miss Bessie Carol Johnson
Miss Barbara Curtis
Miss June Lasseter

A key figure in this project from the moment of its inception has been Mr. Ralph Odum, Assistant to the Attorney General. In addition to expediting the work of the professional research staff, he has contributed his sound thinking to every phase of the study.

Finally, the Committee is deeply indebted to Attorney General Ervin, Superintendent Bailey, and their colleagues of the State Cabinet for making it possible for us to apply our knowledge and skills, as educators and scientists, to the study of this momentous problem.

LEWIS M. KILLIAN
Coordinator of Research

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(Appendix B)

Examples of Florida's Constitutional, Statutory and State School Board Regulatory Provisions Relating to Segregation

Article XII, Section 1:

Uniform system of public free schools.—The Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.

Article XII, Section 12:

White and colored; separate schools.—White and colored children shall not be taught in the same school, but impartial provision shall be made for both.

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228.09 Separate schools for white and negro children required.—The schools for white children and the schools for negro children shall be conducted separately. No individual, body of individuals, corporation, or association shall conduct within this state any school of any grade (public, private, or parochial) wherein white persons and negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers.

229.07 General powers of state board.—Except as limited in the school code, the state board shall have the authority, and when necessary for the more efficient and adequate operation of the state system of public education in carrying out the purposes and objectives of the school code, the state board shall exercise the following general powers:

(1) DETERMINE POLICIES.—The state board shall determine and adopt such policies as are required by law and as in the opinion of the state board are necessary for the more efficient operation of any phase of public education.

* * * *

(3) PRESCRIBE MINIMUM STANDARDS.—Whenever the establishment of minimum standards will aid in providing adequate educational opportunities and facilities, the state board shall adopt such minimum standards for any phase of education as are considered desirable by it in carrying out the provisions of the school code.

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229.08 Duties and responsibilities of state board.—It shall be the responsibility of the state board to exercise all powers and perform all duties prescribed below:

* * * *

(20) PRESCRIBE MINIMUM STANDARDS AND RULES AND REGULATIONS.—To prescribe such minimum standards and rules and regulations as are required by law or as are recommended by the state superintendent in accordance with the provisions of subsection (20), §229.17, and as it may find desirable to aid in carrying out the purposes and objectives of the school code.

* * * *

(23) OTHER RESPONSIBILITIES. — To assume such other responsibilities and to exercise such other powers and perform such other duties as may be assigned to it by law or as it may find necessary to aid in carrying out the purposes and objectives of the school code.

229.16 General powers of state superintendent.—The state superintendent shall have the authority, and when necessary for the more efficient and adequate operation of the state system of public education in carrying out the purposes and objectives of the school code, the state superintendent shall exercise the following general powers:

* * * *

(5) RECOMMEND AND PUT INTO EFFECT MINIMUM STANDARDS.—From time to time to prepare, organize by subjects, and submit to the state board for adoption such minimum standards relating to the operation of any phase of the state system of public education as, in his opinion, will aid in assuring more adequate educational opportunities for all, and to see, insofar as practicable, that such minimum standards as are adopted by the state board are put into effect and are properly observed.

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229.17 Duties and responsibilities of state superintendent.—It shall be the responsibility of the state superintendent to exercise all powers and perform all duties prescribed below; provided, that in those fields in which policies are required by law to be approved by the state board the state superintendent shall act as the advisor and executive officer of the state board.

* * * *

(20) MINIMUM STANDARDS AND RULES AND REGULATIONS.—To prepare, organize, and recommend to the state board such minimum standards and rules and regulations in the following fields as are required by law or as he may find necessary to aid in carrying out the purposes and objectives of the school code; and to execute such standards and rules and regulations as are adopted by the state board in the following fields: (1) establishment, organization, and operation of schools, agencies, services, and institutions, including the classification or accreditation of parochial, denominational, and private schools; (2) personnel; (3) child welfare; (4) courses of study and instructional aids; (5) transportation; (6) school plant; (7) finance; (8) records and reports.

* * * *

(28) OTHER RESPONSIBILITIES. — To assume such other responsibilities and to perform such other duties as may be assigned to him by law or as may be deemed by him to be necessary to aid in the more efficient operation of the state system of public education in carrying out the purposes and objectives of the school code.

230.23 Powers and duties of county board.—The county board acting as a board shall exercise all powers and perform all duties listed below:

* * * *

(6) ESTABLISHMENT, ORGANIZATION, AND OPERATION OF SCHOOLS.—Adopt and provide for the ex-

ecution of plans for the establishment, organization, and operation of the schools of the county, as follows:

(a) *Schools and attendance areas.*—Authorize schools to be located and maintained in those communities in the county where they are needed to accommodate as far as practicable and without unnecessary expense all the youth who should be entitled to the facilities of such schools, separate schools to be provided for white and negro children; and approve the area from which children are to attend each such school, such area to be known as the attendance area for that school; provided, that only under exceptional circumstances as defined under regulations of the state board may an elementary school be located within four miles of another elementary school and a high school within ten miles of another high school in rural areas for children of the same race.

239.41 Value of general scholarships.—Each scholarship for the preparation of teachers shall have a value of four hundred ($400.00) dollars each year and shall be awarded in the following manner:

* * * *

(2) In accordance with these requirements, the principals and county superintendents of each county shall select and recommend, on the basis of merit, a number of high school graduates who are bona fide residents of the State of Florida, as defined in section 97.041, Florida Statutes, which shall be proportionate to the white or Negro population in the county and who are interested in teaching and whose work and qualifications are such as to indicate that they possess the qualities which should be possessed by a successful teacher; provided that each county shall have at least one scholarship for a Negro student.

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Adopted April 27, 1954
Section 236.04 (10)

State Board Regulation
relating to

THE CALCULATION OF INSTRUCTION UNITS AND SALARY ALLOCATIONS FROM THE FOUNDATION PROGRAM

(Repealing regulation adopted June 16, 1953)

Instruction units and salary allotments from the Foundation Program will be calculated separately for white and Negro schools.

No county will receive a greater allotment for salaries for either race than the salaries actually paid the teachers of that race or the calculated amount for that race based on instruction units and training, whichever amount is smaller.

In applying the provisions of Section 236.04 (10), providing that 95% of instructional units allocated to a county must be filled, the units calculated for each race will be considered separately, and 95% of the instructional units for each race must be filled.

Adopted March 21, 1950
Section 236.04 (7)

State Board Regulation
relating to
ADMINISTRATIVE AND SPECIAL INSTRUCTIONAL SERVICE

(Adopted in accordance with the provisions of Section 236.04 (7), Chapter 23726, Laws of Florida, Acts of 1947)

1. *Eleventh and Twelfth Month Personnel.*

Each county superintendent shall file with the State Superintendent on or before May 15 of each year Form A for the use of its administrative and special instructional service personnel. In addition, the county superintendent shall file a plan for the 11th and 12th month program which includes for each race the title and duties assigned for each such unit. Any revision in the plan submitted must be approved by the State Department of Education.

On or before October 1, each county superintendent shall file with the State Superintendent a complete description of the program which operated during the 11th and 12th months, including for each race the title, name, certificate number, rank and duties of each person employed through the use of administrative and special instructional service units.

Ten Months Personnel.

On or before August 15 of each year the county superintendent shall file with the State Superintendent a plan for use of ten months personnel service units (Form C) which includes for each race the title and duties assigned for each such unit together with name, certificate number, and rank of the individual filling the position. Any proposed revision

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in plans for use of ten months personnel shall be submitted by January 15 of each year.

2. Any administrative and special instructional service units to which a county is entitled under Section 236.04 (7), Chapter 23726, Laws of Florida, Acts of 1947, which is not used in accordance with regulations prescribed by the State Board of Education shall be deducted either in the current or the succeeding fiscal year as provided in Section 236.07 (9-e), Chapter 23726, Laws of Florida, Acts of 1947.

Adopted March 21, 1950
Section 236.04 (8)

State Board Regulation
relating to

UNITS FOR SUPERVISORS OF INSTRUCTION

(Adopted in accordance with the provisions of Section 236.04 (8), Florida Statutes as amended by Section 29 of Chapter 23726, Laws of Florida, Acts of 1947)

1. *Application for Instruction Units for Supervisors.*

a. Each County Board shall file through the County Superintendent an application for using instruction units for supervision. This application shall be filed on forms provided by the State Superintendent on or before May 15 of each year.

b. Approval of any application for instruction units for supervision may be given by the State Superintendent when a satisfactory administrative plan for the use of such units (or desirable modification of the initial plan submitted) shall have been developed and approved jointly by the County Superintendent and the State Superintendent which will insure the most effective and economical expenditure of funds. Application for use of state funds for supervisory

services must include: first, provision for general supervision over the common branches of study in all the elementary and secondary grades. Included as a part of the administrative plan for supervision prescribed above, the County Superintendent shall file brief statements outlining (1) the duties to be performed by the supervisor(s); (2) the total annual salary and number of months of employment (in case of a general supervisor(s) this must be twelve months and of special supervisor(s) at least ten months; (3) the amount to be paid for travel; (4) the qualifications of the supervisor who is to be employed.

c. Instruction units for supervisory purposes may be tentatively allocated if the administrative plan for the use of such units required in the preceding section is satisfactory, even though the nomination of the person(s) to fill the supervisory position(s) is pending.

2. *Administrative Plan for Employment of Supervisory Personnel.*

In arriving at a satisfactory plan for supervision in any county, the County Superintendent and the State Superintendent shall select one of the following plans which best fits the needs of the county involved:

a. Single-County Plan

(1) For General Supervision

(a) The instruction unit to which each county is entitled for the employment of a general supervisor may be used for the employment of one person who will have general supervision of white and Negro schools.

(b) The additional instruction units available for supervision, if any, may be used for the employment of separate general supervisors for white and Negro schools, or for some area or special supervisors.

(c) In counties earning fifty teacher units or less, one

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person may be employed to perform the functions of both supervisor of instruction and supervising principal of a school center.

Any person employed as combined general supervisor and supervising principal must be properly certificated for both positions, i.e., hold a Rank II or higher certificate covering both elementary and secondary administration and supervision.

(2) For Special Subject or Field Supervision

(a) Counties entitled to supervisory units in addition to the one reserved for general supervision may use such extra units for employment of additional supervisors, provided, one supervisor shall be employed for each of the units used and provided further that not more than one supervisor in any special subject field may be employed in a county.

b. Joint-County Plan

(1) For Counties Having Not More Than One Supervisory Unit:

Any two or three contiguous counties entitled to not more than one unit each for supervision may submit a cooperative proposal for the joint employment of a supervisor or supervisors in accordance with one or more of the following plans:

(a) Cooperative Plan for General Supervision

Such counties may employ jointly one general supervisor for work with both white and Negro schools; or may employ separate general supervisors for white and Negro schools, provided the cooperative arrangement would not result in any general supervisor's carrying a total load of over 75 teachers.

(b) Cooperative Plan for Special Subject or Field Supervision

After providing for general supervisors, counties may use the remaining supervisory units to which they may be entitled for the purpose of cooperatively employing supervisors in special area or subject fields, provided that not more than one unit from any individual county may be so used for employment of any one supervisor.

(c) Cooperative Plan for School Lunch Supervision

In counties having less than ten school lunch programs, the plan for supervision may be as follows:

Two or three counties may employ a school lunch supervisor on a joint county plan provided that no school lunch supervisor may be responsible for more than thirty school lunch programs.

(2) For Counties Having More Than One Supervisory Unit

After providing independently for general supervision, such counties may use supervisory units beyond the first unit for cooperative employment of special supervisors in accordance with section 2-b-(1)-(b) above.

3. *Salaries and Travel Expense of Supervisors.*

a. Supervisors shall be paid the basic salary schedule of the county for teachers based upon training, experience, and employment on either a ten or twelve months basis plus an appropriate supplement in keeping with the duties and responsibilities of the position.

b. The amount to be paid to the supervisor for travel must be adequate in terms of the territory and number of schools to be served and shall be fixed by the County Board of Public Instruction in accordance with the joint recommendation of the County Superintendent and the State Superintendent.

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Adopted May 29, 1951
Section 230.23 (6)

State Board Regulation
relating to

ESTABLISHMENT, ORGANIZATION AND OPERATION OF SMALL SCHOOLS

(Repealing Regulation adopted March 21, 1950, page 24)

1. No school with an average daily attendance of less than ten pupils in the elementary, junior or senior high school grades may be continued in operation through the use of Minimum Foundation Program funds except when such school is so isolated that transportation of the pupils to another school would not be feasible because of distance, road conditions, or excessive expense, or except when pupils cannot be provided with equivalent or better educational facilities in another school. If a school is to be operated as an isolated school, an application for such operation must be filed with the State Superintendent at least one month before any Minimum Foundation Program funds may be used for the school, giving all facts which may be required as a basis for approval. Approval for the operation of an isolated school will be granted by the State Superintendent of Public Instruction only after consideration of all the facts.

Adopted July 3, 1947
Section 230.34 (8)

State Board Regulation
relating to

SCHOOL ADVISORY COMMITTEES

(Adopted in accordance with the provisions of section 230.34 (8), Chapter 23726, Laws of Florida, Acts of 1947)

If the county board of a county exercises its discretion and determines to set up School Advisory Committees, the following regulations shall apply:

1. The county may be divided into school community areas for each race in accordance with the attendance areas for each school community for each race, or the Board may divide the county into school community areas which areas encompass the schools for both races.

2. Members of the School Advisory Committee may be selected for any school community area by either of the following methods as may be determined by the county board:

a. The Board may provide for the selection of members of the School Advisory Committee at a community meeting called in each school community area at the place designated by the Board of Public Instruction; the hour, the date and place of such meeting to be advertised at least once, at least one week before the meeting in a paper published in the county or in some paper of general circulation in the county.

b. The School Advisory Committee may be appointed by the school board either from lists submitted by a community meeting or directly by the board.

3. If the Board determines that the School Advisory Com-

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mittee shall be selected at a community meeting called in the school community area as prescribed above, parents or guardians of children attending school in the school community area and adult residents of such area shall be entitled to vote for members of the School Advisory Committee.

4. Any adult residing in a school community area is eligible to be selected as a member of the School Advisory Committee.

5. If the Board determines to select School Advisory Committees by the community meeting method, the Board shall determine the time, place, and hour of the meeting but the date selected must be between September 1 and December 31 preceding the January 1 on which School Advisory Committees take office.

6. The members of the School Advisory Committee shall exercise and perform such duties as are prescribed in Section 230.34 (8) of Chapter 23726, Laws of Florida, Acts of 1947.

7. The supervising principal or principal shall serve as secretary of the School Advisory Committee.

Adopted March 21, 1950
Section 236.02 (4)

State Board Regulation
relating to

QUALIFICATIONS, DUTIES AND PROCEDURE FOR EMPLOYMENT OF SUPERVISORS OF INSTRUCTION

(Adopted in accordance with the provisions of Section 236.02 (4), Chapter 23726, Laws of Florida, Acts of 1947)

1. Types and Qualifications of Supervisors

In addition to the objective standards set forth below, all persons employed as supervisors should possess the many intangible qualifications necessary to success in supervisory work.

a. General Qualifications

(1) Age—To be eligible for initial appointment the supervisor shall be between the ages of 25 and 55 years.

(2) Physical Fitness—To be eligible for initial appointment the supervisor must have passed satisfactorily a physical examination given by a regular practicing physician and must have filed a report of such examination on the form now adopted by the State Board of Health; at the discretion of the State Superintendent the applicant may be required to take a special examination given by a physician designated by the State Board of Education.

(3) Leadership and Personal Characteristics—Each applicant for a supervisory position must file with the County Superintendent and the State Superintendent a completed application form setting forth experience, leadership activities, personal characteristics, and other items as may be included on a form prescribed and adopted by the State Board of Education.

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b. Special Qualifications* (see note)

(1) Qualifications of General Supervisors

General Supervisors shall meet the following requirements:

(a) Hold a valid teaching certificate, graduate or above, having on face thereof, "Administration and Supervision," covering both elementary and secondary levels.

Temporary approval may be given for a general supervisor who does not meet certification requirements in full, provided, a plan for securing full certification within two years is filed and carried out.

(b) Have five years successful experience including teaching and/or administrative and supervisory responsibility, at least two years of which experience shall have been completed within the five years immediately preceding appointment to a supervisory position.

(c) Beginning supervisors shall hold a certificate of Rank II or above in accordance with Section 236.07 (1), Chapter 23726, Laws of Florida, Acts of 1947.

(2) Qualifications of Supervisors at the Elementary or Secondary School Levels.

Supervisors whose duties are limited to the elementary or secondary school levels shall meet the following requirements:

(a) Hold a valid teaching certificate, graduate or above, having on the face thereof "Administration and Supervision" covering the level to be supervised.

(b) Have five years successful experience including teach-

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* Requirements here set forth are to be considered a minimum and every effort shall be made to secure the services of persons with much higher types of qualifications and experience. When a supervisor is appointed who meets only minimum requirements he shall be required to make every effort to improve his qualifications consistent with the proper performance of the duties to which assigned.

ing and/or administrative and supervisory responsibility, at least two years of which experience shall have been completed within the five years immediately preceding appointment to a supervisory position. At least three years of the experience shall have been in the level to be supervised and the degree upon which certificate is issued shall have included the special level to be supervised as a major field of training.

(c) Beginning supervisors shall hold a certificate of Rank II, or above.

(3) Qualifications of Supervisors of Special Subjects or Special Programs.

(a) Hold a valid teaching certificate, graduate or above, or its equivalent, in the field for which responsibility is given.

(b) Five years successful experience as a teacher, administrator, or supervisor in the field for which responsibility is given, at least two years of which shall have been completed within the five years immediately preceding appointment to the supervisory position.

(c) Academic specialization shall have included the field to be supervised and the field of education including at least six semester hours in curriculum and supervision.

2. Duties of Supervisors.

a. Persons employed through the use of supervisory units shall give full time to working with teachers, principals, and other school personnel in the field of instruction. Under no circumstances will administrators or administrative assistants be certified from supervisory units.

b. In counties not employing a supervisor of Negro schools the general supervisor shall have his services equitably apportioned among the schools (white and/or Negro) in the one or more counties by whom he is employed.

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c. General supervisors shall be paid and subject to duty on a twelve months basis, and special supervisors on not less than a ten months basis. Supervisors shall attend all conferences called by the State Superintendent of Public Instruction which are related to the satisfactory performance of supervisory duties.

d. Supervisors shall make such periodic reports relative to their plans and accomplishments as may be required by the Division of Instruction of the State Department of Education.

3. Procedure for Employment of Supervisors

a. The employment of persons to fill supervisory positions in a county shall follow the procedure prescribed by law and by State Board Regulations for other instructional personnel up through the point where the County Board of Public Instruction has approved the nomination of the individual concerned. The County Superintendent shall then certify the action to the State Superintendent of Public Instruction, furnishing all information necessary to enable the State Superintendent to present the matter to the State Board of Education for approval or disapproval. The action of the State Board of Education shall then be certified by the State Superintendent to the County Superintendent. In the event the State Board concurs in the action of the County Board, the County Board may then proceed with contracting for the services of the supervisor. In the event the State Board finds the individual not qualified or for other reasons rejects the nomination of the individual concerned, the County Superintendent shall initiate action to secure the nomination of some other individual qualified for the position.

b. The dismissal of persons in supervisory positions in a county shall follow the procedure prescribed by law and by State Board Regulations for other instructional per-

sonnel with the additional requirement that approval of the State Board of Education shall be necessary before the dismissal of any supervisor may be effectuated.

Adopted July 3, 1947
Section 236.04 (1) (2)

State Board Regulation
relating to

ISOLATED SCHOOLS

(Adopted in accordance with the provisions of Section 236.04 (1) and (2), Chapter 23726, Laws of Florida, Acts of 1947)

1. Instruction units for all non-isolated schools with less than 120 pupils in average daily attendance will be calculated by dividing the average daily attendance of such schools by 27.

2. *ISOLATED SCHOOLS.* Any school having less than 120 pupils in average daily attendance shall be considered an isolated school for the purpose of computing instruction units when any of the following conditions are found to exist:

a. *Elementary Schools*

(1) *School with 90 to 119 pupils inclusive in average daily attendance:* If it is more than six miles by the nearest passable road from another elementary school for the same race in which satisfactory facilities could be provided.

(2) *School with from 60 to 89 pupils inclusive in average daily attendance:* If it is more than eight miles by the nearest passable road from another elementary school for the same race in which satisfactory facilities could be provided.

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(3) *School with 59 pupils or less in average daily attendance:* If it is more than ten miles by the nearest passable road from another elementary school for the same race in which satisfactory facilities could be provided.

(4) If more than 15% of the pupils to be transported would have to be on the bus for an average of more than one hour each morning or evening.

(5) Not more than one instruction unit shall be allowed for any one-teacher elementary school regardless of whether it is considered an isolated school; Provided, however, that an instruction unit will not be allotted for a school with an average daily attendance of less than nine, unless evidence is presented to the State Superintendent showing that consolidation of this school is impossible.

b. *Junior High Schools*

(1) *School with 90 to 119 pupils inclusive in average daily attendance:* If it is more than seven miles by the nearest passable road from another junior high school for the same race in which satisfactory facilities could be provided.

(2) *School with from 60 to 89 pupils inclusive in average daily attendance:* If it is more than nine miles by the nearest passable road from another junior high school for the same race in which satisfactory facilities could be provided.

(3) *School with 59 pupils or less in average daily attendance:* If it is more than eleven miles by the nearest passable road from another junior high school for the same race in which satisfactory facilities could be provided.

(4) If more than 25% of the pupils to be transported would have to be on the bus for an average of more than one hour each morning or evening.

(5) Unless a center has a ninth grade or is definitely organized as part of a high school it is to be considered

an elementary school for purposes of computing instruction units and determining isolation.

c. *Senior High Schools*

(1) *School with 90 to 119 pupils inclusive in average daily attendance:* If it is more than eight miles by the nearest passable road from another senior high school for the same race in which satisfactory facilities could be provided.

(2) *School with 60 to 89 pupils inclusive in average daily attendance:* If it is more than ten miles by the nearest passable road from another senior high school for the same race in which satisfactory facilities could be provided.

(3) *School with less than 59 pupils in average daily attendance:* If it is more than twelve miles by the nearest passable road from another senior high school for the same race in which satisfactory facilities could be provided.

(4) If more than 25% of the pupils to be transported would have to be on the bus for an average of more than one hour each morning or evening.

(5) Unless a center has a twelfth grade it is to be considered as a junior high school for purposes of computing instruction units and determining isolation.

3. *TEMPORARY ISOLATED SCHOOLS.* Any school having less than 120 pupils in average daily attendance shall be considered a *temporarily isolated school* for the purpose of computing instruction units when satisfactory facilities cannot be provided at another appropriate center within the distances prescribed above, or when the pupils cannot be transported because of road conditions; provided, however, no school will be considered as temporarily isolated because of lack of building facilities after July 1, 1948.

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Adopted July 21, 1953
Section 239.38
239.41
239.42

State Board Regulation
relating to

THE DISTRIBUTION OF GENERAL SCHOLARSHIPS

1. In accordance with provisions of Sections 239.38, 239.41 and 239.42, Florida Statutes as amended by the 1953 Legislature, the following distribution of scholarships is established:

	White	Negro	Total
Alachua	16	7	23
Baker	7	1	8
Bay	17	4	21
Bradford	8	2	10
Brevard	13	3	16
Broward	21	7	28
Calhoun	7	1	8
Charlotte	5	1	6
Citrus	6	2	8
Clay	10	2	12
Collier	6	2	8
Columbia	11	2	13
Dade	54	10	64
DeSoto	8	1	9
Dixie	5	1	6
Duval	40	12	52
Escambia	27	6	33
Flagler	4	1	5
Franklin	6	1	7
Gadsden	10	9	19
Gilchrist	4	1	5

The Distribution of General Scholarships (Continued)

	White	Negro	Total
Glades	3	1	4
Gulf	7	1	8
Hamilton	7	2	9
Hardee	9	1	10
Hendry	6	1	7
Hernando	7	1	8
Highlands	9	2	11
Hillsborough	42	6	48
Holmes	11	1	12
Indian River	9	2	11
Jackson	12	6	18
Jefferson	6	4	10
Lafayette	4	1	5
Lake	15	4	19
Lee	13	2	15
Leon	15	8	23
Levy	8	2	10
Liberty	3	1	4
Madison	8	4	12
Manatee	15	3	18
Marion	13	6	19
Martin	6	2	8
Monroe	15	2	17
Nassau	9	2	11
Okaloosa	15	1	16
Okeechobee	4	1	5
Orange	28	5	33
Osceola	9	1	10
Palm Beach	24	9	33
Pasco	12	2	14
Pinellas	34	4	38
Polk	29	5	34
Putnam	12	3	15

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The Distribution of General Scholarships (Continued)

	White	Negro	Total
St. Johns	12	4	16
St. Lucie	11	3	14
Santa Rosa	12	1	13
Sarasota	15	2	17
Seminole	11	5	16
Sumter	8	2	10
Suwannee	11	2	13
Taylor	8	2	10
Union	7	2	9
Volusia	20	6	26
Wakulla	5	2	7
Walton	9	3	12
Washington	10	1	11
Total	843	207	1050
	80.3%	19.7%	100%

If any county shall receive more scholarships under this distribution than the total of its General, Representative, and Senatorial scholarship holders on the 1953-54 scholarship roll, the additional scholarships shall not be activated until it is ascertained that the appropriation for scholarships is sufficient for this purpose.

2. Within the allocation tentatively allotted each county, vacancies shall be declared in such a manner as to insure having, whenever possible, not less than twenty-five per cent of the total number of awards open to white and to Negro students respectively who would enter an approved Florida institution as freshmen during each and every year. Where there are sufficient vacancies in any county to allow such distribution, twenty-five per cent of the total number

shall also be made available to persons falling in each of the following levels: sophomore, junior, senior.

3. A scholarship holder must register in the school, college, or department of education of an institution of higher learning located in Florida and approved by the State Board of Education for teacher education and certification.

4. The State Superintendent shall have authority to declare in which teaching fields applicants must train to be eligible for a scholarship.

5. A General Scholarship for the Preparation of Teachers may be renewed annually for a period of four years, but may not be used for work beyond the four-year degree level nor after the holder has received $1600.00 in scholarship funds.

6. Examinations to fill vacancies for General Scholarships are to be held twice a year, in the fall and in the spring. The State Superintendent of Public Instruction shall make all arrangements for these examinations and shall supervise the selection of winners, etc.

7. If for any reason, illness included, a scholarship holder must remain out of college for longer than one semester, he will forfeit his scholarship. If later he returns to college and desires scholarship aid, he must re-apply by submitting a new application for a declared vacancy. An exception may be made in the case of a scholarship holder called into the Armed Services. If the veteran desires scholarship reinstatement upon his return from service, his scholarship may be restored to him if a vacancy exists in his county.

8. If on July 1 of any year, quotas for white or Negro students with respect to General Scholarships for the Preparation of Teachers remain unfilled in any county, and if upon investigation by the State Superintendent it is found that such conditions exist because of (1) a dearth of persons interested in making application or (2) the failure of ap-

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plicants to make the required minimum score, the State Superintendent may declare such vacancies to exist on a state-wide basis. The state-wide vacancies declared should then be awarded in the following manner:

a. A roster shall be compiled containing the names of eligible persons making the minimum passing score who failed to receive an award on the latest examination.

b. From such roster, in order of rank of excellence and in keeping with the college-year level for which the vacancies placed in the state-wide pool exist, awards are to be made.

c. Persons receiving such awards will be permitted to continue them from year to year, as provided by law, until the termination of the scholarship; at the end of this period, such vacancies shall be again restored to the counties to which they were originally allocated.

9. This repeals paragraph 2, pages 225-26 of State Board Regulation relating to Summer School Scholarships and Scholarships for Preparation of Teachers, pages 224-26, adopted July 6, 1949.

Adopted July 21, 1953
Sections: 239.19
239.38-239.44

State Board Regulation
relating to

SCHOLARSHIP COMMITTEE

The State Scholarship Committee shall be composed of eight members appointed by the State Superintendent of Public Instruction. The membership shall be the dean of education of each of four colleges or universities approved for teacher education for white teachers, the president or dean of education of one college or university approved for teacher education for Negro teachers, the dean or the director of one approved junior college, and two members of the State Department of Education.

Two members shall be appointed for a one year term, two for two years, two for three years, and two for four years. Thereafter each member shall be appointed for a term of four years.

Any vacancy shall be filled for the unexpired term by appointment by the State Superintendent of Public Instruction.

The committee shall elect its chairman and recorder for terms not to exceed two years.

The duties of the committee shall be to formulate policies and make recommendations that will add to the effectiveness of the scholarship program.

The committee shall meet at least twice a year and at such other times as the chairman shall consider necessary.

The committee may invite other officials concerned with the administration of the scholarship program to meet with the committee at any meeting.

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Adopted November 16, 1948
Sections 239.41 thru
239.44
239.19 thru
239.24

State Board Regulation
relating to

SCHOLARSHIPS FOR PREPARATION OF TEACHERS AND HOUSE AND SENATORIAL SCHOLARSHIPS

(Adopted in accordance with the provisions of Sections 239.41 thru 239.44 and Sections 239.19 thru 239.24, Florida Statutes, as amended by Chapter 23726, Laws of Florida, Acts of 1947)

The method and manner of handling and collecting scholarship notes which may become in default shall be as follows:

The President of each institution of higher learning where the scholarship was held shall give such assistance as may be reasonably requested by the State Treasurer in the collection of scholarship notes which have become payable by reason of the scholarship holder failing to perform services in satisfaction of his scholarship note.

Adopted July 3, 1947
Section 242.05 (1)

State Board Regulation
relating to

STATE SUPERVISORY SERVICES

(Adopted in accordance with the provisions of Section 242.05(1), Florida Statutes, 1941, as amended by Chapter 23726, Laws of Florida, Acts of 1947)

1. The use of State Supervisory Funds shall be in accordance with a budget for a program planned as a part of the State Department of Education services for supervision of white and Negro schools as recommended by the State Superintendent of Public Instruction.

2. Recommendations for nomination of persons to fill State Supervisory positions shall be submitted to the State Board of Education by the State Superintendent of Public Instruction. In no case may any individual be certified, nominated, or paid any salary from State Supervisory Funds who does not meet the qualifications prescribed by the State Board of Education for holding supervisory positions of the type being filled.

3. Approval by the State Board of Education shall be necessary before any State Supervisory Funds may be paid to any person recommended and employed in accordance with the preceding section; approval of both the State Superintendent of Public Instruction and the State Board of Education shall be necessary before the dismissal of any supervisor employed through use of State Supervisory Funds may be effectuated.

4. Included as a part of the administrative plan for supervision the State Superintendent shall file with the recommendation a brief statement outlining (1) the duty to be

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performed by the supervisor; (2) the total annual salary; (3) the amount to be paid for travel; and, (4) qualifications of supervisor to be employed.

5. The qualifications and duties of State Supervisors shall be in accordance with the types of qualifications and the duties as listed for County Supervisors as would be applicable to work on the State level.

Adopted February 14, 1950
Sections 234.01 thru 234.25
and related sections.

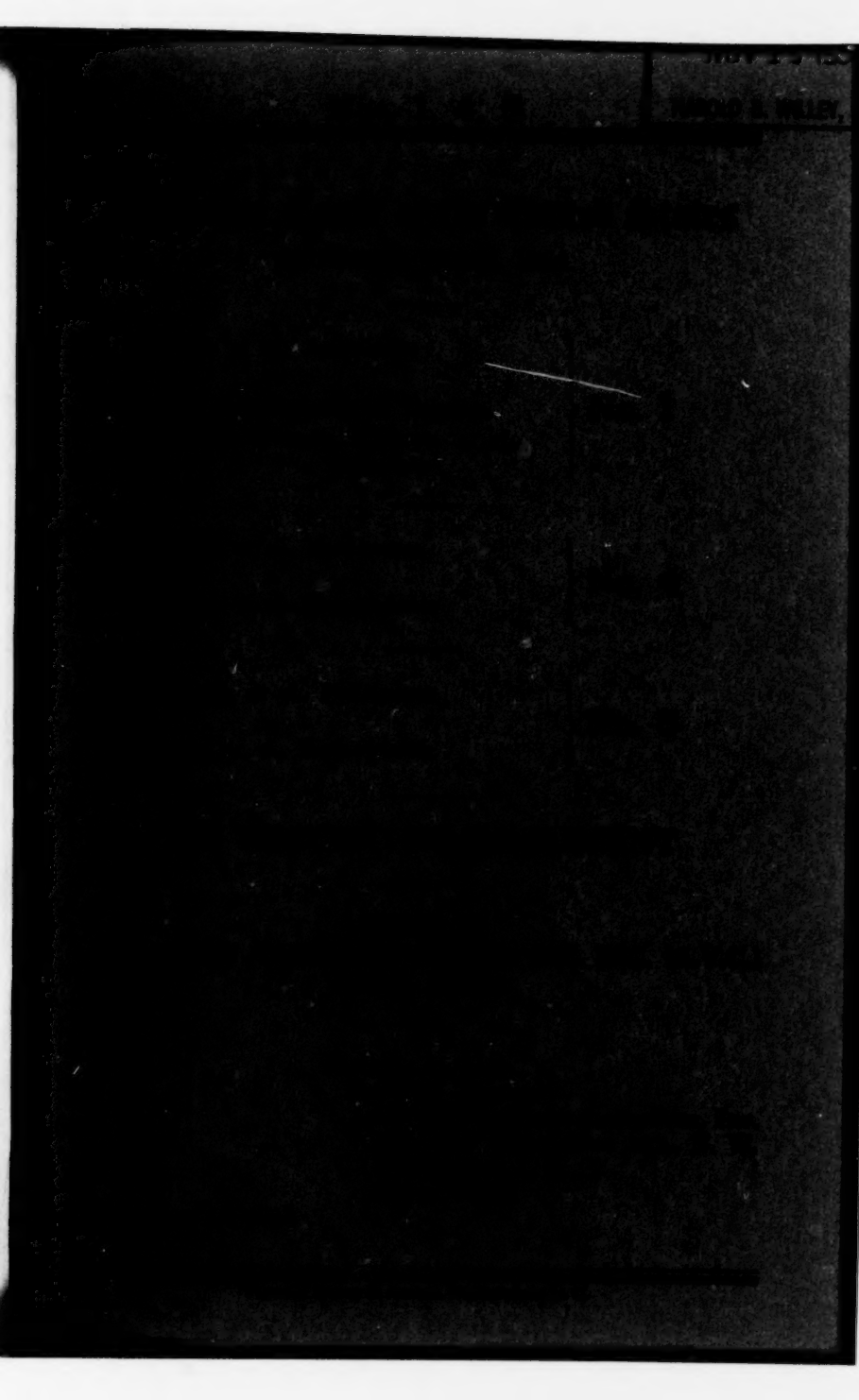
State Board Regulation
relating to

TRANSPORTATION OF PUPILS

(Adopted in accordance with Chapter 234 and related sections of Florida Statutes)

* * * *

(8) The land sections shall be computed separately for white and Negro races.



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Supreme Court of the United States

OCTOBER TERM, 1954

Brown, et al., *Appellants*
v.
Board of Education of Topeka, Shawnee County, Kansas, et al., *Appellees* — **No. 1**

Bolling, et al., *Petitioners*
v.
Sharpe, et al., *Respondents* — **No. 4**

Gebhart, et al., *Petitioners*
v.
Belton, et al., *Respondents* — **No. 5**

ON SECOND RE-ARGUMENT

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (A.V.C.)

Amicus Curiae

PRELIMINARY STATEMENT

The American Veterans Committee, Inc. is a nation-wide organization composed of veterans who served honorably in the Armed Forces of the United States during World War I, World War II, or the Korean Conflict. Our interest in the Public School Segregation Cases was explicated in the briefs we filed on the previous arguments in the 1952 and 1953 Terms.

On May 17, 1954, this Court ruled that racial segregation in public schools violates the Constitutional guarantee of equal protection expressed in the Fourteenth Amendment, and implied in the Fifth Amendment, to the Constitution. *Brown* v. *Board of Education,* 347 U. S. 483; *Bolling* v. *Sharpe,* 347 U. S. 497. The cases were continued for further argument on Questions 4 and 5 set forth in this Court's order of June 6, 1953 (345 U. S. 972, 973).

THE FRAMEWORK WITHIN WHICH THE QUESTIONS SHOULD BE ANSWERED

It is, of course, not appropriate for this Court to try to anticipate the legality of every detail of every desegregation plan which, in the context of the particular pressures and attitudes influencing their members, each of the thousands of school boards may evolve in administering their school systems so as to comply with the requirements of the Constitution. *Cf. United States* v. *Paramount Pictures,* 334 U. S. 131, 163-164 (1948); *Nebraska* v. *Wyoming,* 325 U. S. 589, 616-617 (1945).

On the other hand, we think this Court should indicate in its decrees the principles underlying any method of desegregation, compliance with which will satisfy the Constitutional prohibition against racial segregation. This Court's order for reargument on Questions 4 and 5 has stimulated widespread interest in knowing what desegregation methods this Court would approve. Moreover, it is entirely possible that if this Court simply remands the cases "for further proceedings" without indicating the guide lines of acceptable desegregation methods, the way would be open for prejudiced school boards to remit each applicant for nonsegregated education, despite the *Brown* decision, to the arduous, tortuous and time-consuming process of prosecuting a separate suit in which the court of first instance would take over the administrative tasks properly belonging to the school board. That, indeed, is what the Attorney General of Florida urges in his Brief, pp. 61-65, sec. II. But that course might in some areas

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excise the meaning from the Constitutional right, and would in some other areas open the door to a chaotic pulling-and-tugging in which the lower courts would be hard put to insist on applying the law rather than personal judgment concerning the community's "willingness to accept" the requirements of equal justice under law.

In our opinion, the lode-star in answering Questions 4 and 5 should be the principles inherent in this Court's ruling of May 17, 1954—(1) that under our Constitution all children, of any racial ancestry, including both those now in the public schools and those who may come into the public schools in the future, should and must be permitted to enter the same public schools which children labeled "white" could enter, and (2) that no public school authorities may, in their administration of the public school system, impose any distinctions or accord different treatment, by segregation or otherwise, on the basis of race, color or ancestry.[1]

---

[1] That ruling blends with the body of the law. This court has uniformly and repeatedly held that the right to be free from racial discrimination by governmental authority is a "personal" right, not one to be merged with those of all others of the same race and balanced against the claims of all white persons averaged as a group. *Henderson* v. *United States*, 339 U.S. 816, 825-826 (1950); *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941); *Buchanan* v. *Warley*, 245 U.S. 60, 80 (1917); *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351 (1938). The Constitutional requirement of equal protection of the laws applies to any person subject to group discrimination because of his identifiable racial or ethnic origin. *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Since public education on a segregated basis is not equal education, he is entitled to such education on an unsegregated basis. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Moreover, he is entitled to receive such equal education, and it must be provided for him, "as soon as" it is provided for the white person. *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633 (1948). These decisions were epitomized when this Court unanimously characterized the right to secure public education without racial discrimination as "personal and present." *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950).

SUMMARY OF ANSWERS TO THE QUESTIONS

The best way to take racism out of the schools (where it "has no place") and to let the schools merge into the neighborhood (where racial agglomeration may reflect voluntary association), is by assigning children on the basis of geographic school boundaries based solely on residential proximity and accessibility to the school. But, in the absence of special considerations, the Constitution does not necessarily compel a school board either to require such boundaries or to permit or prevent choice of school by the child. If, and so long as, racial factors are not involved, the method used is for the school board, not a court, to determine.

As to children now in school, the school board's obligation to administer orderly school programs without future regard to their race can be satisfied by a second method—i.e., by affording to each such child the opportunity to obtain, upon application, admittance or transfer to, and education in, a school near his residence without being subject to racial distinctions. This voluntary application method permits adjustment to desegregation which, without denying any child's Constitutional rights, will lean heavily on the readiness of the local community and, in areas of diffidence to voluntary mixing, will permit more gradual desegregation than would the use of compulsory school boundaries. The essence of this voluntary method is that the child's right to admission to any school may not be denied on the basis of race; the process of adjustment to a nonsegregated school system will begin and be effected as such applications are made.

Any other method of gradual adjustment to a nonsegregated system is either not permissible or inappropriate under the judicial process. In any event, this Court should specifically reject the notion that, until such time as the "hard core of public opinion has softened to the extent that there can be at least some measure of acceptance on the part of a majority of the people," school boards may

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reject applications for equal education. Adoption of such a proposal would be worse than reinstatement of the "separate but equal" doctrine.

With respect to students new to a particular school, the first alternative (assignment according to residential boundaries) will, but the second alternative (assignment on the basis of a voluntary application) will not, comply with the Constitution. The latter method implies that in the absence of an application, race or color will determine the assignment of the student. But by applying race or color in the assignment of new students to a school, the structure of segregation in public education will be strengthened and entrenched, instead of gradual adjustment occurring "from existing segregated systems to a system not based on color distinctions." To prevent such addition to the structure of racial segregation in public education, the school authorities should be required to assign new students either on the basis of normal residential school boundaries or, where there are no such boundaries, on the basis of reasonable criteria which do not include race or color. In making assignments not based on geographic boundaries, the school board may, if it wishes, permit the student to choose which school he will attend, but may not, in the absence of such choice by the student, assign him on the basis of his race or color or require him to file an application as a prerequisite to obtaining unsegregated education.

The decrees should become effective at the beginning of the school term immediately following the date of the decrees, but the court of first instance should be permitted to allow an additional school term if the school authorities show that unusual conditions involving technical and administrative difficulties require additional time for effective desegregation.

It is not clear whether this Court, in prescribing the time when the decree embodying these principles shall become effective, may permit extensive delay where such

delay would destroy Constitutional rights which are personal and present. In any event, the public interest does not require extensive delay.

As shown by experience in many areas of daily life, the fears that desegregation will cause widespread violence are largely wraiths and myths. Such experience also shows that rapid desegregation is often smoother and easier than segmentalized or gradual desegregation. The lag in the law, the inhibiting effect of mores and extra-legal pressures, the accumulated racial patterns of residence, and other factors, will provide ample "gradualism" without judicial espousal of "gradualism" as a legal doctrine. Isolated instances of hooliganism, stimulated by the current uncertainty as to the nature of this Court's decree, are not representative. In any event, the possibility of local friction is legally irrelevant in determining Constitutional rights.

This Court should not specify all details, either itself or through a special master, but should in its decrees include the principles mentioned above, enjoin the school authorities from considering race in administering school programs, and require the courts of first instance to deal initially with specific problems presented either by the school authorities or by those claiming deprivation of Constitutional rights under the general principles of this Court's decree.

This Brief suggests specific terms for inclusion in this Court's decree.

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QUESTION 4

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

I. ANALYSIS OF METHODS TO BRING SEGREGATED SCHOOL SYSTEMS INTO CONFORMITY WITH THE CONSTITUTION

A. As to children now in a segregated school

In so far as concerns children who are now in a segregated school, there are two possible approaches to bringing the school system into conformity with the Constitution while at the same time not denying to any individual his personal and present rights under the Constitution.

(1) Normal geographic school districting

This Court's rulings of May 17, 1954, say that the many children who are now in segregated schools are being denied their Constitutional rights to equal education. This does not mean, and it is not our position, that school boards are under a constitutional mandate to go out looking for interracial school populations.

The duty of the school boards, we think, is solely to maintain orderly school programs without regard to race or color, to refrain from denying to any child admission into any school, and to refrain from treating any person in the school system differently, at any time, on the basis of race or color.

One way in which the school boards can fulfill this duty is by prescribing geographical school boundaries based,

not on race, but on the students' residential proximity and accessibility to the school, and by requiring all students within such boundaries to go to that school. The compulsory school attendance laws would thus simply cause the school to reflect the composition of the neighborhood. If the neighborhood is racially mixed, the school will be racially mixed; if the neighborhood population is all-white or all-colored, the school population will have the same hue.

We think, indeed, that this is, from an educational and community standpoint, the desirable way to end the racial aspects of public education with respect to the students. It would shift the issue of racial composition from the public schools, where, as this Court said in the *Brown* case, it "has no place," to the neighborhood, where racial agglomeration, if not imposed by governmental or other outside influences, may simply reflect the tendencies of voluntary association. Children who live and play in the same neighborhood would study together in the same school.

Moreover, assigning children to schools according to their residence within normal geographic school zones is the easiest way to operate a normal public school system without racial distinctions as to pupils. It is a factual, impersonal, and traditional criterion in administering public schools. Not only does it reflect the neighborhood pattern, but it also permits easier programming of school and community needs, and it avoids the imbalance between schools which results from unrestrained migration of pupils.

Nevertheless, in the absence of special considerations, we do not contend that the Constitutional guarantee of equal protection of the laws necessarily requires that boards of education be compelled to admit all children into schools solely on geographic basis, or that the boards be compelled to permit, or be enjoined from permitting, each child to select or transfer to any public school he wishes to attend. *Cf. Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Farrington* v. *Tokushige*, 273 U. S. 284, 298 (1927). The school board may permit children to go to

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any school within the public school system, as in Baltimore, Maryland, or require them to go to the nearest school within a rigidly prescribed residence zone, as in some other cities. The choice of method is, in general, a matter of public school administration which is committed to the sound judgment of the school officials. So long as such judgment applies equally to both white and colored children similarly situated and is not based on racial factors, it is not a matter of constitutional concern.

(2) Voluntary transfer to unsegregated schools

The second way that the school boards could afford to each child then in a school his Constitutional right not to be subjected to compulsory racial segregation in public education, is by permitting him to continue in that school or to transfer to another school, the board acting solely on the basis of applicable scholastic considerations without regard to race. If, as in Baltimore, there are no prescribed neighborhood school boundaries, (except for students at a few overcrowded schools), the student could apply to transfer to any school within the school system. In cities or places where neighborhood school boundaries (which are not based on race) are prescribed, his application to transfer would, of course, be limited to the school within whose boundaries he resides.[2]

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[2] Compare the similar approach adopted by the Delaware State Board of Education on August 26, 1954, in its memorandum *Some Items and Suggestions Relative to Desegregation Plans*, mimeographed, p. 3:

> "If a school district has more than one building serving a given grade, attendance at a particular school could be decided by choice of the student provided, in the event of insufficient space at a particular school, preference should be given students residing nearest the school in question.
>
> "The State Board of Education believes that constitutional requirements are met either by integration within the fixed attendance areas or integration based on a single attendance area wherein freedom of choice is exercised to the extent that physical facilities will allow. The decision as to which type of attendance plan is established in a school district ultimately rests with the local board of education."

True, it might be said that to require a child to file an application in order to get the equal education to which he is Constitutionally entitled, is itself to impose a burden on the child, and that the school board, not the child, ought to initiate what must be done to provide equality of education in the Constitutional sense. However, in view of the considerable administrative adjustments and time that would be required to turn the massive ship of segregated public schools into its newly charted course, it is not unreasonable to ask those who are now in that boat to exercise their "personal" Constitutional right by applying for admittance to a school wherein they will be admitted and educated without racial segregation or other racial distinctions.

One advantage of this voluntary application method is that, without denying the Constitutional rights of any individual, the adjustments made under it would lean heavily on the state of readiness that each local community may have for integration. Thus, where there is either inertia, or a personal or scholastic reason which leads children to desire to remain in their school, or, in some areas, a diffidence to voluntary mixing of school children heretofore separately educated, the method here suggested would permit a more gradual integration than would occur where compulsory school boundaries are invoked to aid integration. This, indeed, has been the experience in several of the public school systems where students were permitted, in September 1954, to attend the school nearest their home, or, subject to the priority of neighborhood children to attend particular schools which are overcrowded, any school they chose to attend. *E.g.*, in Baltimore, Md., where 39 percent of the 141,000 children are Negro, only about 2.5 percent of the total Negro enrollment chose to go to schools formerly attended only by white children; in Springfield, Mo., almost half of the Negro children chose to remain in the school they previously attended; in Wichita, Kans., only small numbers of Negroes chose to attend schools which formerly

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served only white students. *Southern School News,* vol. 1, no. 2, pp. 8, 10, 16 (Oct. 1, 1954).

On the other hand, one of the disadvantages of the voluntary application method would be that it permits substituting the irresponsibility and uncertainty of "mores" (and perhaps extra-legal social or economic pressures) in lieu of orderly application of the compulsory school laws in the context of Constitutional requirements.

The essence of this voluntary application method is that any child now in a segregated school should have the right to apply at any time for admission to a school, at the beginning of a school term, on the basis of proper scholastic criteria which do not include race or ancestry, and that the school board must be enjoined from denying his application solely on the basis of race, color or ancestry. Thus, the process of adjustment to a nonsegregated school system will begin and be effected as such applications are made and granted. Whatever problems may arise can and should be dealt with then.

Every other method of "gradual" adjustment to a nonsegregated system which we have considered (*i.e.,* which does not require or permit education in a school near one's residence without regard to race or ancestry) would either violate the personal and present right of particular persons, or provide prejudiced boards with an excuse for interminably dragging their heels, or both, or are not, we think, appropriate for judicial action. Thus, procedures such as integrating only a limited or specific number of schools, or grades, per year, would disregard the rights and needs of individual children in other schools, or grades, who seek nonsegregated education. Moreover, judicial authorization of such arbitrary methods would encourage evasiveness and procrastination in conforming to the requirements of the Constitution. Also, clearly, gradual desegregation which is based solely on prior change of community attitudes toward desegregation, through use of such techniques as intercultural education and mass

communication, training of teachers, administrators and police, etc., not only is disregardful of the present rights of the children seeking unsegregated education but also is beyond the scope of the litigious process and of the judicial power.

In any event, we urge that this Court totally reject the notion advanced by the Attorney General of Florida (Brief, item (5) on p. 63) that the school board be allowed to refuse a Negro child's application for admission to non-segregated education if there is "such a strong degree of sincere opposition and sustained hostility on the part of the public" [apparently he means that portion which is prejudiced against Negroes] as to lead the school authorities to believe that approval of the application would cause "a disruption of the school system" or create "emotional responses among the children which would seriously interfere with their education." That proposal, keyed as it is to criteria of the vaguest sort, means only that the guardianship of Constitutional guarantees should be surrendered to prejudice, mob hostility, and the thoughtlessness of immature children emotionally titillated by parental racism.

Furthermore, such a proposal would be worse than reinstatement of the "separate but equal" doctrine. To prove that the "hard core of public opinion has softened to the extent that there can be at least some measure of acceptance on the part of a majority of the people," which is what the Attorney General of Florida says a Negro child must prove before he can obtain equal education (Brief, p. 43), would be infinitely more onerous than to prove inequality of physical facilities. Such a proposal would relegate Constitutional rights to popularity polls in which the deciding ballots would be cast by those who are most biased and least law-abiding. Indeed, if that proposal were adopted, this Court's rulings of May 17, 1954 that racial segregation in public education is unconstitutional would become, in the words of the late Mr. Justice Jackson,

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"only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California,* 314 U. S. 160, 186 (1941).[3]

In any event, the fears which underlie the proposal of the Attorney General of Florida are not legally relevant, and even if they were, part III of our Brief points out that there is no substantial basis for them.

B. As to children who enter a particular school for the first time

Somewhat different, and special, considerations are applicable to students who are ready to enter a particular school for the first time (either by virtue of beginning public school education, transfer of residence, or graduation from a lower level school). The first alternative—

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[3] We cannot over-emphasize the importance of fulfilling the promise of May 17, 1954. The whole world has been discussing it. Typical of World opinion this side of the Iron Curtain (except in South Africa where *Die Transvaler* deplored the decisions) was the editorial comment in *Journal d'Egypte* (Cairo, Egypt, May 30, 1954): "This human victory which America has just won over herself brings her a world wide prestige far superior to any that a demonstration of her military or financial strength might have brought." The *Berlingske Aftenavis* of Copenhagen, Denmark, said that this Court's decisions of May 17 were a "victory . . . for the United States as a pioneer for human freedom and equality." The conservative *Yorkshire Post* in London predicted (May 20, 1954) that the decisions "will help stem Communism among the colored peoples of Asia and other parts of the world." The *Statesman* of New Delhi, India, emphasized (May 20, 1954) the contrast between this Court's decisions and the *apartheid* madness of Prime Minister Malan in South Africa, but cautioned "it remains to be seen how and when the decision will be enforced."

On the other hand, Soviet propaganda has stressed "how small the practical value" of the decisions is, and that this Court, by this very reargument, "prepares for itself the way to a retreat." Article by S. Kondrashov, section A, *Izvestia* (June 23, 1954). The Milford, Delaware, incident served as a further opportunity for Moscow to charge that this Court's ruling of May 17 "was only meant for publicity" and that the authorities "had no intention of enforcing it." U. S. Information Agency report, Oct. 6, 1954.

assigning them on the basis of normal geographic school boundaries—would satisfy the Constitution as to them just as it would for children now in school. But unlike the case of children now in the school, to apply the second alternative—the voluntary application method—to new students would probably tend to strengthen and further entrench segregation in public education. This is because the method of voluntary application implies that in the absence of an application the student would be assigned to a public school on a racial basis.

It is one thing to say that, in light of the considerable administrative adjustments and time necessary to shift to wholly nonsegregated operation, a school board may require students who were assigned to that school prior to this Court's decrees in these cases, even though on a racial basis, to continue to attend that school unless they voluntarily apply for transfer to another school. It is quite different to say that a school board may, *after this Court's decrees,* assign children to a school on the basis of race who have never previously been in that school.

Insofar as concerns the student who is ready to enter a particular school for the first time, if the school board assigns him to a school on the basis of his race and for the purpose of maintaining racial uniformity in the particular school, rather than exclusively on the basis of proper scholastic criteria (age, educational level, residential proximity and accessibility to the school, etc.) which take no account of race, it is at once apparent that he is being subjected to unconstitutional racial distinctions.

Even more important, it is also apparent that such action *extends and further entrenches* the structure of racial segregation in education and thus makes it more difficult, rather than easier, to change "from existing segregated systems to a system not based on color distinctions."

To prevent public education from miring deeper in the bog of unconstitutional racial segregation, the school board must be enjoined from imposing *additional* segregation.

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This does not mean that the school board may not permit the student, where normal geographic boundaries are not prescribed, to choose which school he will attend. But it does mean that in the absence of such choice by the student, the school board may neither assign him on the basis of his race or color, nor require him to file an application as a prerequisite to obtaining unsegregated education.

Accordingly, in order to effect even the minimum compliance with the Constitution, this Court should, in its decrees:

(a) permit the school authorities to assign children to school in accordance with normal geographic school boundaries which are based on residential proximity and accessibility to the school, and not on race;

(b) prescribe that the school authorities, with respect to children then in school, shall not on the basis of race or color:

(i) either deny admission to any student who applies to transfer to a school within the normal residential school boundaries of which he lives;

(ii) or, if no boundaries are prescribed for a school, deny admission to any student who applies to transfer to that school;

(c) prescribe that the school authorities, with respect to any child who will, after the date of this Court's decree, be new to any particular school (either by beginning public school education, transfer of residence or graduation from a lower level school):

(i) shall assign such student to the school within the normal residential boundaries of which he lives, or

(ii) if no boundaries are prescribed, shall assign such student to a school on the basis of reasonable criteria, as determined by the school authorities, which do not include the factor of race. In making such as-

signments, the school board may, if it wishes, permit the student to choose which school he will attend, but shall not, in the absence of such choice, assign him on the basis of race or color, or require him to file an application as a prerequisite to obtaining unsegregated education.

(d) enjoin the school authorities from segregating or otherwise according different treatment to any person within a school on the basis of race or color. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950).

The adoption of these principles will, we believe, provide a normal and impersonal method (1) for gradual desegregation which (2) recognizes the Constitutional rights of the children, and (3) affords no excuse by which prejudiced school boards may evade or interminably delay compliance with the Constitution.

II. WHEN THE DECREES SHOULD BECOME EFFECTIVE

In our opinion the decrees here suggested should be effective as of the beginning of the school term immediately following the date of the decrees, with provision for delay for an additional school term where the school board proves to the court of first instance that unusual technical or administrative difficulties require such delay.

Whether the equity power of this Court is sufficient to allow more extensive time for gradual adjustment to a nonsegregated system if more time is deemed necessary in the public interest is not entirely free from doubt. Of course this Court has power to consider, and has considered, the exigencies of the public interest in prescribing the time for compliance with its decrees. See 28 U.S.C. (1952 ed.) sec. 2106; *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-330 (1944); *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 239 (1907); *ibid.,* 237 U.S. 474 and 678 (1915); *ibid.,* 240 U.S. 650 (1916); *United States* v. *American Tobacco Co.,* 221 U.S. 106, 185, 187-188 (1911).

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But all of these cases involved issues and rights other than the "personal and present" constitutional right to equal protection of the law. In those cases, delay in effectuating the decree did not forever destroy a person's civil right to have equal access to something which he could get only within a limited time or not at all. The present cases, on the other hand, involve injury to the children which "may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education,* at p. 494. To delay fulfillment of, and thereby to destroy, their Constitutional rights seems inconsistent with the equity function to protect the very Constitutional right (freedom from governmentally imposed racial discrimination) which was "the matter of primary concern" for the Framers of the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U.S. 1, 23 (1948); *Hurd* v. *Hodge,* 334 U.S. 24, 32 (1948); *Strauder* v. *West Virginia,* 100 U.S. 303, 306, 310 (1880); *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 70-72, 81 (1873); *Railway Mail Ass'n.* v. *Corsi,* 326 U.S. 88, 94 (1945).

In any event, what we say (see Part III of this Brief) is that the public interest does not require extensive delay in making effective the terms of the decrees as suggested above. We believe that the period between the issuance of the decrees and the opening of the next school term should provide ample time to make necessary changes in records and facilities, personnel assignments, and other purely administrative changes to a non-racial basis. Such administrative adjustments did not prove great obstacles in the desegregation programs of the relatively complex school systems of Washington, D. C., Baltimore, Md., Topeka, Kans., Wilmington, Dela., the States of New Jersey, Indiana, Illinois, and the many other areas where public school desegregation has been proceeding smoothly, effectively, and rapidly.

There may be unusual technical or administrative difficulties because of which one or some school boards may

need additional time to change from a segregated to a nonsegregated school system.[4] The decrees of this Court should therefore authorize the court of first instance to allow additional time for such adjustment, but not in excess of one school term at any one time—such additional time to be granted only when the court of first instance, in hearings at which the school authorities have the burden of proof by substantial and probative evidence, is convinced that because of unusual conditions involving technical or administrative difficulties such additional time is clearly needed to enable effective transition to a nonsegregated school system. Each such further extension of time for an additional school term should be predicated on the facts and circumstances then existing as proved by the school authorities in subsequent hearings before the court of first instance.[5] Opposition and hostility by part of the community to desegregation of schools should not

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[4] *E.g.*, in Dover, Delaware, it may be necessary to consolidate the separate board which administers the new high school for Negroes with the Dover Board of Education which administers the other public schools in Dover, both those for white students and those for Negro students. *Southern School News*, Vol. 1, No. 1, p. 3, col. 4 (Sept. 3, 1954). In some cases, also, revision of school district boundaries, to apportion children between schools on the basis of residence proximity and accessibility, may require legislative action. *Ibid.* Col. 5.

[5] It is of course proper and fair that the school authorities (who administer the school system, formulate its programs and schedules, have better opportunity to know the facts, and claim an exemption from the requirement of the law), should have the burden of proving why any child desiring nonsegregated education should be denied that right beyond the beginning of the next school term, and of showing how its plans for more gradual adjustment to a nonsegregated system could be justified under the Constitution and in the light of pertinent circumstances. See 9 Wigmore on Evidence (3rd ed.), sec. 2486, p. 275, and cases cited, n. 3, including 1953 Supplement. See also *United States* v. *Fleischman*, 339 U.S. 349, 360-361 (1950); *Commercial Corp.* v. *New York Barge Co.*, 314 U.S. 104, 111 (1941); *Schnell* v. *The Vallescura*, 293 U.S. 296, 304 (1934); *Rossi* v. *United States*, 289 U.S. 89, 91-92 (1933); *Selma, Rome & Dalton R. Co.* v. *United States*, 139 U.S. 560, 566 (1891).

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in themselves be considered as constituting unusual conditions warranting delay in complying with the court's decrees.

III. "GRADUALISM" IS NOT NECESSARY TO ACHIEVE SMOOTH AND EFFECTIVE DESEGREGATION

There need be no fear that a decree such as we here urge will produce widespread friction and violence. Experience in many areas of daily life, including the administration of public schools, demonstrates that smooth adjustment to nonsegregated operation, in the South as well as the North, and on a large as well as on a small scale, can be accomplished rapidly. See Clark, *Desegregation: An Appraisal of the Evidence*, 9 Journal of Social Issues, No. 4, pp. 1-76 (1953); Time Magazine, *The U.S. Negro, 1953*, pp. 55-58 (May 11, 1953) (reprinted, 99 Cong. Rec., A5384-87); *ibid.*, *When the Barriers Fall*, p. 40 (Aug. 31, 1953); Wertham, *Psychiatric Observations on Abolition of School Segregation*, 26 J. of Educ. Soc. 333 (March 1953); Bustard, *The New Jersey Story: The Development of Racially Integrated Public Schools*, 21 J. of Neg. Ed. 275 (Summer, 1952).

Indeed, such adjustment is often facilitated by desegregating as rapidly as the necessary changes can be made in records, facilities, personnel, and other purely administrative affairs to a non-racial basis. Segmentalized "gradual" desegregation which is slower than that does not necessarily make the transition easier. On the contrary, it tends to stimulate an atmosphere of uncertainty and resentments, with the result that those who seek desegregation accelerate their efforts to end injustice, while those who wish to continue segregation intensify their efforts to evade, obstruct, and resist desegregation. Such "gradualism" thus heightens, rather than diminishes, both overt and latent tensions. A vivid illustration is the recent experience of the District of Columbia Recreation Board. During 1952 and 1953, that Board's efforts at gradual

and segmentalized desegregation, which ended segregation at a dozen or so individual playgrounds, visibly heightened racial tensions in Washington as the pro- and anti-segregationists pushed their views. See Phineas Indritz, *Racial Ramparts in the Nation's Capital,* 41 Georgetown L.J. 297, 327 (March 1953). But after the Recreation Board on May 18, 1954, abruptly abolished all racial distinctions simultaneously in all its facilities (over 100), racial tensions in public recreation calmed and ceased.

That large numbers of people are affected, that the proportion of Negroes involved may be substantial, and that the desegregation is relatively rapid, are not, *per se,* major obstacles to an effective and peaceful transition to a non-segregated community. The recent desegregation of the vast military establishment, as rapidly as administrative adjustments could be made, has been effected smoothly. Nichols, *Breakthrough on the Color Front* (1954); 99 Cong. Rec. A1982-84; *Freedom to Serve,* Rept. of President's Committee on Equality of Treatment and Opportunity in the Armed Services (Govt. Printing Off., May 22, 1950); *Integration in the Armed Services,* Progress Report of the Civilian Assistant to the Secretary of Defense (Aug. 31, 1954). "There are no longer any all-Negro units in the Services". *Ibid.,* p. 6.

After this Court's decision in *District of Columbia* v. *John R. Thompson Co., Inc.,* 346 U.S. 100 (June 8, 1953), racial discrimination in the restaurants of a large city having a "southern exposure" ended overnight, without friction or disturbance among the thousands of people who daily use them. Not long thereafter all remaining racial discrimination ceased in District of Columbia theatres and all publicly administered recreational facilities, and the many thousands who now sit and play next to persons of another race display no tremor or qualm.

During the past nine years (since 1945), more than 60 million Americans have obligated themselves, through their legislative representatives in 12 states and at least

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32 municipalities, to abstain from racial discrimination in employment. Management has generally responded favorably and many unions are extending the principle of nondiscrimination, including nonsegregation. Davis, *Negro Employment: A Progress Report,* 48 Fortune 102 (July 1952); Ruchames, *Race, Jobs and Politics,* 192 (1953); Hope, *Efforts to Eliminate Racial Discrimination in Industry—With Particular Reference to the South,* 23 J. of Neg. Educ. 262 (Summer 1954). Recent surveys have shown that large percentages of Southern workers favor nondiscriminatory employment requirements, one survey showing 48 percent. Ruchames, *supra,* p. 192. With increasing industrialization, the South is, more and more, experiencing and accepting nondiscriminatory and nonsegregated employment. Time magazine, *Industry—Through the Color Barrier,* p. 104 (March 22, 1954); see also Statement of November 11, 1953 by President Eisenhower announcing the ending of racial segregation of civilian workers at Navy shore establishments in Southern states.

Moreover, the past 5 years have seen widespread effort to minimize racial discriminations and tension in many other areas. In the fields of housing and urban redevelopment, the federal government (which underwrites over 25 billion dollars of home mortgages) now refuses home loan guarantees or insurance (V.A. or F.H.A.) for property on which racial restrictive covenants have been recorded since February 15, 1950; and racial discriminatory practices are now prohibited by law in 11 States. In addition, either by municipal ordinance or other action, or by resolution of the local housing authority, racial discriminatory practices in housing are forbidden in 24 cities, including such large centers of population as Baltimore, Md., Washington, D. C., Wilmington, Del., New York, Los Angeles, Boston, Cleveland, Philadelphia, Cincinnati, St. Paul, etc. More than 60 cities have established Human Relations Commissions; and at least 50 Southern municipalities have adopted anti-mask ordinances designed to curb Klan terrorism.

As the thinking of America focuses on the subject of school desegregation, this Court's decision is receiving more and more affirmations of support from civic, religious, veterans, parent-teachers, labor, business, educational, and a host of other types of organizations. It is particularly significant that practically every major religious denomination has vigorously urged compliance with both the letter and the spirit of integration.

Illustrative of the tone of such support is the announcement by the National Council of the Churches of Christ in the U.S.A., on May 19, 1954, urging all churches and individuals "to exert their influence and leadership to help the authorized agencies in the several communities to bring about a complete compliance with the decision of the Supreme Court." See also the National Council's Statement *The Churches and Segregation* (June 11, 1952) urging elimination of segregation and exclusion policies at all church-related, as well as public, schools. Similar views have been expressed by the Southern Baptist Convention, the Southern Presbyterian 94th General Assembly (1954), the Southern Methodist Church (including the Conferences in Florida, North Georgia, Louisiana, North Arkansas, Southwest Texas, etc.), the Southeastern Province of the Protestant Episcopal Church, the Catholic Committee of the South, Southern B'nai B'rith lodges, the Disciples of Christ, many Southern councils of the United Church Women, and other active religious denominations. See Southern Regional Council, *Schools in the South,* pp. 6-7 (June, 1954); *ibid., New South,* vol. 9, no. 8 (Aug. 1954).

These pronouncements are not simply pious hopes. They reflect what is actually happening in America. Racial discrimination is being abandoned or destroyed in the armed forces, in professional societies, in the entertainment world, in schools and colleges, in churches, in industry, in government, indeed, almost everywhere. It merits noting that

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only 6 years ago no Negro could hope to play baseball in the major leagues, while now Negro ballplayers are heroes to millions of sports enthusiasts. See, *e.g.,* Tallulah Bankhead, *What is so Rare a s a Willie Mays,* Look Magazine, vol. 18, no. 19, p. 52 (Sept. 21, 1954); E. B. Henderson, *The Negro in Sports* (1949).

Yesterday's announcements that the Disciples of Christ 105th International Convention in Florida voted for nonsegregation (*Washington Post & Times Herald,* p. 24M, Oct. 31, 1954), and that the Medical Society of Virginia voted to admit colored physicians to membership (*Washington Evening Star,* p. B-1, Nov. 1, 1954), are similar to hundreds of recent instances illustrating how widely race bars are being dropped by voluntary and private groups without legal compulsion to do so.

Literally thousands of schools, in the South and throughout the country, which were operated until recently on a segregated basis, now have integrated student bodies, and many of them already have integrated teaching staffs in the particular school.

White and Negro children are already sitting side by side in church-supported schools in Arkansas, Kentucky, Maryland, Missouri, North Carolina, Oklahoma, Tennessee, Texas, Virginia, West Virginia, and other areas where segregation was the rule prior to this Court's decisions of May 17, 1954. See, *e.g.,* Release, Sept. 13, 1954, National Catholic Welfare Conference News Service. Schools on numerous military reservations throughout the South have already been integrated, and no segregated school will be operated on any military reservation after September 1, 1955. *Integration in the Armed Services,* Progress Report of Civilian Assistant to the Secretary of Defense, pp. 2-3 (Aug. 31, 1954). And according to the Southern Regional Council's list (October 1954), at least 116 colleges and professional schools in Southern and border states, both public and private, which were formerly restricted to white

students, are now desegregated. Although we do not have precise data as to how many private non-Catholic schools below college level have race bars no more, we do know they number in the hundreds.

Thousands of public elementary and secondary schools, too, have recently been desegregated. Virtually every section in Missouri has some form of integration in its public schools. In Arizona and New Mexico, public school segregation is now a thing of the past. In West Virginia, more than 25 counties have already fully or partially integrated their public schools. In Texas, at least 10 municipal junior colleges formerly restricted to white students now admit Negro students. These are but samples of the widespread growth of racial integration in the schools of America. See N. Y. Times, pp. 1, 74 (Oct. 3, 1954); *Southern School News*, Vol. 1, Nos. 1 and 2 (Sept. 3 and Oct. 1, 1954).

In three of the cases here involved, the picture is even more encouraging.

In *No. 1, Brown* v. *Board of Education:* In September 1953 the Topeka School Board, which had no segregation at the secondary school level, adopted the policy of desegregating the elementary schools as rapidly as practicable, and immediately terminated segregation in two elementary school districts. In September 1954, the Topeka Board of Education ordered complete integration in 10, and partial integration in 2, additional elementary school districts. Thus, at present, 14 of the 19 elementary schools previously attended by white children now have integrated student bodies; five schools are attended solely by white children; and four schools are attended solely by colored children. The Superintendent of Schools, in his letter of Sept. 24, 1954, advising us that in January 1955 he will announce the third step toward integration, stated as follows: "It is my belief that segregation will be terminated in this city

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before the Supreme Court acts indicating the manner in which it should be accomplished."

In *No. 4, Bolling* v. *Sharpe:* Shortly after this Court's decision of May 17, 1954, the District of Columbia Board of Education adopted a policy of complete nonsegregation and the Superintendent of Schools initiated a program to implement that policy.

Up to the date of filing this Brief, most of the D. C. public schools have been wholly or partially desegregated by virtue of (a) transferring some 3000 Negro children from overcrowded schools chiefly to schools serving the areas where they live; (b) applying new non-racial school boundaries to all students (some 12,000) who in September 1954 were new to the school system; (c) permitting those who had changed their residences to another school zone to transfer to the school serving that zone; and (d) permitting approximately 1000 additional junior and senior high school students and approximately 900 other elementary school pupils to transfer to schools within the boundaries of which they live. Racial exclusion has been abandoned for all evening schools and for the two teachers colleges, and it is proposed to merge these colleges as soon as administrative details and facilities can be arranged. Teachers are being examined and assigned without regard to race.

In addition, all children still remaining in schools which are outside the boundaries within which they live may either remain in their present school until graduation or file applications for transfer to a school serving the school zone in which they live. The Superintendent of Schools has announced that these applications will be made effective either in February or September 1955; that children living within the school boundaries will, after September 1955, have priority, if the school is overcrowded, over those who live outside the boundaries; that all students gradu-

ating from junior high school in February 1955 will go to the high school serving the zone within which they live; and that in September 1955 the new boundaries will be applicable to all students except those remaining in a school until they graduate. The D. C. public school system serves over 100,000 students, 60 percent of whom are of Negro ancestry.[6]

In *No. 5, Gebhart* v. *Belton:* The two schools involved (Claymont high school and Hockessin elementary school) have been integrated since 1952. In addition, under the policy recently adopted by the Delaware State Board of Education which virtually incorporates the proposals we here urge (see footnote 2, *supra*), many other Delaware schools have already been integrated, in varying patterns and, except at Milford, without difficulty. Thus, in Newark, junior and senior high schools have been integrated. In Newcastle, integration has been smoothly introduced for first year children and all high school grades. In Wilmington, integration began in the summer school session; in September, integration was smoothly accomplished at the elementary school level where 67 percent of the students are now enrolled in schools attended by both white and colored children while the remainder attend schools which serve all-white or all-colored residential areas (no qualified Negro student sought transfer to any secondary school serving white children); and racial restrictions were removed from evening schools and all activities of extended services. See *Southern School News,* vol. 1, Nos. 1 and 2 (Sept. 3 and Oct. 1, 1954); Wilmington *Journal—Every Evening,* p. 1 (June 22, 1954); *ibid.*, pp. 1, 4 (Sept. 21, 1954).

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[6] *Washington Post & Times Herald,* p. 7M (May 23, 1954); p. 17 (May 26, 1954); p. 19 (June 10, 1954); p. 18 (June 24, 1954); p. 1 (July 2, 1954); p. 20M (Sept. 12, 1954); p. 1 (Sept. 14, 1954); p. 18 (Sept. 16, 1954); p. 1 (Sept. 17, 1954); pp. 1, 18 (Sept. 22, 1954); p. 19 (Sept. 25, 1954); *Southern School News, supra,* Nos. 1 and 2.

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The recent highly publicized incidents, such as the picketing and threats which stopped or reversed integration plans of the local school boards at Milford, Dela., and White Sulphur Springs, W. Va., and the brief flurry of walkouts and truancy by a small proportion of the students in Baltimore, Md., and Washington, D. C., do not undermine our contention that "gradualism" is unnecessary to smooth integration. Those incidents were isolated instances of rowdyism, largely inspired by professional hate mongers. When compared to the overall picture of effective transition in the many areas where desegregation is taking place, these incidents, despite their notoriety, shrink to their proper miniscule proportion.[7]

Moreover, as shown in the newspaper reports from those localities, the vast majority of the local citizenry disavowed and deplored such defiance of law and order *e.g.*, see daily issues during October of: Wilmington *Journal—Every Evening*, Wilmington *Morning News*, *Baltimore Sun*, *Washington Post & Times Herald*, Washington *Evening Star*, etc.).

Indeed, it can be stated that the current atmosphere of uncertainty as to the nature of this Court's decree concerning the methods for desegregation of the public schools has undoubtedly been a large factor in encouraging the climate of overt hostility and active resistance to desegregation which stimulated those incidents. But after this Court's decrees outline the methods of compliance with the Constitution, accommodation and acceptance, even though

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[7] The Wilmington *Journal-Every Evening* appraised the Milford, Delaware outburst as "nothing more than isolated incidents of a few irresponsible persons getting briefly out of hand" (Editorial, Oct. 14, 1954), while the Washington, D. C. walkout consisted almost entirely of "teen-agers on a lark. It did not smack of real racial bigotry." *Washington Post & Times Herald*, p. 8, col. 2 (Oct. 19, 1954).

sometimes reluctant, will rapidly replace the present uncertainty and resistance.[8]

As actual experience has shown, "The likelihood of desegregation being accompanied by active resistance or violence is not directly dependent upon the degree of expressed racial prejudice among the whites prior to the desegregation. Prejudiced whites accommodate as well to a changed social situation as do less prejudiced whites. There is also some evidence that a change in the social situation brought about by desegregation tends to decrease the intensity of expressed racial prejudice." Clark, *Desegregation: An Appraisal of the Evidence*, 9 J. of Soc. Issues, No. 4, p. 47 (1953). These findings are, indeed, buttressed by the survey of attitudes on desegregation conducted under the auspices of the Attorney General of Florida which found:

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[8] *Washington Sunday Star*, p. A-2, cols. 2-4 (Oct. 3, 1954). In Clark, *Desegregation: An Appraisal of the Evidence*, 9 J. of Soc. Issues, No. 4, pp. 53-54 (1953), the key principles are stated as follows:

"VII. Active resistance, and sometimes violence, though rare, are associated with desegregation under the following conditions:

A. Ambiguous or inconsistent policy;
B. Ineffective policy action;
C. Conflict between competing governmental authority or officials.

* * * * * * * * * *

"VIII. The accomplishment of efficient desegregation with a minimum of social disturbance depends upon;

A. A clear and unequivocal statement of policy by leaders with prestige and other authorities;
B. Firm enforcement of the changed policy by authorities and persistence in the execution of this policy in the face of initial resistance;
C. A willingness to deal with violations, attempted violations, and incitement to violations by a resort to the law and strong enforcement action;
D. A refusal of the authorities to resort to, engage in or tolerate subterfuges, gerrymandering or other devices for evading the principles and the fact of desegregation;
E. An appeal to the individuals concerned in terms of their religious principles of brotherhood and their acceptance of the American traditions of fair play and equal justice."

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"While the majority of white persons answering opposed the decision, it is also true that a large majority indicated they were willing to do what the courts and school officials decided." (Florida Brief, pp. 24, 108)

"29. A large majority of white principals and supervisors in all regions indicate that they would comply with the decision regardless of personal feelings but the percentage varies from 76% in Region VII to approximately 94% in Regions VI and VIII." (*Ibid.*, p. 33).

In any event, however, the possibility of occasional local friction does not provide a relevant legal basis for depriving law abiding persons of their legal rights. *Buchanan* v. *Warley*, 245 U.S. 60, 80-81 (1917); *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941); *Shelley* v. *Kraemer*, 334 U.S. 1, 21 (1948). This Court has sturdily refused to permit the standards of the Constitution to be set at the larrikinalian level demanded by local ruffians and Ku-Klux-Klan-like demagogues. See *Moore* v. *Dempsey*, 261 U.S. 86 (1923) (mob violence); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) (street argument); *Hague* v. *C.I.O.*, 307 U.S. 496, 516 (1939) (anticipated public disorder, but no showing of inability to control it.) Also *Cf. Terminiello* v. *Chicago*, 337 U.S. 1 (1949) (speech before riotous and turbulent crowd); *Kunz* v. *New York*, 340 U.S. 290, 296 (1951) (speech likely to stir strife); *Feiner* v. *New York*, 340 U.S. 315 (1951) (speech which actually incited crowd). This Court was not frightened by threats of large scale violence nor deemed it necessary to espouse a formal policy of "gradualism", when it ordered the end of racial discrimination, whether in the form of segregation or otherwise, in voting, interstate travel, land ownership and occupancy, employment, public accommodations, graduate education, jury service, and other areas of daily life.[9]

[9] See numerous cases cited in our Brief for AVC on the previous reargument (1953 Term), p. 16, ftnts. 7-13. Some instances of awful predictions of dire violence which never materialized can

Throughout this experience in desegregation, the phobias of predicted violence proved to be wraiths, fantasies and myths. Here and there, one or a few hoodlums created localized tensions and anxieties. But the vast majority of people accommodated themselves to and accepted the change in their pattern of racial relations which, this Court decreed, was required by the Constitution. See Comment, *Racial Violence and Civil Rights Law Enforcement*, 18 U. of Chi. L. Rev. 769 (1951).

The unfortunate truth is that considerable time, perhaps years, may elapse before all the public schools are fully integrated. Residential segregation alone will greatly minimize the effect of this Court's rulings in these cases. There are multitudes of areas inhabited almost entirely by white persons or almost entirely by colored persons. The student body of the schools in those areas will have the same hue as the residents of the neighborhood.

Moreover, the lag in the law and the inhibiting effect of the mores and extra-legal pressures in particular communities, when added to the accumulated racial patterns of residence, and other factors, will envelope the process of desegregation with ample "gradualism". *Cf.* Ashmore, *The Negro and the Schools*, pp. 134-139 (1954); Leflar and Davis, *Segregation in the Public Schools—1953*, 67 Harv. L. Rev. 377, 404-420 (January 1954); Frank, *Can Courts Erase the Color Line?*, 21 J. of Negro Educ. 304 (1952).

Whatever may be one's thoughts as to the extent of time which may be desirable, from an administrator's standpoint, for adjustment to a non-segregated system of public education, this Court need not and ought not water down the equal protection guarantee of the Constitution through the formal espousal of a legal doctrine of "gradualism".

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be seen in the brief for the State of Virginia (pp. 14, 18-20) in *Morgan* v. *Virginia*, 328 U.S. 373 (1945 Term, No. 704), in the *amicus* brief filed by the Attorneys General of eleven States (p. 9) and in the brief for the University of Texas Law School (p. 175) in *Sweatt* v. *Painter*, 339 U.S. 629 (1949 Term, No. 44), and in the *amicus* brief by Rep. Sam Hobbs of Alabama (p. 5) in *Henderson* v. *United States*, 339 U.S. 816 (1949 Term, No. 25).

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QUESTION 5

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

THE TERMS OF THE DECREES WHICH WE SUGGEST

We have indicated above our belief that this Court should not undertake to encompass in its decree all conceivable local conditions and educational problems or to formulate a decree attempting to foresee and meet every possible contingency concerning the many individuals and circumstances involved in readjusting school districts, educational methods, patterns of pupil attendance, the assignment of teachers, etc. to meet constitutional standards. Nor should this Court do so vicariously through a special master. Such problems, to the extent that they are submitted to the judicial ken, are properly the initial concern of courts of first instance. Moreover, those courts cannot deal with such problems in identical manner. Differences in facts and unforeseen circumstances may compel variations in both procedure and solution.

Nevertheless, the courts of first instance should not be left entirely at large. Pursuant to the views expressed above, we urge that this Court remand these cases to the courts of first instance with the following directions:

(a) That the courts of first instance order and enjoin the respective boards of education:

(1) to admit and educate any applicant (if qualified on the basis of, and subject to, proper scholastic criteria which take no regard of his race or ancestry, including normal geographic school boundaries where such boundaries are prescribed) in any school in which any other person similarly situated, but without regard to race, color, or ancestry, would be admitted and educated; the board may, if it wishes, choose to comply with this requirement by assigning children to schools in accordance with normal geographic school boundaries which are based on proximity of residence and accessibility to the school and not on race, color or ancestry;

(2) as to any student who will thereafter be new to a particular school, to assign him to a school on the basis of normal residential boundaries not based on race or color, or, if no boundaries are prescribed, on the basis of reasonable criteria which do not include race or color; where no boundaries are prescribed, the board may, if it wishes, permit the student to choose which school he will attend, but shall not require him to file an application as a prerequisite to obtaining unsegregated education;

(3) to refrain, in the administration of their respective schools systems, from making any distinction, or providing any difference in treatment or education, solely on the basis of race, color, or ancestry, with respect to any student or other persons; and

(4) to comply with the above provisions not later than the beginning of the school term next following the issuance of this Court's decision.

(b) That the court of first instance:

(1) shall retain jurisdiction of the cases for such time as that court deems necessary to deal, upon motion by either side, with any special problems that may

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arise in complying with the provisions mentioned above;

(2) may allow such additional time to the respective board of education, but not in excess of one school term at any one time, as the board of education on the basis of unusual conditions involving technical or administrative difficulties then existing, proves, by substantial and probative evidence at open hearings before the court, is needed by the board to effectuate compliance with this Court's decree; and

(3) shall not consider opposition and hostility by part of the community to desegregation of public education as constituting in themselves sufficient basis for delaying compliance with this Court's decree.

If the above directives are included in this Court's decree, we think that the court of first instance should be left free, subject to appellate review of any error committed, to adopt whatever procedures it deems wise in prescribing such additional specific terms, not inconsistent with this Court's decree, as may be necessary in the particular case to provide equal, unsegregated education to each person who desires it.

CONCLUSION

In view of the advanced status of desegregation in Kansas, the District of Columbia, and Delaware, we assume that in the cases from those areas (Nos. 1, 4, 5), the school authorities would have no objection to decrees containing the terms suggested above and effective September, 1955.

No different treatment is required, nor should be made, either for the other two cases now before this Court or for any other public school desegregation situations that we are aware of.

It is significant that although the appellees in the Virginia case stated that racial segregation was designed to prevent violence and reduce resentment, they frankly admitted that "The passage of time has removed violence

and substantially removed resentment in Virginia." Brief for Appellees, No. 191, Oct. Term, 1952, p. 17.

In states such as South Carolina, Georgia, Mississippi, and Alabama, and some parts of a few other states, integration of the public schools will involve a greater emotional adjustment. But we believe that the people of these areas can and will make that adjustment much easier than some of their present political leaders give them credit for.[10]

The events of World War II and its aftermaths have in the past several years brought about a vast reorientation of the community attitudes which formerly buttressed racial segregation. More and more, the people of the South are striving to discard the discriminations which grew from previous prejudices. In ever growing degree it is apparent that they would travel even faster toward that objective as the shackles of legal prohibitions against their voluntary association are removed.

Most of the people of the South respect the Constitution. They will comply with firm directives embodied in decrees of this Court. The more positive the ruling, the greater will be its acceptance. We believe that the future course of desegregation in the South will substantiate the experience of public school desegregation in New Jersey: ". . . that the best way to integrate is to do it." Bustard, *supra*, 21 J. of N. Ed. 275, 285.

AMERICAN VETERANS COMMITTEE, INC.,
Amicus Curiae.

By PHINEAS INDRITZ,
National Counsel,
American Veterans Committee, Inc.

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[10] Compare the observation in *Freedom to Serve, supra*, p. 44: "Integration of the two races at work, in school, and in living quarters did not present insurmountable difficulties. . . . The enlisted men were far more ready for integration than the officers had believed." The same phenomenon was observed when white students greeted Negro students after the *Sweatt* and *McLaurin* decisions opened the doors of the Universities, and is now being seen in the vast majority of the elementary and secondary schools which have recently been desegregated.

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HAROLD B. WILLEY, Cle

Supreme Court of the United States

OCTOBER, 1954, TERM

OLIVER BROWN, ET AL.,
Appellants,
VERSUS
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS ET AL.
No. 1

HARRY BRIGGS, JR., ET AL.,
Appellants,
VERSUS
R. W. ELLIOTT, ET AL.,
No. 2

DOROTHY E. DAVIS, ET AL.,
Appellants,
VERSUS
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.,
No. 3

FRANCIS B. GEBHART ET AL.,
Petitioners,
VERSUS
ETHEL LOUISE BELTON, ET AL.,
No. 5

BRIEF OF MAC Q. WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, AMICUS CURIAE

MAC Q. WILLIAMSON,
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Oklahoma City, Oklahoma,
Amicus Curiae.

NOVEMBER, 1954.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

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AUTHORITY

Authority for the filing of this *Amicus Curiae* brief may be found in the concluding paragraph of this Court's opinion in the cases (as consolidated) above listed. 347 U. S. 483, 98 L. ed. (advance) p. 583. See, also, Par. 4 of Rule 42 of this Court.

The State of Oklahoma is one of the states requiring segregation in public education; and principally because of both constitutional and legislative restrictions as to the financing of separate educational facilities for white and negro children, it is probably more immediately concerned than some, if not all, of the other states having segregation in public education in whether this Court directs that existing segregated systems be stopped immediately, or adjusted gradually to a procedure not based upon color distinctions.

At the outset, it may be noted that Oklahoma's dual system of tax-gathering is unique and different from most other "segregation" States.

Basically—as will hereinafter be pointed out—our Oklahoma district or "majority" schools (which are usually but not always for white children, because of the numerical preponderance of white children in such school districts) are financed by a school-district-wide ad valorem tax levy, whereas separate schools, (which are usually but not always for negro children, because of the

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smaller number of negro children) are financed by a county-wide ad valorem tax levy. These levies—the first, to be administered by school district officers, while the second, or separate school funds, are expended by county officers—are supplemented by State excise taxes, etc., and by State appropriations, all of which are presently geared to the segregated or double system of education, as are the ad valorem tax levies for "majority" as well as "separate" schools. The income and revenues allocated for both systems are (usually) barely sufficient to provide appropriate and desirable educational facilities, separately functioning, for all children (of both the white and colored races).

So that if the method of financing and allocating revenues for the education of one race must *now* be used for the education of both races (which apparently will be the case, since the doctrine of "separate but equal" has been determined by this Court to have no place in the field of education), then our entire fiscal program with its "two-pronged" methods of raising and dividing tax moneys (1) on a district-wide basis—as to the majority schools; and (2) on a county-wide basis—as to our separate schools, must needs be recast by Constitutional change, and by our next Legislature (which meets in regular session January 3, 1955).

This Court's determination that the doctrine of "separate but equal" has no place in the field of scholas-

tic education quite apparently means that there can be only one system of public education available to negro and white children alike; and since, in each of these cases, children of the negro race were seeking admission to schools attended by white children, it is logical to assume that, as far as the State of Oklahoma is concerned, negro children are intended to be admitted to and integrated in the district schools(usually but not always for white children) and that separate schools (usually but not always for negro children) can no longer be maintained by the State, as such. Thus it appears that separate schools for white and for negro children, based on color distinctions, must be discontinued; it having been said by the Court in these cases that "separate educational facilities are inherently unequal"; which (among other things) indicates that separate schools (and the finances therefor) in Oklahoma are contrary to the Fourteenth Amendment to the United States Constitution, and are unlawful.

In this connection, it is pointed out that all budgets for both majority and separate schools for the current Oklahoma fiscal year (1954-55) have long since been officially approved, and tax levies made and extended upon the tax-rolls of each of our 77 counties; and such taxes are now payable, and in process of collection—the first half of all said taxes actually becoming delinquent on December 31, 1954. Thus the fiscal program for all

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schools on the traditional and divided basis is so far along that it would be a clear impossibility to try at this time to "unscramble" the set purposes and destination of tax moneys of our 77 counties for this year, when and as collected.

Another point to consider is the fact that hundreds of thousands of dollars are being collected—under State constitutional authority—for *separate* school purposes, *with each county—rather than each school district—as a taxing unit;* and if the decision should be—under the Court's Question 4—"integration forthwith," then every dollar so collected (and being held by the various County Treasurers) would remain "locked up" and entirely unavailable for *any* school purposes until new and different constitutional and statutory remedies could be provided; this, for the reason that Sec. 19, Article 10, Oklahoma Constitution, forbids the diverting of any tax moneys away from the original purposes of the levy.

Said Section and Article provide as follows:

> "19. SPECIFICATION OF PURPOSE OF TAX—DEVOTION TO ANOTHER PURPOSE.—Every act enacted by the Legislature, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied and no tax levied and collected for one purpose shall ever be devoted to another purpose."

Thus, while necessary remedial legislation can (and doubtless will) be provided by or before June 30, 1955

(the end of the current fiscal year), yet it will reasonably take that long to make the change-over.

Each Oklahoma school district, depending—as it now the case—for its very existence upon revenues allocated to it for education of children of only one race, will thus find it presently impossible to provide funds for adequate education for children of both races, unless and until the Legislature of the State of Oklahoma and the people of the State of Oklahoma have had an opportunity—through amendatory legislation—to give increased revenues to such school districts; which might (and probably will) consist largely of new Acts consolidating revenues formerly allocated for both district and separate schools.

The problem confronting the State of Oklahoma in changing from the heretofore approved "separate but equal" system (which has prevailed since before Statehood, in 1907) can better be understood by a consideration of provisions (hereafter quoted) of the Constitution of Oklahoma and statutes enacted by the Legislature of the State of Oklahoma.

For the purposes of this brief, references to statutes of the State of Oklahoma will be by title and section in Oklahoma Statutes, 1951, as follows:

"_____ Oklahoma Statutes 1951,
(Title number)
Sec. _____."
(Section number of title)

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Section 5, Article I, Oklahoma Constitution, reads as follows:

> "Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools: And *Provided, further, that this shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children*" (Emphasis ours).

Section 3, Article XIII, Oklahoma Constitution, reads as follows:

> "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term 'colored children,' as used in this section, shall be construed to mean children of African descent. The term 'white children' shall include all other children."

Section 11 of Article 23, Oklahoma Constitution, reads as follows:

> "Wherever in this Constitution and laws of this State, the word or words, 'colored' or 'colored race,' 'negro' or 'negro race,' are used, the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons."

70 Oklahoma Statutes 1951, Sec. 5-1 provides that the public schools in Oklahoma "shall be organized and maintained *upon a complete plan of separation* between the white and colored races with impartial facilities for

both races." Other statutes prescribe penalties for teaching pupils of the colored and white races in the same school. 70 Oklahoma Statutes 1951, Secs. 5-4 *et seq.* However, since this Court has already held that segregation of white and colored children in public education is in contravention of the United States Constitution, this Court will not be burdened with any argument herein as to the meaning of the aforecited constitutional and statutory provisions which for many years have been in effect in Oklahoma.

The question of immediate concern to the State of Oklahoma is an adjustment to a single system of public education, which is to be considered by this Court in resolving Questions 4 and 5 that have been previously propounded by the Court. Therefore, it is deemed appropriate to present for this Court's consideration these further constitutional provisions, constituting—as they do—the basic authority for county-unit taxation for separate school purposes, only.

Section 9 of Article 10, Oklahoma Constitution, reads as follows:

> "Except as herein otherwise provided, the total taxes for all purposes, on an ad valorem basis, shall not exceed, in any taxable year, fifteen (15) mills on the dollar, to be apportioned between county, city, town and school district, by the County Excise Board, until such time as the regular apportionment is otherwise provided for by the Legislature.
>
> "No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad

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valorem tax levy upon any kind of property in this State be used for State purposes: *provided, however, any County of the State may make an additional ad valorem levy, not exceeding two (2) mills on the dollar valuation, on any property within the county, for separate schools for white and negro children, such aid or money raised therefor to be apportioned as provided by law; provided, further, that upon certification of the need therefor by the governing board, an additional levy of not to exceed one (1) mill on the dollar valuation on any property within the county shall be made by the County Excise Board for separate schools for white and negro children; provided, further, that upon certification of the need therefor by the governing board, an additional levy of not to exceed one (1) mill on the dollar valuation on any property within the county shall be levied by the excise board, the proceeds derived therefrom to be used exclusively for the acquisition of sites and erection of buildings for separate schools for white and negro children;* provided, further, the annual ad valorem tax rate for school purposes may be increased, in any school district, by an amount not to exceed fifteen (15) mills on the dollar valuation, upon all property in the district, on condition that a majority of the qualified voters of such district voting at an election, vote for such increase, provided, however, that the Legislature shall by proper laws prescribe the manner and method of conducting said election, but until such legislative provision is made, said levy may be made and said election held as now provided by law; and provided further, that limitations on the levy of such additional 15-mill levy may be made hereafter by the Legislature.

"Provided, also, an additional levy may be made each year, in the State and in the various subdivisions thereof, on all personal and real property subject to ad valorem taxes, to reasonably take care of

bonded and other valid indebtedness of the State and its various subdivisions existing at the time this amendment is adopted and becomes effective, but such necessary additional levy or assessment on such property to take care of such indebtedness existing and owing by the State and its subdivisions at such time shall in no event exceed levy or assessment for which such property would have been liable under the Constitution and laws of the State as same existed immediately prior to the adoption of this amendment. No provision hereof shall be construed to tax churches or schools."—As amended State Question No. 185, Referendum Petition No. 61, Adopted August 15, 1933; State Question No. 319, Referendum Petition No. 91, Adopted special election July 2, 1946; State Question No. 314, Initiative Petition No. 224, Adopted general election Nov. 5, 1946; State Question No. 316, Initiative Petition No. 226, Adopted general election Nov. 5, 1946; State Question No. 327, Referendum Petition No. 92, Adopted special election July 6, 1948.

It will thus be seen that definite limitations are placed upon ad valorem tax levies for school districts (which are maintained for the "majority" race, which usually means the white race), and for separate schools (which ordinarily means the "minority" or the negro race); and it will also be observed that the *tax levies for majority school districts are invariably on a district-wide basis*, whereas levies for the separate schools *are and always have been on a county-wide basis* (Emphasis ours).

70 Oklahoma Statutes 1951, Sec. 5-8, prescribes the procedure to be followed in levying taxes for the

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maintenance of "county separate schools for white and colored children."

While children of both races may be integrated into the school district system, as distinguished from the county separate school system, in the State of Oklahoma, the aforementioned limitations as to financing must be faced and solved, primarily by the people, and as well, by the Legislature, of the State of Oklahoma, since the principal source of revenue for schools is an ad valorem tax levy, which has a definite limitation by the terms of the Constitution, as aforementioned. This means, of course, that appropriate or adequate facilities for public education cannot be given to both white and colored children under a newly-created and required system of non-racial education until a plan for removing or raising the constitutional limitation on ad valorem tax levies has been devised and submitted to the electorate of the State of Oklahoma.

In this connection, it might be pointed out that the State Legislative Council in Oklahoma (which consists of the entire current membership of both Houses, and which functions between regular legislative sessions) has been making a study of this question and is in the process of submitting its recommendations to the Oklahoma Legislature when it convenes in regular session in January, 1955. Probably the recommendations so made will require, and certainly will be entitled to, debate in both

houses of the Oklahoma Legislature; it being necessary to formulate a permanent solution, by way of constitutional amendment, of the future financing of a single system of public education which will include and integrate both white and colored children. Such proposed constitutional amendments will be by the Legislature submitted to the voting citizens of the State. Likewise, it will be necessary for the Oklahoma Legislature, itself, to formulate a system to supplement, by excise taxes, etc., revenues that will be made available from ad valorem tax levies, for the newly arranged school program.

It seems to be settled law that this Court, having once begun an exercise of its equity powers in injunction proceedings, can properly continue its control over the subject matter of the cases, so as to do "entire justice" with respect to such subject matter, which means that this Court has the power—and we think, the corresponding duty—to retain jurisdiction, as long as might reasonably be necessary, to effect entire and complete justice not only to the parties in these cases, but to all others who will be affected by the decision of this Court.

> (U. S. Va. 1830) The process of an equity court should act on known and definite interests and not on such as admit of no medium of estimation, and its decrees should terminate and not instigate litigation.—*Caldwell* v. *Taggart*, 29 U. S. 190; 4 Pet. 190; 7 L. Ed. 828.

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(U. S. Va. 1937) Extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule, but rests in sound discretion of court * * * Equity courts may go much farther both to give and withhold relief in furtherance of public interest than they are accustomed to go where only private interests are involved.—*Virginian Ru. Co.* v. *System Federation No. 40*, 57 S. Ct. 592; 300 U. S. 515; 81 L. Ed. 789; affirming CCA, 84 F. 2d 641; affirming D.C. *Ry. Employees Dept. of A.F.L.* v. *Virginian Ry. Co.*, 11 F. Supp. 621; certiorari granted *Virginian Ry. Co.* v. *System Fed. No. 40, Ry. Employees Dept. of A.F.L.*, 57 S. Ct. 43, 299 U. S. 529; 81 L. Ed. 389. Also, see *Scripps-Howard Radio* v. *Federal Communications Comm.*, 62 S. Ct. 875; 316 U. S. 4; 86 L. Ed. 1229. *Mercold Corp.* v. *Mid-Continent Inv. Co.*, 64 S. Ct. 268; 320 U. S. 661; 88 L. Ed. 376;—Rehearing denied—64 S. Ct. 325; 321 U. S. 802; 88 L. Ed. 1089 (also see 89 L. Ed. 546—motion denied).

(U. S. Miss. 1874) It is a rule of a court of equity to do complete justice when such is practicable, not merely by declaring the right, but by enforcing a remedy for its enjoyment, and such a court does not turn the party to another forum to enforce a right which it has itself established.—*Terrell* v. *Allison*, 88 U. S. 289; 21 Wall. 289; 22 L. Ed. 634.

We believe certain generalized rules to be apropos. 30 C. J. S., Equity, Sec. 67, states:

"The aim of a court of equity is to administer complete relief in a single suit and, as a general rule, the court will in the one suit investigate and determine all questions incidental to the main controversy and grant all relief incidental to accomplishment of the principal object of the bill, and it is a well settled rule that a court of equity which has obtained jurisdiction of a controversy on any

ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter, particularly with respect to the enforcement of its own decree, and this is true whether the question is of remedy or of distinct yet connected topics of dispute, and whether the rights and remedies involved are legal or equitable."

19 Am. Jur., Equity, Sec. 127, states:

"The rule is that equity will not enter a partial or incomplete decree. Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally dispose of the litigation so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation. * * *."

Undoubtedly this Court can, and will, consider the ability of States affected by its decision, to endeavor to conform to the doctrine of only one system (without distinction as to color) in public education; and it is respectfully submitted that this Court should consider the financial problems of a State—such as ours—in determining *when and how* there shall be an affirmance from this Court respecting the time for the ultimate cessation of segregation.

The problem of the State of Oklahoma in adjusting or changing the financial structure for maintaining public schools is a serious one, grounded in constitutional

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and statutory provisions of long standing—the uprooting of which, in an effort to conform, will take time to solve. Therefore, it is respectfully suggested that this individual problem of the State of Oklahoma be considered by this Court in making a fully equitable and final disposition of these cases, and the principles therein laid down.

MAC Q. WILLIAMSON,
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NOVEMBER, 1954.

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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 1 etc.

OLIVER BROWN, ET AL.,
Appellants,
v.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL.,
Appellants,
v.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
Appellants,
v.
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,
v.
ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF ARKANSAS

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PRELIMINARY STATEMENT

This brief is filed by the Attorney General of the State of Arkansas as *amicus curiae* at the invitation of this Court in the four cases shown in the caption. For brevity and convenience, the four cases are referred to collectively as "the *Brown Case*". *Brown* v. *Board of Education of Topeka, Shawnee County, Kansas*, 347 U. S. 483.

In the *Brown Case*, the Chief Justice, speaking for the unanimous Court, stated the issue presented to the Court in the four cases as follows, 347 U. S. at 493:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"

The Court decided that issue in the following language, 347 U. S. at 495:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Let it be said at the outset that nothing contained in this brief is intended to bring into question the correctness of the ruling of this Court or its reasons for reaching that conclusion.

The full force and effect of the decision in the Brown Case was recognized by a "policy statement" issued by the State Board of Education of Arkansas following a meeting of the Board on June 14, 1954. The policy statement of the Board is as follows:

> "Under our present law the State Board of Education acts only in an advisory capacity to local school boards. The local board itself is the governing body of the school district and its decisions are final. Therefore, decisions must be made by the local school board, but within the limitations and restrictions provided by law. Our present state law provides for segregation in the public schools and any decision by a local board providing for integration of the races is premature, as the Supreme Court in its opinion stated that further arguments would be heard and a decree entered. We do not know when the decree will be entered or what it will provide. In the meantime, members of both races at the community level should continue as they have in the past in working cooperatively and effectively in a friendly effort to achieve better and substantially equal schools for all children, without regard to race.

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> "It is important to keep in mind that policy decisions are made by local school boards. The public school system in America calls for local control of schools and the state functions in the area of leadership only in such vital statewide matters as the one involving segregation of the races."

The General Assembly of Arkansas (the constitutional legislative branch of Arkansas' government) has not been in session since March of 1953 and will not convene in regular session until January of 1955. Without anticipating what action, if any, the General Assembly of Arkansas will take in its 1955 session, it is probably safe to say at this time that some further words of advice and direction from this Court will go a long way toward charting the course of future action or inaction by the Arkansas General Assembly. One of the purposes of this brief is to solicit most earnestly from this Court such words of clarification and advice as to the course to be pursued by the people of Arkansas in carrying out the final mandate of the Court as may be proper.

PERTINENT ARKANSAS CONSTITUTIONAL AND STATUTORY PROVISIONS

Ark. Const. (1874) Art. 14, §1, provides:

> "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

Ark. Const. (1874) Art. 14, §4, provides:

> "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly."

The first general law providing for the separation of white and negro children in the public schools of Arkansas was enacted on July 23, 1868 — the year of adoption of the Fourteenth Amendment to the United States Constitution. The act provided that school boards in Arkansas shall "make the necessary provisions for establishing separate schools for white and colored children and youths . . . ." Act 52, Ark. Acts of 1868.

In 1873 the Arkansas school law of 1868 was re-enacted and Act 130, Ark. Acts of 1873, §108, provided for "establishing separate schools for white and colored children and youths." According to a contemporary newspaper, there were twenty negro members in the 1873 session of the Legislature and it was reported that "that one-fifth part is a complete master of the two houses, as if the number that composed the group were three times as great." Editorial, "The Colored Legislators," Arkansas Gazette, February 1, 1873, p. 2.

It is also interesting to note that on January 6, 1873 (the year during which the Arkansas school laws were being formulated), J. C. Corbin became State Superintendent of Public Instruction for Arkansas. He was a negro educator who came to Arkansas during the War between the States. See Weeks, "School History of Arkansas." (U. S. Bureau of Education Bul. No. 27, 1912) pp. 59, 117.

The only statutory law in Arkansas today on the separation of white and negro children in the Arkansas public school system provides:

> "The board of school directors of each district in the State shall be charged with the following powers and perform the following duties . . . (c) Establish separate schools for white and colored persons." Ark. Stats. (1947) §80-509.

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The existing school segregation law in Arkansas, therefore, apparently had its origin at a time when the negroes in Arkansas greatly influenced, if not dominated, legislative action on the school question.

FACTUAL BACKGROUND

Attached hereto as Appendix "A" appears a tabulation which shows pertinent information as to the various school districts of Arkansas. The purpose of this tabulation is to demonstrate the proposition that the wide variety of circumstances which exist in the various counties of Arkansas requires a wide variety of remedies and plans in bringing about the ultimate result demanded by the decision of this Court, that is, the abolition of the dual school system in Arkansas.

There are 75 counties in Arkansas. The tabulation shows there are 422 separate school districts in the State or an average of about five separate districts for each county. Each school district has its separate board of directors which is the immediate governing authority of the district. The members of the board are elected by the qualified electors of the district and they are directly responsible to the people for their actions.

It is of interest to note that there are 14 counties out of the total 75 counties which had no negroes enrolled in the public schools of the county. Ten of the counties without negro population are located in the north and northwest (mountain) section of the State. Two of the non-negro counties (Polk and Scott) are in the southwestern section of the state. The remaining two non-negro counties (Clay and Greene) are contiguous to Mississippi County to the east which had a negro enrollment of 4,789 or about 20% of the total enrollment for Mississippi County.

By way of contrast, it will be seen from Appendix "A" that in six counties in Arkansas the negro enrollment exceeded the white enrollment. Five of these predominately negro counties (Lee, St. Francis, Crittenden, Chicot and Phillips) are in the eastern section of the State and border the Mississippi River. The other predominately negro county (Lincoln) is in South-central Arkansas.

The tabulation shows that the negro enrollment for the State was about 23% of the total enrollment of the State.

As further evidence of the variety of conditions and circumstances in Arkansas, it should be noted that two districts in Arkansas have already integrated the white and negro children in the schools.

The Charleston School District in Western Arkansas (Franklin County) has integrated pupils during the 1954-1955 session from the first grade through the twelfth grade. The Fayetteville School District in Northwest Arkansas (Washington County) has an enrollment of 3,096 white pupils and 64 negro pupils. This district has integrated the negro and white pupils at the high school level. Negro children in the Fayetteville School District attend a segregated school from the first grade through the ninth grade. For the 1954-1955 session, 11 negro high school pupils are attending the same high school with approximately 500 white children.

It is a matter of general information that integration has been accomplished so far in the Charleston and Fayetteville School Districts without any unusual incidents. However, from a comparison of the factual situations of the Charleston and Fayetteville School Districts with, for example, districts in St. Francis and Phillips Counties, it would certainly seem to follow as a matter of necessity that the process of integration must be applied as the circumstances in each district may require.

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ARGUMENT

1. This Court should not order "forthwith integration" in the public schools.

2. This Court should enter a decree in the pending cases which will permit gradual adjustments.

3. The Court should leave the problem of integration of the races in public schools to Congress for appropriate legislation.

Point 1

This Court Should Not Order Immediate Integration

This Court in its opinion in the *Brown Case* clearly recognized that the procedure for integration of the races in the public schools "presents probllems of considerable complexity." Thus the Court has indicated that it is not unmindful of the possibility of widespread hostility in at least some school districts if immediate integration of the races in the public schools is required by this Court. This hostility is commonly known to exist in varying degrees in a majority of the school districts of Arkansas although there have been, so far as is known, no overt acts by any particular group or groups indicating open defiance of the law as declared by this Court.

But even unwilling or hostile compliance can, and probably would, have a most undesirable effect upon the whole system of public education in Arkansas. It will be conceded, presumably, that the bulk of the financial support for the public schoo' system of Arkansas flows from the white population. This fact will continue to be true for many years to come unless a large portion of those persons who now pay taxes in support of public schools manage, by some means not now forseeable, to withdraw their

support as a result of legislative enactments of some kind or other.

Without the leadership of those who carry the large portion of the burden of supporting the school system, the system as a whole is bound to pass through a period of deterioration which might last for many, many years. If the public school system is permitted to deteriorate, it necessarily follows that both the negro children and the white children will be the unfortunate victims. The negro children in all probability will suffer to a greater degree than the white children in such circumstances.

The Arkansas public school system today ranks far down the list in many respects in comparison with the systems of other states. There is a long way to go before Arkansans can point with pride to their school system as a whole. But no well-informed person will seriously contend that Arkansas has not made measurable progress during the past few years. Every well-informed person in Arkansas agrees with this Court when it said that "today, education is perhaps the most important function of state and local governments" and education "is the very foundation of good citizenship." *Brown Case, supra.*

The executive, legislative and judicial branches of the State government have for years pointed up the school problem as the most important problem confronting the people of this State. It is well within the realm of possibility that any decree of this Court at this time which would have the legal effect of ordering immediate integration of the races in all the school districts of Arkansas would disrupt the financing, management and control of the school system for many years.

A recognized authority on the sociological aspects of school segregation has said:

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> "Finally, there is the hard fact that integration in a meaningful sense cannot be achieved by the mere physical presence of children of two races in a single classroom. No public school is isolated from the community that supports it, and if the very composition of its classes is subject to deep-seated and sustained public disapproval it is hardly likely to foster the spirit of united effort essential to learning. Even those who are dedicated to the proposition that the common good demands the end of segregation in education cannot be unaware that if the transition produces martyrs they will be the young children who must bear the brunt of spiritual conflict." Ashmore, "The Negro and the Public Schools," (Chapel Hill 1954) p. 135.

It would unduly extend this discussion to take up the problems of grade requirements, transportation problems, revision of school area distribution and the many other complex management problems which will ultimately have to be solved in bringing about complete integration in Arkansas. This Court has already indicated by the opinion in the *Brown Case* and by the study which the Court has obviously given to these cases that it is fully aware of the complexity of the problem. This Court has not asked for a statement of the problem, but rather for a solution.

What has been said is, of course, addressed to the discretion of this Court in the exercise of its equity powers in the four cases now pending before it. It is believed that this complex problem can be solved most effectively and most satisfactorily in the interest of both the negro children and the white children by a gradual, rather than an immediate, adjustment or transition from segregation to integration of the races in the public schools.

There are, of course, many decisions of this Court pointing out the peculiar nature of equity practice. In the interest of brevity, it is appropriate to point to the

opinion of Mr. Justice Douglas in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329, where the Court said:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity', *Meredith* v. *Winter Haven*, 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree of the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs as well as between competing private claims."

This Court also held in *International Salt Co.* v. *United States*, 332 U. S. 392, that district courts are invested with large discretion in modeling their judgments to fit the exigencies of the particular case, and the framing of decrees should take place in the district rather than appellate courts.

Point 2

The Court Should Enter a Decree in the Pending Cases Which Will Permit Gradual Adjustments

The pending cases have been designated as class actions by the Court. The principal matter about which the people of Arkansas are concerned is the binding effect of the impending decrees on prospective or pending litigation of similar nature in the federal courts of Arkansas.

It is believed that the decree of this Court in the *Briggs Case*, for example, would not have the effect of an adjudi-

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cation of pending or prospective similar actions in the federal courts of Arkansas. That decree would be a precedent to be followed by the federal courts in Arkansas only to the extent that the *Briggs* decree would permit the federal court in Arkansas in equity to follow the procedural scheme provided for in the *Briggs* decree.

The ultimate solution of the complex problem of transition is undoubtedly one which calls for "flexibility rather than rigidity." *Hecht Co.* v. *Bowles, supra.*

In framing its decrees in the pending cases, it is deemed proper for this Court to consider the opinion of Judge Harry J. Lemley in *Pitts* v. *Board of Trustees of DeWitt Special School District No. 1,* 84 F. Supp. 975 (E. D. Ark.). That case asserted the rights of negro plaintiffs to equal public school facilities under the Fourteenth Amendment to the United States Constitution. The Court followed the "separate but equal doctrine" of *Plessy* v. *Ferguson,* 163 U. S. 537, and held that the negro children were entitled under the Amendment to school facilities substantially equal to the school facilities afforded white children. Judge Lemley was there confronted, as the Court is here, with the terms and the scope of the decree to be entered under his findings of fact and conclusions of law. In solving this perplexing problem, Judge Lemley said, 84 F. Supp. at 983:

> "The instant suit is one in equity, and the bill is addressed to the court sitting as a court of equity. Hence the court has a wide discretion in determining what relief is proper and prescribing the time within which such relief must become effective. The case at bar is not the only one of this nature upon the court's docket and, in connection with our discussions and holdings herein, it should be borne in mind that each of these cases stands on its own peculiar facts; relief which might be proper in one

> case might not be sufficient in another, and the length of time allowed to a district within which to bring about an equalization of educational facilities which might be reasonable in one case could be unreasonable in another."

In the same opinion, Judge Lemley further said, 84 F. Supp. at 988:

> "We are not going to attempt to say what a 'reasonable time' in this case will be; that is a matter properly left, for the time being, to the good faith and discretion of the Board. If the Board is dilatory, the plaintiffs are not without their remedy in the Courts."

The problem before Judge Lemley was, in effect, the same as now confronts this Court in the framing of its decrees. Judge Lemley decided that the negro children were entitled to separate but equal facilities. This Court has decided that the negro children in the instant cases are entitled to identical facilities, subject only to classification not based on race. Judge Lemley was confronted with a transition from unequal to equal facilities. This Court is confronted with a transition from separate to identical facilities.

It seems obvious that Judge Lemley adopted the logical and equitable solution of the problem before him. It appears also that this Court could find no better solution of its problem in the instant cases than remanding the four cases to the courts of first instance for adoption, in substance, of the language of Judge Lemley in the *Pitts Case, supra.*

It is contended, therefore, that the Court should enter a decree in each of the pending cases which will read substantially as follows:

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"The case is remanded to the court of first instance with directions to enter such orders and decrees as are necessary and proper and not inconsistent with the opinion of this Court in this case. In exercising its jurisdiction upon remand, the court of first instance is left free to hold hearings, through a Special Master of the court if deemed necessary or appropriate, to consider and determine what provisions are essential, proper and appropriate to afford appellants and those similarly situated full protection against segregation of negro children in the public schools solely on the basis of race in violation of their rights under the Fourteenth Amendment to the United States Constitution." *Terry* v. *Adams*, 345 U.S. 461, 470.

POINT 3

The Court Should Leave the Problem of Integration of the Races in Public Schools to Congress for Appropriate Legislation

Even if the Court remands the pending cases with directions as suggested, there still remains the uncertainty of the immediate effect which those decrees may have on prospective cases in the federal courts in Arkansas. The Court must of necessity make some disposition of the pending cases by way of appropriate decrees. In this connection it is most respectfully urged that the Court take some action by way of a supplemental opinion, in addition to the specific decrees, which will have the effect of precluding what might well turn out to be a flood of cases in the federal courts of Arkansas and other so-called "segregated states."

The point here is that this Court can and should deal with the problem by way of supplemental opinion in such a way that the whole problem of solving the method of integration should fall squarely where the Fourteenth

Amendment says it should fall; that is, on Congress for appropriate enactment.

In its opinion of May 17, this Court has definitely and finally decided that the separation of the races in public schools pursuant to state laws on a basis of race violates the Equal Protection Clause of the Fourteenth Amendment. The law having thus been interpreted and declared by this Court for the first time, it now becomes the function and the constitutional duty of Congress to exercise the power granted by Section 5 of the Fourteenth Amendment.

Section 5 of the Fourteenth Amendment is as follows:

> "The congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It might be well to mention at the outset that it is fully recognized that "it is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body," *Collins* v. *Hardyman*, 341 U. S. 651, 663, and that "the judiciary may not, with safety to our institutions, enter the domain of legislative discretion and dictate the means which Congress shall employ in the exercise of its granted power. That would be sheer usurpation of the functions of a coordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government." Mr. Justice Harlan dissenting in *The Civil Rights Cases*, 109 U. S. 3, 51.

Nevertheless, it would certainly not be entirely without precedent for this Court to point out to Congress, as urged here, the necessity for "appropriate legislation"; especially in view of the known fact that the prolonged inaction by Congress has now resulted in a condition which has some aspects at least of a national emergency.

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As a matter of pertinent history, it is very significant that the legislative records of Congress in promulgating the Fourteenth Amendment and of state legislatures in ratifying it have very little to say about racial segregation in public schools. It is, however, a matter of record that Senator Charles Sumner of Massachusetts appears to have strenuously but unsuccessfully advocated implementing legislation under Section 5 of the Fourteenth Amendment which would have been a specific and far-reaching proscription of racial segregation in the public schools. *Cong. Globe*, 42 Cong., 2d Sess. 383-84 (1872).

By way of contrast, it is quite obvious from a reading of the Court's opinion in the *Brown Case* that, in arriving at its decision, the Court took full cognizance of contemporary conditions in the field of public education as compared with conditions existing at the time of and for many years subsequent to 1868. This Court said, 347 U. S. 492:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . .
>
> "Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education."

The Court having pointed out so forcibly the evolving concept of the Fourteenth Amendment, it would seem to follow as a necessary conclusion that the Court should now (by way of an additional opinion) not only nudge but even exhort Congress to enact appropriate legislation under the power of Section 5 of the Amendment.

This Court could with complete propriety point out to Congress that legislative action is a necessity and that such necessity is a result of extending inaction by Congress. If Congress responds to the urgent invitation of the Court (and there are many reasons for believing that it will), then it will be performing the mandate of the people which is incorporated in Section 5 of the Amendment.

This Court in *The Civil Rights Cases,* 109 U. S. 3, 11, said that, under Section 5 of the Amendment, Congress is empowered

> "To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous."

And in the same cases this Court said, 109 U. S. 14:

> "It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character."

In his very forceful dissenting opinion in *The Civil Rights Cases,* Mr. Justice Harlan said,

> "The legislation which Congress may enact, in execution of its power to enforce the provision of the amendment, is such as may be appropriate to protect the right granted. The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of this court. Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances, primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained."

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The conclusion to be drawn from the decision in *The Civil Rights Cases* is that the "appropriate legislation" contemplated by Section 5 is co-extensive with and just as important a part of the Fourteenth Amendment as is Section 1 which declares the rights of all persons to equal protection under the laws. Therefore, whatever action Congress sees fit to take in the light of this Court's decision would rest upon the judgment of Congress; provided, of course, that such legislation is directed against state action. As Mr. Chief Justice Marshall said in *United States* v. *Fisher*, 6 U.S. 358:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Mr. Justice Frankfurter, concurring in *McCollum* v. *Board of Education*, 333 U. S. 203, 212, said that the case

> ". . . demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." And in the same case, Mr. Justice Jackson, concurring, said, 33 U.S. at 237: 'It is idle to pretend that said, 333 U. S. at 237: 'It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely . . . to make the legal "wall of separation between church and state" as winding as the

> famous serpentine wall designed by Mr. Jefferson for the University he founded.' "

This Court in the *Brown Case* arrived merely at the "formulation of a relevant Constitutional principle." This Court should invoke immediate action by Congress to declare and solve the variations of the controversy which are prevalent in the so-called "segregated states" — particularly in Arkansas.

Again it is appropriate to refer to the opinion of Judge Lemley in his "separate but equal" decision, *Pitts* v. *Board of Trustees*, where he said, 84 F. Supp. at 988:

> "In the last analysis, this case and others like it present problems which are *more than judicial* and which involve elements of public finance, school administration, politics and sociology . . . . The federal courts are not school boards; they are not prepared to take over the administration of the public schools of the several states; nor can they place themselves in the position of censors over the administration of the schools by the duly appointed and qualified officials thereof, to whose judgment and good faith much must be left." See also *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586.

In the Pitts Case and other "*equal facilities*" cases like it, the Court had before it, insofar as enforcement is concerned, a much less complicated problem than the present problem of integration of races. The magnitude and complexity of the integration problem dictates a legislative solution.

In the enactment of appropriate legislation under Section 5 of the Amendment, Congress could, and probably would, recognize the necessity of allowing school officials wide latitude of administrative discretion under the supervision of a federal agency which would guarantee ultimate integration. Congress could make adequate provi-

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sions for variations in such matters as geographical peculiarities, increasing or decreasing enrollment in particular districts, ratios of enrollment as between white and negro children, population shifts and any other factors which Congress might consider to be relevant.

Under Section 5, Congress would undoubtedly have power to fix a definite future date for complete integration in the several districts which have heretofore operated under the segregated system; or Congress might provide that integration must be completed in all districts within a reasonable time — such reasonable time to be determined in the manner prescribed by Congress.

As said by Mr. Chief Justice Stone in *Coleman* v. *Miller*, 307 U. S. 433, 453,

> "The question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

It is submitted that so long as Congress confines its "corrective" legislation to state action which infringes the Equal Protection and Due Process Clauses of the

Fourteenth Amendment, Congress would be the "guardian of its own conscience" as to what legislation on the school integration subject is more or less "appropriate." In fact, it has been noted that in other fields it has not been uncommon for Congress to leave detailed administration to state control and discretion so long as such control and discretion are kept within the framework dictated by federal law. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, and *Parker* v. *Brown,* 317 U. S. 341.

The Constitution has conferred upon Congress the power to secure equal educational opportunities in the public schools for all children regardless of race. If Congress has failed and should continue to fail in exercising its powers whereby equal educational opportunity is denied by reason of state laws "the remedy will ultimately be with the people." "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Colegrove* v. *Green,* 328 U. S. 549, 556.

It is a matter of particular interest here that on the very same day this Court decided the school segregation cases (May 17, 1954) the Court also decided a very important case arising under the Federal Tort Claims Act, 60 Stat. 842. The case was *United States* v. *Gilman,* 347 U. S. 507. In construing the act, the unanimous Court, through Mr. Justice Douglas said, 347 U. S. at 511.

> "Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy, which is most advantageous to the whole, involves a host of considerations that must

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be weighed and appraised. That function is more appropriately for those who write the laws, rather than those who interpret them."

In the instant cases the Court is most certainly dealing with "a complex of relations" between the federal government on the one hand and the state governments on the other. The specific problem of implementing Section 1 of the Fourteenth Amendment as interpreted by this Court is a matter on which Congress has not taken a position over a period of eighty-six years and presents serious "questions of policy." The selection of policy relating to the integration of the races in public schools "involves a host of considerations that must be weighed and appraised." This Court should, in some appropriate manner, leave the details of the solution of the problem "to those who write the laws."

CONCLUSION

The point which is urged here with most emphasis is that a decree of this Court ordering *immediate* integration of the white and negro children would have a most disastrous effect upon the public school system of Arkansas. Likewise, it would most seriously disrupt the efforts of the leaders of both races in solving the racial problem in Arkansas in all its various aspects. No person or court can predict at this time what the consequences would ultimately be. There is no need for immediate integration in the public schools. It is not required by the Constitution.

The problem of integration of races in the public schools is of such magnitude that it can be solved effectively only by a *gradual* process which would vary from locality to locality. It is probably safe to assert at this time that no person or group of persons — not even any court — has formulated any definite plan of integration

which would operate successfully in the school districts of Arkansas. As to the four cases now before the Court, the plan for integration in the districts which would be directly affected by those cases must, for the time being at least, be formulated, developed and finally concluded under the supervision and control of the courts of first instance. The decrees of this Court should accord to the lower courts the very widest range of discretion in bringing about integration in a manner which will promote, rather than retard the ultimate solution of the whole problem.

Finally and most earnestly, it is urged that this Court, by a supplemental opinion, point out in no uncertain terms that the integration problem is one which should be solved by Congress under Section 5 of the Fourteenth Amendment. The American system of government being what it is, this Court cannot compel Congress to act. But certainly this Court can, by some appropriate suggestion, bring about prompt and appropriate action by that branch of the government in which the people themselves, by adoption of the Fourteenth Amendment, lodged the power to adopt the appropriate plan to correct the conditions which, so this Court has said, the states have brought about in violation of the Amendment.

If the powers of this Court were not limited by the Constitution, the proper decrees of this Court in the pending cases would be to "remand the cases" *to Congress* with directions to take appropriate action. Lacking the power to *command* Congress, the next best thing would be a most urgent *invitation* to Congress from this Court. It is such a course which this Court is asked to adopt to the very limit of its power. If the Court complies with this request, then the solution of the problem will rest where it

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was intended by the Constitution that it should rest—with the Congress.

November 15, 1954.

Respectfully submitted,

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APPENDIX

ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Arkansas . . .	3,630	1,360	4,990	$ 891,277	$ 732,917
Ashley	3,963	2,367	6,330	1,018,902	895,782
Baxter	2,148	xxx	2,148	326,545	286,029
Benton	7,443	1	7,444	1,199,694	1,046,447
Boone	3,516	xxx	3,516	488,271	483.435
Bradley	2,064	932	2,996	479,622	454,240
Calhoun	1,056	592	1,648	286,115	263,004
Carroll	2,240	xxx	2,240	330,165	315,957
Chicot	2,461	3,053	5,514	837,044	666,743
Clark	3,430	1,569	4,999	719,768	644,724
Clay	5,899	xxx	5,899	712,092	695,944
Cleburne . . .	2,466	xxx	2,466	273,697	257,370
Cleveland . . .	1,546	526	2,072	353,646	333,275
Columbia . . .	3,679	2,807	6,486	1,010,188	927,011
Conway	2,721	1,211	3,932	535,174	489,141
Craighead . . .	11,264	295	11,559	1,502,603	1,389,577
Crawford . . .	5,147	87	5,234	647,874	635,714
Crittenden . .	4,012	6,909	10,921	1,254,324	1,052,578
Cross	4,106	1,985	6,091	797,101	731,553
Dallas	1,659	1,221	2,880	467,792	430,774
Desha	3,426	3,078	6,504	824,451	730,117
Drew	2,237	1,366	3,603	544,724	463.941
Faulkner . . .	3,981	612	4,593	633,314	620,258
Franklin . . .	3,033	38	3,071	408,118	376,237
Fulton	1,728	xxx	1,728	243,406	232,057
Garland	8,045	910	8,955	1,449,747	1,392,016
Grant	2,121	203	2,324	381,496	364,546
Greene	6,608	xxx	6,608	856,064	781,482

ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Hempstead . .	2,965	2,355	5,320	783,593	707,316
Hot Spring . .	4,860	744	5,604	1,020,340	877,411
Howard	2,333	809	3,142	511,605	449,967
Ind'p'nd'nce .	4,723	77	4,800	637,999	593,318
Izard	2,093	14	2,107	240,407	224,549
Jackson	5,005	904	5,909	824,448	766,556
Jefferson . . .	8,869	8,025	16,894	2,353,543	2,038,288
Johnson	3,159	41	3,200	450,995	434,097
Lafayette . . .	1,629	1,614	3,243	560,538	480,749
Lawrence . . .	4,857	55	4,912	732,762	670,184
Lee	2,316	3,552	5,868	626,368	537,960
Lincoln	1,744	1,887	3,631	544,104	470,376
Little River .	1,799	964	2,763	438,760	393,134
Logan	3,230	169	3,399	558,614	482,709
Lonoke	4,518	1,428	5,946	829,476	723,716
Madison	2,640	xxx	2,640	277,237	266,346
Marion	1,516	xxx	1,516	254,566	232,608
Miller	5,927	2,106	8,033	1,143,452	1,027,337
Mississippi . .	13,218	4,789	18,007	2,366,353	2,302,446
Monroe	2,394	2,176	4,570	526,483	483,524
Montgomery	1,416	3	1,419	284,030	232,634
Nevada	1,893	1,498	3,391	588,702	494,588
Newton	1,946	xxx	1,946	220,148	212,226
Ouachita . . .	4,781	3,637	8,418	1,336,720	1,095,448
Perry	1,297	48	1,345	221,272	190,383
Phillips	4,294	6,409	10,703	1,132,056	1,036,507
Pike	2,003	74	2,077	348,979	304,222
Poinsett	8,022	694	8,716	1,035,175	972,903
Polk	2,931	xxx	2,931	534,865	439,619
Pope	4,270	123	4,393	608,356	589,653

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ARKANSAS SCHOOL ENROLLMENT

1953-54 SESSION

COUNTY	Enrollment White	Negro	Total	Annual Receipts	Annual Disb'mts
Prairie	2,296	575	2,871	433,500	413,484
Pulaski	27,695	9,088	36,783	6,413,057	5,871,522
Randolph . . .	2,808	31	2,839	374,322	337,164
Saline	4,800	88	4,888	791,254	729,381
Scott	1,564	xxx	1,564	295,193	254,689
Searcy	2,200	xxx	2,200	278,123	266,129
Sebastian . . .	12,400	903	13,303	2,138,442	2,023,826
Sevier	2,264	264	2,528	479,528	376,536
Sharp	2,345	xxx	2,345	328,387	308,232
St. Francis . .	3,740	5,300	9,040	948,998	886,075
Stone	1,590	xxx	1,590	194,428	182,477
Union	7,524	4,325	11,849	2,264,543	1,892,648
Van Buren . .	1,960	17	1,977	268,505	256,415
Washington .	9,299	64	9,363	1,262,843	1,213,977
White	7,817	302	8,119	1,230,306	1,160,193
Woodruff . . .	2,552	1,946	4,498	553,958	544,544
Yell	2,910	90	3,000	539,774	477,755
TOTAL	314,041	98,310	412,351	$60,261,321	$54,618,690

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 1, 2, 4 and 10 5

OLIVER BROWN, ET AL.,
Appellants,
vs.
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,

HARRY BRIGGS, JR., ET AL.,
Appellants,
vs.
R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL.,
Appellants,
vs.
COUNTY BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,
vs.
ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF MARYLAND

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The Daily Record Co., Baltimore 3, Md.

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BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

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COUNTY BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL.,
Petitioners,

VS.

ETHEL LOUISE BELTON, ET AL.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF MARYLAND

I. PRELIMINARY STATEMENT

This amicus curiae brief filed by the Attorney General of Maryland, pursuant to permission granted by this Honor-

able Court, is intended to be exactly what its name imparts, i.e., we shall endeavor, as a friend of the court to assist in the resolution of the questions propounded. The Attorney General is, of course, not intervening in the cause, nor is he authorized to submit the State of Maryland as a party to the instant case. The opinions expressed herein are those of the Attorney General and, of course, do not preclude the Legislature of the State of Maryland, nor the people thereof from taking any action dealing with the segregation problem which may in the future seem desirable to those bodies.

A thorough study has been made for the assistance of the Attorney General by the educational authorities of the State, and our argument must necessarily, to a great degree, be based upon the facts as they exist in the State of Maryland, which a cursory study indicates are not greatly different from those in most of the other States involved, i.e. those States either requiring or permitting segregation, because of color, in public education. The general feeling of the people of Maryland on the subject is substantially similar, although perhaps not as intense as that of the people of the States further South, and the laws of Maryland requiring segregation in education (App. 72, 73) are substantially similar to those of the States from which the cases before the Court have arisen. A more detailed review of the factual situation in our State will be made during the course of argument herein, and, at this point, the Court may be assured that no attempt has been made herein to circumvent or contest the broad principles of law as stated by this Court in its previous opinion in these cases, and the Attorney General, speaking for himself and the State Department of Education at least, assures the Court of the good faith of the State of Maryland in its endeavor to implement this Court's decision.

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II. QUESTIONS PRESENTED

Strictly speaking, an amicus curiae should address himself exclusively to the Court's decision in the particular cases at the bar. However, in view of the language of the opinion previously given which, in effect, considers these cases as though they were in form as well as in substance, class actions, this amicus curiae will endeavor to assist the Court in a broader manner than would normally be indicated. The Court has presented for argument questions 4 and 5, previously considered, namely:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> "5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
>
> "(a) should this Court formulate decrees in these cases;
>
> "(b) if so, what specific issues should the decrees reach;
>
> "(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
>
> "(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions

should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

We believe that these questions should be resolved in favor of an affirmative answer to Question 4(b), and a further affirmative answer to Question 5(d), with certain reservations and qualifications, which will be suggested in the course of argument.

III. ARGUMENT

1.

This Court May and Should, in the Exercise of its Equity Powers, so Frame its Decree as to Effect an Effective, Gradual Adjustment to be Brought About From Existing Segregated Systems of Public Education to Systems Not Based on Color Distinctions.

There is a plenitude of authority to support the conclusion that this Court (and, for that matter, the court of first instance) has the power to decree an effective, gradual adjustment of the problems involved in the matter of racial segregation in public education.

Undoubtedly, the violation of a legal right, and specifically the violation of the right to equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, is a proper subject for an equitable decree or injunction to enforce the maintenance of that right in the cases before the Court. However, the questions which have arisen are not confined to the rights of the parties to the cases themselves alone, but involve a deep and lasting effect upon a large portion of our nation. For all practical purposes, a new right has been created for the possible benefit of approximately two million children and

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their parents, and, as always, with the creation of legal rights, one of the effects is bound to be a limitation of rights or privileges, real or fancied, theretofore enjoyed by others.

The Congress has empowered this Court to grant any remedy which it may find consonant with the public interest, and that of the parties involved. 28 U. S. C. A., 2106 states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, c. 646, 62 Stat. 963.)"

This Honorable Court has shown by its decisions on many occasions the broad and flexible character of its powers in adopting remedies to the circumstances of the case. In *Virginian R. Co. v. System Federation* R. E. D., 300 U. S. 515, at 552, this Court said:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Language particularly applicable to the present situation was used by this Court in *Addison v. Holly Hill Co.*, 322 U. S. 607 at 619, wherein it was said that:

> "Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken."

It has appeared from the Court's previous opinion in these cases that most of the nation has been operating under the erroneous supposition that segregation in public edu-

cation was not a violation of the prohibitions of the 14th Amendment as long as facilities provided for the races were substantially equal, and this Court should make a disposition of the cases consonant with justice to all interests involved in retracing the erroneous course that has been taken. It must be recognized that dangerous consequences could very well follow any other course in this Honorable Court's final decree.

In the case of *Yakus v. United States*, 321 U. S. 414 at 441, 88 L. Ed. 834 at 857, this Court said:

> "But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. Virginian R. Co. v. United States, 272 U. S. 658, 672, 673, 71 L. ed. 463, 471, 47 S. Ct. 222; Petroleum Exploration v. Public Serv. Commission, 304 U. S. 209, 222, 223, 82 L. ed. 1294, 1303, 1304, 58 S. Ct. 834; Dryfoos v. Edwards (D. C.) 284 F. 596, 603, affirmed in 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; see Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 91, 92, 75 L. ed. 221, 233, 51 S. Ct. 1. Compare Wisconsin v. Illinois, 278 U S. 367, 418-421, 73 L. ed. 426, 434-436, 49 S. Ct. 163. This is but another application of the principle, declared in Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 552, 81 L. ed. 789, 802, 57 S. Ct. 592, that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' "

The abolition of segregation in public education is beyond question a problem of great public interest and undoubtedly a court of equity may grant or withhold its

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aid and the manner of moulding its remedies should be influenced by the public interest involved. This is nothing new to courts of equity in the State of Maryland. For example, in the case of *Caretti v. Broring Building Co.*, 150 Md. 198, 132 A. 619, the Court of Appeals of Maryland determined in a case brought to enjoin a nuisance (namely the emptying of sewage into a stream of water flowing through Caretti's land) that since the sudden closing of the system, which admittedly was creating an enjoinable nuisance, might create a serious situation affecting others than the plaintiff and defendant, that the case should be remanded to the lower court with instructions to issue an injunction, *unless within a reasonable time* the Company changed its system in such a way as to avoid injury to Caretti. See also *Baltimore v. Brack*, 175 Md. 615, 3 A. 2d 471. In the case of *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, a suit in equity to enjoin the Tennessee Copper Company from emitting noxious gas over an area in the State of Georgia, this Court held that there is no alternative to the issuance of an injunction *after allowing a reasonable time* to the defendants to complete efforts that they were at that time making to remedy the situation.

Apparently an important factor in all of the cases is the good faith of the defendant in his effort to alleviate the condition complained of by the plaintiff, and the courts under such circumstances have been loathe to use drastic remedies to enforce even obvious rights where such enforcement might cause inconvenience or damage to third parties, or even to the defendant himself.

With reference to the State of Maryland, the Department of Education and the State Law Department, as represented by the Attorney General, have accepted the decision of the Supreme Court and are currently engaged in planning to

take such action as has been indicated is required by law by this Court's previous opinion, and as may be further indicated by the final decree in these cases. See the Report to the State Board of Education and the Attorney General of Maryland by the School Superintendent's Committee (App. 1). See also the Statement of the State Board of Education, May 26, 1954 (App. 17). We will consider below at greater length the current factual situation with respect to public education administration and public opinion in the State of Maryland, but suffice it to say at this time that the good faith of the State cannot be questioned in the premises, and it is respectfully urged, for the above reasons, that the answer to Question 4 should be an affirmative one with respect to 4(b), i.e. that this Court should exercise its existing equity powers to permit an effective, gradual adjustment to be brought about as the most equitable solution of the problem created by the impact of this Court's decision upon established practices and mores. In the words of the Solicitor General of the United States, in an address before the Judicial Conference of the Fourth Circuit, on June 29, 1954:

> "* * * In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might. For example, for several years before taking the School Segregation Cases the Court repeatedly turned away opportunities to decide questions in that area, *perhaps* because they deemed them premature. Lately it declined to review a ruling on segregation in public housing, *perhaps* because the Court thought it best, after deciding the School Cases, not to say more on other aspects of segregation at this time. Or the Court may think the

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record in the case at hand not adequate or otherwise unsuitable to raise and decide the point. We can only speculate. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance."

2.

These Cases Should be Remanded to the Courts of First Instance to Frame Decrees in Accordance With the General Principles of Law as Stated by This Court in its Opinion, and Without Specific Directions as to Methods or Time of Compliance, Which Questions Should be Determined by the Courts of First Instance in the Light of Local Conditions as They May be Found to Exist.

It is the contention of this amicus curiae that the cases before the Court should be remanded to the courts of first instance for the framing of decrees in accordance with the general principles of law as stated in the Court's opinion of May 17, 1954, with specific instructions only to frame such decrees so as to permit an effective, gradual adjustment to be brought about. The courts of first instance, in our opinion, should frame their decrees so as to carry out the processes of desegregation as soon as reasonably possible under the conditions which those courts may find to exist in the areas of their jurisdiction.

It is difficult, if not impossible, for us to argue on the facts that exist in the current cases before the Court, and we are only fully acquainted with the facts as they exist in the State of Maryland, which, however, we feel are so analogous to those existing in the States involved in the instant cases that an argument based on the situation as it exists in the State of Maryland would be a valid and compelling one, if otherwise sound. Maryland is a State with a long tradition of the operation of its public schools on a basis of

segregation by race. The State Constitution has provided for the education of both the white and colored races since 1867, and the Maryland statutes, under which the school system operates upon this basis, will be found in the Appendix at pages 72, 73. Maryland has made considerable progress in the education of the Negro, and it is completely true that in Maryland today educational facilities are equal although separate — equal in physical fact and not by law alone or in theory only. As a matter of fact, in some respects, the State of Maryland has shown less discrimination against its Negro students and educators than certain other States in which segregation has been illegal for many years. This shows up particularly with respect to teaching personnel. Maryland, with a population of 2,350,000 has over 2,900 colored school teachers for a non-white population of 388,000; whereas, New Jersey, for example, with a population of 4,835,000, has only 645 colored teachers for a non-white population of 324,000 and Connecticut with a population of over two million has, we are informed, fewer than 100 colored school teachers. Other indications of this situation may be found as referred to in the so-called Ashmore Report, "The Negro and the Schools", The University of North Carolina Press, 1954; which is undoubtedly well known to every member of this Court.

The University of Maryland has been operating on a non-segregated basis in its graduate schools for a number of years, and has recently begun to admit Negroes to its undergraduate courses. The State of Maryland has been spending in excess of $200,000 annually for scholarships for Negroes to out-of-State institutions offering courses which were not available to them at the University of Maryland until this year, and one effect of the Supreme Court's opinion followed by the desegregation of the University has been to

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eliminate the granting of any further scholarships of this nature (Statement of Trustee Committee on State Scholarships, July 7, 1954, App. 70). The State further operates Morgan State College, which was designed primarily as an institution of higher learning for Negroes, but which has of recent years admitted white students also who care to attend that institution. So much for the situation with respect to higher education.

In the City of Baltimore, the public school system has begun the process of desegregation with the Fall Term of 1954, and the documents under which such program was instituted will be found in the Appendix at pp. 47 et seq., with, on the whole, a great deal of success, although some difficulties have been encountered.

In the Counties of Maryland outside of the City of Baltimore, the situation is extremely varied. Maryland has been called "America in Miniature", the aptness of which is certainly indicated by the figures on population and school attendance. The Court is respectfully referred to the population map at page 45 in the Appendix, from which, it may readily be seen that the percentage of Negro population varies from practically zero in Garrett County to almost fifty per cent in Calvert County, there being as much difference in this respect between these two Counties as there is between Maine and Mississippi. There are eight Counties with less than ten per cent Negro population; five with from ten to twenty per cent; six with from twenty to thirty per cent; and four with from forty to fifty per cent. Further, the existing public mores, ways of life and established patterns of thinking vary, probably, to a greater degree than the population statistics, although it must be reiterated, in every County substantially physically equal facilities have been provided for Negro students, and in most

of the Counties the facilities provided for the Negro students are superior physically, because newer, than those provided for white children. The tables in our Appendix indicate better than anything we can say the situation with respect to the various problems involved, namely, school population, teaching personnel, school buildings and bus transportation, all of which are factors which must be considered in any survey of the factual situation. It will be seen from a reading of the entire Report to the State Board of Education and the Attorney General of Maryland by the School Superintendent's Committee (App. 1) that the authorities in the field of public education in the State of Maryland are in favor of a peaceful implementation of the Court's decree, whatever form it may take, and they have made what we strongly urge the Court to accept as proper recommendations for the processes of change.

We believe that if left alone to devise in good faith a timetable for the desegregation of every school in Maryland, the local authorities will best be able to solve this problem with the fewest possible ill effects. Unfortunately, all Maryland thinking is not along these lines. Undoubtedly, at the next session of the Maryland Legislature, there will be a deluge of bills and proposals, petitions and propositions, urging everything from the abolition of the school system in its entirety to the election of school teachers by popular vote. The Attorney General of Maryland has received hundreds of letters of varying degrees of literacy upon this subject, all containing suggestions as to what ought to be done.

Two of the more serious attempts to circumvent or defeat this Court's decision are exemplified by two of the inclusions in our Appendix, namely, the so-called "West River Proclamation" (App. 62, 63), which was issued by an

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earnest and intelligent group of parents of school children in one of the Counties of Southern Maryland. Another example is the petition which has been circulated by the so-called "Maryland Petition Committee", and which already has thousands of signatures appended thereto. A copy of this may be found in the Appendix at page 63. These two documents illustrate the point of view of what might be called the "upper brackets" of anti-integration. Other suggestions go all the way down the line from the type of action indicated by these two inclusions in our Appendix to outright demand for blood and the reactivation of the Ku Klux Klan. On the other hand, there are those who are in favor of immediate integration and even in favor of the establishment of hard and fast school districts, and the requirement that all pupils must attend a particular school regardless of their or their parents' choice in the matter. This has never been a practice in the State of Maryland, and all children have always had a choice of schools and there has been no arbitrary districting except in cases of serious overcrowding. The above point of view is represented by the data to be found in the Appendix at pages 64 et seq., arising out of a conference of Negro educators at Morgan State College on June 19, 1954. This also earnest and intelligent group has apparently studied the problem carefully but has, as may be seen from the data in the Appendix, reached utterly different conclusions, not only from the anti-integrationists, but also from what may be called the middle view taken by the school authorities in the City of Baltimore, as is indicated by the message of the School Superintendent to Teachers of June 14, 1954, to be found in the Appendix at page 52. We are inclined to urge the latter view as the best authority when coupled with a reasonable time schedule, remembering always that what may be done in one County without perceptible effect, could not be done

in another County at the same time without grave danger of serious public disorder and personal violence.

It has not been difficult to find judicial authority for the proposition stated in the argument above concerning the equity powers of the courts. However, in arguing the second question, we are removing ourselves from the area of the "is" to the area of the "ought to be". We are transporting our argument from the field of law to that of psychology, sociology and public relations. However, it is no new thing to state that this Court should not place itself in the position of attempting to engage in the administration of any public school system. As was said by this very Court in the case of *Minersville School Dist. v. Gobitis,* 310 U. S. 586, 84 L. Ed. 1375, at 1381:

> "* * * But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."

Just as soon as this Court decrees "an effective, gradual adjustment", the timetable and the methods to be used to accomplish such "an effective, gradual adjustment" become a matter of school administration, and we respectfully urge that this Court, or any court, should only intervene where school administrators on the local level can be shown to have failed to exercise good faith and reasonable diligence to that end. We further believe that the cases before the Court should be remanded to the courts of first instance

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with as few specific instructions as possible, except to frame decrees so as to permit the "effective, gradual adjustment", with, of course, a right of review of their actions in such matters by this Honorable Court, if necessary by the continuing supervision of these particular cases. It is further respectfully urged that the courts of first instance, in the cases at bar, and also other nisi prius courts in which similar cases may be pending, or in which similar cases may be filed in the future, be guided by principles substantially similar to those recommended in the Report included in the Appendix at page 10, i.e.:

1. The Courts should enforce the constitutional right of any child to attend the school of his choice within reasonable limits, and this right must not be impaired because of race or color.

2. The Courts should recognize that they are not school boards or administrative bodies at any level. Their function should be judicial and not administrative.

3. The Courts should take into consideration in enforcing the rights of one citizen, or a class of citizens, the possible effect of such enforcement upon the rights of other citizens.

4. The Courts should take into consideration the good faith and intentions of those with a desire to accept the Court's decree and charged with the difficult job of carrying out the process at a level dealing with human minds and bodies and not with abstract principles, however lofty, and these administrators must, therefore, not be hampered by unnecessary restrictions.

5. The Courts should take into account the motives of those who, in the future, may bring actions to enforce the rights established by this Court's decision.

In any event, this amicus curiae and the educational authorities of the State of Maryland stand together in one respect at least, and that is that, under no circumstances should little children of any race be used as guinea pigs in experiments to support or destroy anyone's social theories. The purpose of an educational system is to educate, and there can be no sound reason, in the operation of a sound educational system like that of Maryland, to operate so as to arbitrarily create integration any more than to create segregation. As a matter of fact of which this Court is probably well aware, school segregation has been well on its way out long before this Court acted in the present cases. We cannot express this feeling better than in the words of Harry S. Ashmore in "The Negro and the Schools", at page 135:

> "Finally, there is the hard fact that integration in a meaningful sense cannot be achieved by the mere physical presence of children of two races in a single classroom. No public school is isolated from the community that supports it, and if the very composition of its classes is subject to deep-seated and sustained public disapproval it is hardly likely to foster the spirit of united effort essential to learning. Even those who are dedicated to the proposition that the common good demands the end of segregation in education cannot be unaware that if the transition produces martyrs they will be the young children who must bear the brunt of spiritual conflict."

We do not want spiritual conflict in our school children, nor do we yearn to create martyrs. We do want to preserve public peace and order and, at the same time, continue the excellence of the school system which Maryland has enjoyed for many years, and as was said in the Report

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to the Governor of North Carolina by the Institute of Government of the University of North Carolina, at page 38:

> "Law and order is an achievement of men and women and not a gift of the gods. It must be affirmed or lost in every generation."

Good public schools are likewise an achievement and not a gift and it is to preserve these achievements that we respectfully urge the Court that time, understanding and education of the public are necessary to solve the great problem which has been created by the decision in the instant cases, and we, therefore, urge that this Court so frame its decree as to leave the determination of the "how" and the "when" at the lowest possible local level administratively, if possible, and judicially, if necessary.

CONCLUSION

It is, for the reasons stated in the argument, respectfully submitted to the Court by this amicus curiae, that this Court so frame its decree as to answer the questions propounded in the manner in which we have indicated.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General of Maryland,

W. GILES PARKER,
Assistant Attorney General of Maryland,

JAMES H. NORRIS, JR.,
Spec. Asst. Attorney General of Maryland.

APPENDIX TO AMICUS CURIAE BRIEF OF ATTORNEY GENERAL OF MARYLAND

I.

REPORT

TO

THE STATE BOARD OF EDUCATION

AND

THE ATTORNEY-GENERAL OF MARYLAND

Foreword

This report combines the findings and recommendations of individuals, and committee groups, who have—

(1) studied the recent opinion of the Supreme Court with respect to segregated school systems, such as exist in the twenty-three counties of Maryland;

(2) gathered pertinent data; and,

(3) developed statements of principles for consideration by:

The State Board of Education
and
The Attorney-General of Maryland

William S. Schmidt,
Chairman.

Acknowledgment is due many individuals in the preparation of this report. As chairman of the Superintendent's Committee on Desegregation of the Public Schools of Maryland, I wish to express my gratitude first to the members of my committee,

Mr. James M. Bennett, Superintendent of Schools, Wicomico County,

Mr. William M. Brish, Superintendent of Schools, Washington County,

Mr. Reade W. Corr, Superintendent of Schools, Kent County

and

Mr. John H. Fischer, Superintendent of Schools, Baltimore City,

who assisted me so ably in the gathering of data and the drafting of statements of general principles, as well as, through their critical reading of the preliminary report.

The Committee is indebted especially to our State Superintendent of Schools, Dr. Thomas G. Pullen, Jr., to Mr. W. Giles Parker, Assistant Attorney-General of Maryland, and to Mr. Paul E. Huffington, State Supervisor of High Schools, for their invaluable contribution of thought, and their wise counsel. The Committee also wishes to acknowledge the help of all others who had a share in gathering and compiling the data upon which this report is based.

As chairman, I wish to express my appreciation to a member of my professional staff, Miss Rowannetta S. Allen, for her assistance in editing and combining the several reports received.

Maryland has always been considerate of its colored population. As a matter of fact, the State was considerate of the Negro race when most of its representatives within the confines of the State were not citizens but slaves. The most eloquent testimony of this fact is that in 1861 the number of Negroes in Maryland was about equally divided between freed men and slaves. In its Constitution of 1867 the State provided for the education of both the white and colored races. True, it did provide for the education of both races in separate schools, but this was the accepted pattern of the day.

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Elsewhere in this report is a summary of the progress that has been made in the education of the colored race in Maryland from 1867 through 1954, a period of nearly a century. Progress has been phenomenal. It is not the purpose of this report to belabor this particular point; facts and figures are cited merely to prove the good will and intent of the State of Maryland toward all its citizens.

On May 17, 1954, the Supreme Court of the United States rendered an opinion to the effect that the continuation of segregated schools is unconstitutional, and it invited the attorneys general of the various states affected to present briefs to the Court in the capacity of "amici curiae" suggesting procedures by which segregation of schools could be eliminated most satisfactorily and to guide the Supreme Court of the United States in drawing up its final decree.

The State Board of Education held its first meeting following this decision on May 26. The Board was advised by Attorney-General Rollins that the Supreme Court had issued only an "opinion" not a final decree.

It should be noted that the Attorney-General of Maryland, while not objecting in any sense to the opinion and to the forthcoming decree of the Supreme Court, notified the State and local school authorities of Maryland that in accordance with the laws of the State it would be necessary for them to continue segregation in the schools and teachers colleges of the State until such time as a final decree was transmitted or until such time as the Legislature of the State might repeal its laws requiring segregation.

Particular attention should be called to the fact that the Attorney-General of Maryland accepted the opinion of the Supreme Court as being just and equitable and publicly affirmed his willingness to assist in the desegregation of the schools of the State in accordance with due process of law and the decree of the Supreme Court of the United States.

Especial attention is called also to the fact that the State Superintendent of Schools has accepted the decision of the Supreme Court and has indicated his willingness to imple-

ment desegregation to the best of his ability and to the limit of the powers of his office. Further, the State Board of Education, at its meeting on May 26, took the position that the final judicial authority of the land had spoken and that it would do all within its power to implement the decision of the Court's decree when it is finally passed. (For the record, a copy of the statement of the State Board of Education is included in this brief.)

This action of the State Board was followed by a meeting of the school superintendents from the twenty-three counties and Baltimore City with the Attorney-General and other state officials. At that time, Dr. Thomas G. Pullen, Jr., State Superintendent of Schools, announced the appointment of a five-man committee of superintendents to (1) work closely with the State Department of Education and the Attorney-General's Office on the collection and preparation of data to be used in the presentation of Maryland's brief to the Supreme Court in October, and (2) to draw up a broad general statement of principles to be used by local boards of education as guiding principles for implementing the Supreme Court decision "that will be fair and equitable through the state" and impair no individual rights.

In compliance with this assignment, the committee divided itself into two sub-committees: one studied and considered the general guiding principles; the other conducted the survey and compiled data regarding the present status of our segregated schools.

Very early in its work, the committee discovered that one of its functions would be to advise the Attorney-General on the arguments to Questions 4 and 5 which the Supreme Court had propounded for reargument in the October 1954 session. These questions are: (4) "Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school

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districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

In search for the answer to this question, the committee was governed by the returns on its questionnaire circulated to the superintendents of the twenty-three counties of the State, and to the Superintendent of Schools of Baltimore City. In a majority of the counties the returns indicated that the most acceptable method for ending public school segregation would be by a gradual transition period. In support of this position, the committee offers the following statements:

(a) Since 1870, Maryland has operated a segregated system of public education. The adherence to the Plissy v. Ferguson doctrine of "separate but equal facilities" since 1896 has created in many counties a duplication of facilities, personnel and administrative practices which, if abruptly discontinued or ignored, could create much unrest and confusion and ultimately result in unnecessary harm to children and youth.

(b) Few, if any, of the county units are prepared for a sudden changeover if integration should be made a mandatory requirement. Workshops in Human Relations on a bi-racial basis need to be instituted at all levels; i.e., pupil, teacher, administrator and parent. The hopeful outcome of such planning and preparation would be to identify any problems and tensions which now exist, and to develop, through cooperative endeavor, techniques and procedures for solving these problems and for relieving the tensions. An orderly transition would be a more certain way of improving inter-racial understanding than to summarily implement the desegregation of the public schools.

(c) The wide variation which exists in the number and percentage of Negro pupils in the different counties of Maryland makes obvious the view that the counties in the State vary in their racial composition as Maine varies from Mississippi. In four or five counties the transition would possibly create few, if any, problems at all as the number of Negro pupils affected totals less than 500. In all other units the total of Negro pupils involved is considerably larger and the percentage in one county exceeds 50% of the total school enrollment. It is apparent that with such differences it is desirable that the counties within the State be permitted a gradual period of transition consistent with local conditions.

(d) The canvass of the counties also indicates that there is considerable variation within a county. One county specifically noted that desegregation would affect four communities within that county. While little or no opposition or tension would be manifest on a county-wide basis, citizens in the affected areas have indicated a preference for a gradual period of change from segregation to integration. This condition can be duplicated in nearly every unit where there is a concentration of Negro population.

For these reasons, the committee urges the Attorney-General of Maryland to argue for a "gradual adjustment" as the counties move from a segregated system "to a system not based on color distinctions". As stated above, the variation among states having segregated schools; the variation existing in Maryland as reflected in Garrett, Allegany and Washington Counties with the region of Southern Maryland and the Eastern Shore Counties; the variation within a given county; compel us to suggest that any time limit recommendation be flexible enough to provide for local adaptation to the final decree of the Court. If it please the Court to issue such a decree, it may be argued by some protagonists that indefiniteness is an invitation to endless court litigation and confusion. In fact, some have already

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argued that "gradual adjustment" will be nothing short of a dodge — "a law of compliance which permits state officials to do nothing at all whenever they are of a disposition to do nothing". In rebuttal, the committee would call to the attention of the Supreme Bench the expressed intent of public officials of Maryland, who would be charged with the responsibility of carrying out the Court's decree, which appear earlier in this document. The committee would also wish to impress upon the honorable judges the fact that the process of desegregation will be carried out with the same good will and spirit — which have always characterized the application of the law in Maryland. The long and honorable record of Maryland as a member of the Union attests to the integrity of this statement. However, it may be argued that the moment a state or county ceases to operate a system providing enforced separation of *every* Negro child from *every* white child solely because of race, it has begun an action aimed to guarantee to every citizen his, or her, rights existing under the Fourteenth Amendment to the Constitution, as recently interpreted by the Supreme Court.

Any decree of the Supreme Court as to the procedure to be used in desegregation, we believe, should take into due consideration the good faith, fair-mindedness, and civil integrity of the people who will be affected, as well as, the profound and sweeping changes involved. The court's decision (May 17, 1954) will inevitably affect the entire school system of the State in the areas of administration, expenditures, allocation of pupils and teachers, construction of school facilities, and other related services. It may even necessitate a revision of state laws. We believe that changes of this kind, involving extensive reorganization, and the mores of society, to be successfully and soundly established, must be based on intelligent, considered action in the light of both fortunate and unfortunate eventualities, of both positive and negative reactions. In the judgment of the committee it would seem better to *plan* and *prepare* the way thereby creating a readiness which would assure success.

The Supreme Court in abolishing segregation in the public schools of this country created a new right for a minority group. By the same action it abrogated a right of the majority group. It is specious to argue that this right of the majority did not exist legally; it has been countenanced as a right for nearly a century and the Supreme Court on one memorable occasion placed its official sanction upon it. Pragmatically, then, the right of the white people in any given state, under the approval of its state laws, to send their children to segregated schools has existed. More important than any other consideration is the fact that the citizens of the several states practicing segregation in their schools have thought they had this right and their thinking and their attitudes have been conditioned by this fact.

The Supreme Court, in rendering its opinion to the effect that the operation of segregated schools by any state or local community is unconstitutional, strongly emphasized the psychological disturbances in Negro children due to this policy of excluding them from schools for white children. Supposedly, and conversely, the mixing of children, white and colored, will eliminate this emotional disturbance on the part of Negro children. Assuming for the purposes of this discussion that the premise has validity, although the problem is not quite so simple, by the same token it is reasonable to expect that integration will cause emotional disturbances in those white children who have lived in a segregated world with as clear a conscience as that of the English, Dutch, and New England slave traders who brought the Negroes to America for financial gain. Without implying criticism of the Court on this point, it might be said that justice—we are not referring to mercy—has no concern with the purely psychological. Justice is concerned solely with rights and privileges — moral or legal.

But since the psychological disturbances of Negro children have been considered in creating this new right for them, the Court should bear in mind the emotional disturb-

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ance it is creating in white children by revoking the pre-existing right. The practical application of this point is that this factor should be taken into consideration in deciding upon the final decree.

The second question (#5) propounded by the Supreme Court and, in turn, directed to this committee for a recommendation is stated as follows:

"5. On the assumption on which question 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

The reply to these questions is a legal one with many different answers. These questions ask: Who will decide the exact and precise steps to be taken in abolishing segregation? Who will decide when the process is to begin? Who will decide how the process will proceed? These and many other questions must be clarified before the Supreme Bench issues its final decree.

It was the considered judgment of the committee that the Attorney-General of Maryland should be requested to plead for the remanding of all cases involving segregation

to courts of the first instance (lower courts) with instructions to them to devise a program for implementing the Court's opinion of May 17. This decision was reached because of our belief that it is not proper for the Supreme Court to involve itself in the administration of the public schools.

In the light of the foregoing, the following statement of principles to guide the State and local school authorities in Maryland would seem appropriate:

1. The primary concern of the Supreme Court is to guarantee that the right of no child to attend the school of his choice be impaired by reason of race.
2. The Supreme Court is not an administrative body on the Federal, State, or local level. Its function is judicial, not administrative.
3. The Court, in setting forth the condition under which its decree is to be implemented, should take into consideration the same psychological disturbances which were one of the bases for its decision.
4. The Supreme Court, in setting forth the conditions of implementation, should recognize the good faith of those who accept its decree and not inhibit them with undue restrictions.
5. The Supreme Court should be mindful of the fact that public education is the responsibility of the several states, and that they are accountable to no Federal agency or court except as they may infringe upon the rights guaranteed citizens by the Constitution.
6. The Supreme Court would be less than fair to those who are entrusted with the task of implementing its decree unless it defined a "non-segregated school". Are the terms "non-segregated" and "integrated" synonymous? Is non-segregation a legal fact only if there is a close relationship between the ratio of races in a school to the racial composition of the com-

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munity? Would the practices in the states where segregation is already illegal be accepted in Maryland as satisfying the decree of the Supreme Court?

The following recommendations are made only with the unique problem in Maryland in mind.

Under the laws of Maryland "The State Board of Education shall exercise, through the State Superintendent of Schools and his professional assistants, general control and supervision over the public schools and educational interests of the State; . . .", and "The county board of education shall exercise through its executive officers, the county superintendent, and his professional assistants, control and supervision over the public school system of the county." Other sections of the law state that "Educational matters affecting the State and the general care and supervision of public education shall be entrusted to a State Department of Education, at the head of which shall be a State Board of Education", and "Educational matters affecting a county shall be under the control of a County Board of Education".

It should be apparent from these and other laws that the State Board of Education is entrusted with general oversight and supervision of the public schools of the State, but that the actual operation of schools, including specifically such matters as the assignment of pupils, consolidation of schools, and the appointment and dismissal of teachers, is the responsibility of the local (the several counties and Baltimore City) school systems.

It should be obvious then that the functions of the two divisions of administrative authority are different. Briefly and simply, the functions of the State Department of Education, acting under the State Board of Education, are supervisory; and those of the local school systems are operational. In the implementation of the decree of the Supreme Court, the statement made by the State Board of Education at its meeting on May 26, 1954, clearly defines the respective duties and functions of the two authorities.

The following is an excerpt from the statement of the State Board, and the amplifying and clarifying principles are added:

> "The role of the State Board of Education is not to set the detailed pattern of operation but to take an official position that the decision will be implemented with fairness and justice to all, and with due regard for the professional aspects of the program. Further, its responsibility is to act in a general over-all supervisory nature to insure that standard, equitable, practices are followed throughout the State."

In the opinion of the Committee the State Board of Education would be acting within the scope of its authority and in line with its responsibility if it should agree upon the following set of general principles, including possibly others, regarding the implementation of the decree of the Supreme Court.

It should state clearly and unequivocally to the local school authorities and the public the effect of the decree of the Supreme Court and of its (the State Board's) intention to exercise whatever authority it may have to guarantee that the decree is implemented fairly, honestly, and intelligently:

1. The administration of the public schools in Maryland is the responsibility of the county and city boards of education. Practices locally must be consistent with the laws of the State and the by-laws of the State Board of Education.

2. By law the consolidation of schools is the responsibility of the county and Baltimore City boards of education. The State Board of Education has no initiatory powers with respect to consolidation; it does have the right of review upon appeal.

   Likewise, the county boards of education have the responsibility for assigning children to schools. The

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only inhibitory condition placed upon the county boards in the assignment of children is that race shall not be a factor in the decision.

3. In consolidating schools and in assigning children to schools, no county board may deny any child a right enjoyed by others.

4. Coercive measures should not be employed; that is, no child should be compelled to attend a particular school, rather, he should be given a choice. This position is more or less consistent with the pattern now employed in the several school systems of the State with respect to white children attending white schools and colored children attending colored schools.

5. Each county and Baltimore City should study its own situation and decide upon a plan to be put into operation within that system. The policy determined should be uniform throughout the system.

6. Certain cases of individuals who might believe themselves to be discriminated against could be appealed to the State Board of Education; others would have to appeal to the courts.

7. State funds are distributed to the counties and Baltimore City contingent upon the faithful adherence to the school laws; otherwise these funds can be withheld.

8. Due to different conditions, professional and social, the change from segregated schools to non-segregated schools will be more rapid in some local systems than in others; the change should be gradual but as rapid as possible.

While the local school systems are governed in a general way by the supervisory authority of the State Board of Education, they possess a considerable degree of autonomy. This autonomy, in effect, permits them to accept or reject certain actions suggested by the State Board; in certain

aspects of operation, however, the coercive authority must be accepted. In the field of simple administrative procedure, the autonomy of the local board is quite clear. As local school systems vary greatly in their problems it would be exceedingly unwise and futile for either the Court, or the State Board of Education, to make detailed suggestions for implementing the program of desegregation within the counties of the State.

If the committee's reasoning is correct the inauguration and implementation of desegregation in the schools of Maryland will constitute an involved and time-consuming process. It was our hope that we might be bold enough to suggest a possibility for the carrying out of the Court's opinion. Would it not be feasible to suggest to the Court that it provide for the principle of "gradual adjustment" and that it leave great discretion to responsible state and county school authorities and the legal department of the several states to devise ways and means for putting the program of desegregation into effect? We believe because of the argument previously presented, that these responsible school authorities should have the first opportunity to devise and inaugurate a plan, reasonable, fair and just, to implement the opinion of the Court. We believe that such action on the part of the Court would reaffirm our great faith in the wisdom and integrity of our State and local county boards of education and their executive officer — the superintendent of schools.

For that reason, the following set of principles for the local school systems, would seem appropriate:

That the County and Baltimore City Boards of Education, solely responsible for the operational phases of the local units of the public school system of the State, plan for desegregation on the basis of morally, legally, and administratively sound principles. In the opinion of the Committee those principles should be a clear delineation to the public of the implications of the decree of the Supreme Court.

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THAT each local school system should develop a program of action based upon a thorough and comprehensive study of the local situation designed with due regard to the rights of every child and after consultation with representatives of both races. It might be remarked, parenthetically, at this point that such studies have already been inaugurated in many of the local units in Maryland.

THAT each local school system should develop a program of action that takes into proper consideration the psychological and other factors, both detrimental to and beneficial of, the orderly process of desegregation. In effect, application of this principle means simply that desegregation may be more rapid in some local school systems than in others. but it does not mean that no step in that direction may be taken by any local system. It does mean, however, that no uniform rigid pattern of desegregation can be followed statewide in Maryland.

THAT each local school system should keep in constant contact with proper authorities, educational and judicial, for review of actions taken as to their professional and legal appropriateness.

THAT the attitude of the local school authorities should not be one of aggressive advocacy but rather one of calm, fair administrative justice.

THAT the local school board should exercise all the leadership of which they are capable in bringing about an orderly implementation of the decree of the Supreme Court.

THAT in their procedure of implementation, the local school authorities making public utterances should be mindful not to make careless statements which will inflame the public. On the other hand, the local school officials should be clear, frank, and meticulous in informing the public of the detailed steps they intend to take in carrying out the program of desegregation.

In summary, the committee advocates a policy of gradual adjustment and remanding of responsibility for implementing the decree to the local school authorities. Legal opinion would seem to indicate that the issues to be treated in moving from segregation to desegregation are not within the conventional experience of the judiciary. The state and local agencies which have been established to cope with such problems should be afforded the first opportunity to work out on a bi-racial basis the procedures for meeting the new principles of law as contained in the Court's decision of May 17.

Our adherence to this position is based on our desire to build at the local level in our respective counties a climate of good will between all parties concerned. This climate is necessary to undergird the program of action which must be organized to carry out the opinion of the Court. We recommend to the several counties the formation of Citizens' Committees appointed by the local board and consisting of representatives of both races, who will consult with the local educational authorities on the steps to be taken in each county, the progress of desegregation, and the setting up of safeguards for the protection of the rights of all children. Following such a democratic procedure the people will feel that they have had a part in this program if the authority and responsibility for implementing the course of action is arrived at through citizens' advisory groups working in cooperation with local boards of education to devise the appropriate administrative policies. It is our further belief that this program will need the sympathetic understanding of all citizens, if the decision and resultant course of action are to be freed of emotional outbursts. Imposition of the specific directions at a level of government detached from the people will only add suspicion and confusion to an issue highly charged with emotionalism. The very nature of our democratic life implies that we approach this problem with an attitude of trust and a determination to develop a satisfactory answer to our immediate problem.

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The essence of democracy lies in the local community; its manifestations are in the light of local tradition and thought. Mere edict from above will not change thinking nor the attitudes which influence human behavior; although its power may be accepted. If respect for law and order, elementary justice, and good will toward every man are present, as we desire them to be in Maryland, then the Supreme Court may well decide that establishment of the principle of non-segregation is the primary concern of the nation for the moment, with the belief that each community will move as rapidly as possible to bring its practices in line with proper moral and legal principles. Coercive measures, particularly drastic and sudden ones, never settle issues; they often create new ones. However, proper restrictive measures properly employed could serve as a gentle prod to action in the desired direction.

Finally, it is but a truism to say that the means determine the end. The manner in which desegregation is put into effect in our state and in our nation will determine for many years to come the attitude of the races toward each other. Only through good will is good will engendered.

II.

STATEMENT OF THE BOARD OF EDUCATION REGARDING THE SUPREME COURT DECISION OF MAY 17, 1954

"The Supreme Court of the land has spoken. It is the duty and responsibility of the State Board of Education to do all within its power to work out the problem 'seemingly and in order' and in such manner that the rights and priviliges of no individual are impaired by arbitrary or capricious methods.

Upon the advice of the Attorney General of Maryland, the decision of the Supreme Court and the full implications of the decision will not be made until some time in the fall after the Court has had a conference and further hearings

and arguments with the Attorneys General, and possibly other representatives from the various states which will be affected. Until the conditions of the decision are made known finally, with the mandate and decree of the Supreme Court, any detailed plan of action for implementation would be premature. This statement does not imply, however, that the State Board of Education and the local school authorities, upon whom the major burden of solving the problem will fall, should delay in analyzing the situation and making plans for implementing the decision of the Court.

The laws of Maryland specifically provide for segregation in the public schools and in the teachers colleges. In view of this law requiring segregation, no program of integration can be put into effect until the decision of the Supreme Court becomes final and an effective date is set by the Supreme Court.

The detailed problems in respect to implementing the decision of the Supreme Court will rest primarly upon the local boards of education. The problems involved in any program of integration will vary among the different school systems of the State, but we are confident that they will be solved in a fair, decent, and legal manner and with good common sense. Furthermore we are confident that the local school boards, the local school officials, and the parents will settle this problem without restorting to chicanery or devious methods and with due regard for the rights of all parties concerned. Any program of implementation will be based upon professional and human considerations and not with coercive designs or methods. The public school system of Maryland has always been known for its high professional attitude and for its unbiased and unprejudiced treatment of all children.

The role of the State Board of Education is not to set the detailed pattern of operation but to take an official position that the decision will be implemented with fairness and justice to all, and with due regard for the professional aspects of the program. Further, its responsibility is to act

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in a general over-all supervisory nature to insure that standard, equitable practices are followed throughout the state."

May 26th, 1954.

III.

A SURVEY OF NEGRO EDUCATION IN MARYLAND

Since the early days of the State's history, Maryland has had a relatively large Negro population. In 1790, the year of the first Federal census, Maryland's total population was 319,728, of which 65.3 per cent were white and 37.7 per cent were Negro. The maximum proportion of Negroes to white was reached in 1810, with 38.2 per cent, with a gradual decrease, decade by decade, until in 1950 the Negro population comprised but 16.5 per cent of the total.

The following table gives the racial population since 1890.

Population of Maryland by Races*

Year	*Total Population*	*White*	*Per Cent*	*Negro*	*Per Cent*
1890	1,042,390	826,493	79.3	215,657	20.7
1910	1,295,346	1,062,639	82.0	232,250	17.9
1930	1,631,526	1,354,226	83.0	276,379	16.9
1950	2,329,263	2,343,009	83.5	385,972	16.5

* U. S. Census Bureau Reports.

A. Public School Education for Negroes

In any study of the status of Negro education in Maryland, two or three basic factors and conditions should be mentioned. The first of these has to do with the varied population patterns among the counties and the metropolitan areas of the State. The northern and western counties have very sparse Negro populations; in fact, there are no Negroes of school age in Garrett, the mountainous, western-

most county of the State. The concentration of population increases from less than two percent in Western Maryland to approximately 25 per cent in the Southern Maryland and Eastern Shore counties and in Baltimore City.

The second factor has to do with the State's geographic location and socio-economic life. Maryland's varied topographic features, socio-economic patterns, and racial groups are some of the reasons why the State is frequently referred to as a "miniature America." Although it is a border state, many of its customs and traditions have linked it with the South. In fact, life in some areas of Southern Maryland and the Eastern Shore is similar in many respects with life in areas traditionally characterized as "the deep South." The highly industrialized Baltimore City area has attracted large numbers of people, both white and Negro, many in the unskilled labor category, chiefly from the South. Similarly, because of employment opportunities in government and related service fields, a tremendous concentration and expansion of population of both races is characteristic of the Washington suburban areas.

The third factor concerns the impact of the above noted population trends and patterns upon the school enrollments in the counties and in Baltimore City. These enrollment figures are shown in the table below:

Maryland Public School Enrollment by Color:
1923-1953

A. State Enrollment

Year Ending June 30:	*Total Enrollment*	*White*	*Per Cent*	*Colored*	*Per Cent*
1923	256,546	208,023	81.1	48,523	18.9
1933	280,519	228,071	81.3	52,448	18.7
1943	279,842	222,596	79.5	57,256	20.5
1953	399,050	314,916	78.9	84,134	21.1

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B. Baltimore City Enrollment

Year Ending June 30:	Total	White	Per Cent	Colored	Per Cent
1923	104,072	87,066	83.6	17,006	16.4
1933	113,039	89,251	79.0	23,788	21.
1943	105,212	75,309	71.6	29,903	28.4
1953	131,854	84,498	64.2	47,356	35.8

C. County Enrollment — All Counties

Year Ending June 30:	Total	White	Per Cent	Colored	Per Cent
1923	152,474	120,957	79.4	21,517	20.6
1933	167,480	138,820	82.9	28,660	17.1
1943	174,640	147,287	84.2	27,353	15.8
1953	267,196	230,418	86.1	36,778	13.9

Maryland Public School Enrollment — Colored Pupils: 1923-1953

Year Ending June 30:	Total State			Total Counties			Baltimore City		
	Total	Elem.	High	Total	Elem.	High	Total	Elem.	High
1923	48,523	46,745	1,778	31,517	30,070	447	17,006	15,675	1,331
1933	52,448	47,193	5,255	28,660	25,944	2,716	23,788	21,249	2,539
1943	57,256	48,699	8,557	27,353	22,170	5,183	29,903	26,529	3,374
1953	84,134	57,877	26,257	36,778	23,631	13,147	47,356	34,246	13,110

Historically, Negro education in Maryland has followed the social and economic trends of our country's development. During the Revolutionary War period, benevolent attitudes were prevalent, especially on the part of many statesmen and churchmen; education was favored, and many Negroes became tradesmen, artisans, and clerks. Maryland early developed a favorable attitude toward the education of Negroes as evidenced by the establishment in Baltimore in 1797 by the Maryland Abolition Society of "An Academy for Children of Africans."

With the invention of the cotton gin, the extension of the plantation system southward, and the expansion of slavery, the first half of the nineteenth century was a period of strong reaction against education of Negroes, with legal restrictions in the South and segregated schools for Negroes in the northern states.

During the hectic reconstruction period following the Civil War, Negro education gradually became accepted and extended, with special help from church groups, philanthropic foundations and the Freedman's Bureau. By 1900, the Negro had achieved his legal right to education in all states, but with segregation the pattern in the South and border states.

Maryland is particularly fortunate in the legal framework supporting the public school system. The State school system is made up of twenty-three self-governing local county units and Baltimore City, each under the leadership of professionally trained superintendents and supervisors, and each unit developing its own program in compliance with the State School of Law and under the leadership and support of the State Superintendent of Schools and his staff. The entire structure of the system rests upon legislation enacted from session to session to support and implement the 1867 Constitutional provisions for public education.* This section of the Constitution is the foundation for a State minimum program of education for every child in Maryland regardless of race, creed, color, or geographical location of his birth. This program makes provision, among other things, for:

1. A qualified teacher for every child
2. A twelve-year system of education
3. A minimum salary scale for teachers, principals, and supervisors

* Constitution of Maryland — Declaration of Rights and Articles III and VIII. Also Article 77: The Public School Laws of Maryland.

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4. State assistance to local units in establishing a minimum pupil-teacher ratio.
5. Free transportation for all pupils who live beyond a reasonable and safe walking distance
6. Free textbooks and materials of instruction
7. A minimum school year of 180 days
8. Compulsory school attendance
9. Special non-teaching services to pupils
10. Additional financial assistance for atypical pupils
11. An incentive fund to assist local units in financing construction of school buildings
12. A system of teacher tenure and retirement

A brief review of some of the legislation and practices affecting the progress of Negro education will show the tremendous advances made, particularly in the last few decades, in the State's effort to provide adequate educational opportunities for its children and youth.

Separate colored schools were established as a part of the public school system in Maryland as a result of the enactment of Chapter 377 of the Laws of 1872. Every county had colored schools in operation for the school year 1872-1873. In 1918, four counties established high schools for their colored youth. The number increased gradually until by 1934 every county, with the exception of one county with no colored children, was providing and is continuing to provide high school advantages for its colored youth.

A. Supervision

An act of 1910 Maryland Legislature provided supervision of Negro schools in the counties and carried with it a State appropriation for the salary of the supervisor. This law was modified in 1916 to require that a county must have as many as ten Negro schools to receive the State appropriation.

In 1920 a by-law of the State Board of Education, having the force of law, fixed the minimum academic and professional qualifications of supervisors and required the State Superintendent's approval for their appointment.

The 1916 Legislature created the position of State Supervisor of Colored Schools, as a member of the State Superintendent's staff, restricting the appointment to a white person. This restriction, however, and the position were removed by later legislation. In 1947 the first Negro was appointed to the supervisory staff of the Department of Education, and there are now two members on the staff. Special supervisors in the Department have, since their appointment, rendered equitable and regular services to all schools without regard to color.

Legislation enacted in 1945 provided that each county employing 30 or more teachers must employ a colored person as supervisor of colored schools, and also provided part-time supervision in counties employing from 10 to 30 teachers, with no color restriction.

B. Teacher Certification

When certification of teachers became a State function, according to 1916 legislation, the same certification requirements were set for both white and colored teachers. As the certificate requirements were increased from time to time, those for colored teachers usually lagged by a few years but are now identical. As a matter of fact, the certification status of colored teachers has maintained a most favorable position. As early as the school year ending in June 1934, the county colored elementary teaching staffs of 704 members included 689, or 98 per cent, who held first-grade certificates. As certification requirements were extended first to three years' and then to four years' training, the colored teachers have continued to maintain almost 100 per cent full certification status at both elementary and high school levels.

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C. Teacher Salaries

Maryland had no State-wide salary schedule for public school teachers prior to 1904, at which time the Legislature prescribed a minimum of $300 per year for white teachers. In 1918 a salary schedule for colored teachers was set up by the Legislature. This schedule was increased in 1920 and in 1922 legislation provided for increments for satisfactory service, with a maximum of $85 per month for the eight-month school year then required. Although other salary adjustments were made after the 1922 legislation, the most significant advance was made when the Legislature, in 1941, passed the law equalizing salaries of white and colored teachers, effective January 1, 1942. Maryland thus became the first state to equalize salaries. Equality in salary for all teachers with comparable training and experience has since been fully respected by all counties, including the payments of increments not specified by State law. From an examination of the data in Table 2, it will be noted that the average annual salary for colored teachers in the State in 1953 (the latest year available) exceeded that of the white teachers by $61 or $3996 for colored and $3935 for white teachers. This favorable status is accounted for through the generally longer tenure and higher certification ratings of Negro teachers.

D. Length of School Year

The minimum session for colored schools was fixed at 140 days, or seven months, in 1916, but the Legislature raised this to 160 days or eight months in 1922, and to the present 180-day minimum for all schools in 1937. See Table 3 for fuller details regarding length of school year.

E. Transportation and Consolidation

Consolidation of schools has developed at an accelerated pace during the last decade or two as modern highways and buses have aided transportation of pupils. The extent to which consolidation has taken place is shown in Table 4. From less than one per cent in 1923, transportation is now

provided for more than half of all colored elementary pupils (57.0%) and for nearly three-fourths (73.5%) of colored high school pupils.

Even more remarkable has been the consolidation of schools from the inadequate, often drab and sub-standard one- or two-room schools to the modern, functional school plants which now are provided generally for all pupils, regardless of color. The figures in Table 5 tell only a part of the story but the reduction from over 400 one-teacher schools to only 26 in three decades is partial evidence of the trend toward adequate facilities for the colored pupil. Further evidence is found in tremendously accelerated post-war building programs for Negro schools. From 1946-1953, inclusive, the total capital outlay for new schools or additions in the State amounted to $31,432,740, with every county and Baltimore City sharing in this cost. Based on the 1952-53 total State enrollment of 84,134 colored pupils, this capital outlay represents an investment of $374 per pupil in *new* facilities alone. This figure compares favorably with the value of school property per pupil, regardless of color.

F. Enrollment and Persistency Trends

With the expansion of facilities, the extension of transportation, the improvement of teacher qualifications, and the modifications in the school program, there have come marked changes in enrollment and persistency in schools for colored children. Certainly the greatest change has been the expansion of high school enrollment. We note a 73 per cent increase in elementary enrollment since 1923 and a 1380 per cent increase in high school enrollment. Overageness likewise was reduced from more than 65 per cent in 1921 to 11.8 per cent in 1949, the last year such studies were made by the State Department of Education. Persistency to high school graduation, while not keeping pace with enrollment increases, has improved remarkably and is now approximately 50 per cent — that is, one-half of all pupils enrolled in the 9th grade remain until graduation four years

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later. The number of graduates in the county high schools has increased from 24 in 1923 to 1,086 in 1953 and the State total from 958 in 1933 to 1,912 in 1953 — a 100 per cent improvement in twenty years (See Table 6). Further examination of the data in this table will show the improved situation with regard to the extension upward into high school grades of very large numbers of our colored youth. For example, the ratio of high to elementary enrollment has been reduced from 1 to 27 pupils in 1923 to 1 to 2.2 pupils in 1953.

G. Miscellaneous Information Supporting Progress in Negro Education

It is generally conceded that the current expense cost per pupil is a fair index of educational opportunity. From this criterion, there is full evidence that the State is fulfilling its obligation of equal educational opportunity for all its children and youth. In 1953 the State per capita cost for elementary pupils was:

Colored pupils — $185.72	For high schools:	Colored	— $239.07
White pupils — $184.61		White	— $247.36

(See Table 7, for further detail)

The effectiveness of a school's program is in part dependent upon the number of pupils assigned to each teacher. State aid is given to counties on the basis of thirty pupils per teacher in the elementary school since this ratio is considered the maximum for optimum effectiveness. The ratio for high schools is somewhat smaller in view of the nature of the offerings. From Table 8, it will be noted that in recent years, especially, there has been little difference in the teacher-pupil ratio among the schools regardless of color. The counties, in particular, have been able to reduce class size nearly to the desired minimum. In 1953, for example, the ratio for colored elementary schools was 32 and for high schools 21.2.

Another evidence of an improved educational program is the extent to which teachers take advantage of the in-service training opportunities offered them. Traditionally, the colored teachers of the State have taken full advantage of all programs designed to improve themselves professionally. Through summer schools, extension courses, workshops, and other such programs, teachers have been given full and equal opportunities. In recent years these programs in the various counties have been conducted for all teachers on an integrated basis. Indeed, one of the most promising advances has been the complete integration of local supervisory and administrative staffs to promote one program for all pupils in a particular unit.

Other evidences of continued progress in the public schools of the State include:

1. The appointment of a Negro member to the State Board of Education
2. The appointment of Negro members to various local Boards of Education
3. Removal of the color restriction concerning membership in the Maryland State Teachers' Association
4. Extension of programs of adult education on an integrated basis in the local units
5. Programs of Parent Education extended to County units
6. The appointment of Negro supervisors of pupil personnel in counties with large Negro pupil populations
7. Extension of vocational programs in home economics, agriculture and trade and industrial education in all high schools where enrollment justified without regard to color
8. Legal provision for *colored* supervisors in all county units with 30 or more colored teachers even though such restriction based on color is contrary to current interpretations.*

* Chapter 11, Section 142: Public School Laws of Maryland, Vol. 28, April '48, No. 2.

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9. Proper distribution of all funds received from local, State, and Federal sources for educational purposes, without regard to color.

10. Adequate provision for buildings, equipment, and materials of instruction for every child in the State, regardless of color.

11. Uniform provision for related and supporting services to the educational program; e.g. school lunch, health, and library services, to all pupils without regard to color.

B. Higher Education for Negroes in Maryland

There are at the present time four Negro colleges in the State, all of which are under public control and state support. Two of these are State Teachers Colleges, operated under the State Board of Education, acting as their Trustees, one is a branch of the University of Maryland and the fourth is a liberal arts college with its own Board of Trustees. None of the Negro colleges have ever offered work beyond the under-graduate level. In 1950 a Junior College for Negroes was opened in Montgomery County, with some State aid, but operating under the County Board of Education.

Within the past few years, the rigid pattern of racial segregation in higher education has begun to relax. Since 1935, an increasing number of Negro students have been admitted to the School of Law of the University of Maryland, and to such private institutions as the Johns Hopkins University, Loyola College and St. John's College. During the current year 1953-1954, both graduate and under-graduate Negroes are enrolled in several colleges of the University of Maryland.

The State's interest in and support of higher education for Negroes are reflected in its investment for capital outlay and general fund appropriations to the Negro colleges. The figures for recent years are shown below:

STATE SUPPORT FOR MARYLAND NEGRO COLLEGES

Year	*Bowie State Teachers College*	*Coppin State Teachers College*	*Maryland State College*	*Morgan State College*
A. *Capital Outlay Appropriations* — 1939-1953*				
1939	$ 30,000	—	$ 35,000	$ 122,000
1947	42,000	—	587,000	1,491,000
1949	750,000	—	865,000	1,669,170
1951	800,000	—	865,000	2,111,170
1952	—	—	—	—
1953	260,500	—	—	1,920,000
B. *Property Inventory — Buildings, Equipment and Land*				
1953	$1,720,843.88	$674,213.84	$2,506,689.03	$6,392,225.55
C. *General Fund Appropriations*				
1950-51	$187,531	—	$457,186	$639,041
1951-52	241,456	$70,000	495,807	822,083
1952-53	263,012	86,035	559,461	929,681

* Source: Reports of the Comptroller of the Treasury Construction and Property Inventories and Fiscal Digests of the State of Maryland.

SUMMARY OF SELECTED DATA CONCERNING INSTITUTIONS OF HIGHER LEARNING FOR NEGROES IN MARYLAND*

Institution and Location	*Date Founded*	*Enrollment, June*	*Number Teachers on Staff*	*Number Acres in Site*	*Estimated Value (Present Value)*
1. Carver Jr. College	1950	39	**	**	**
2. Maryland State College, Princess Anne	1886	431	47	303	$4,500,000
3. Morgan State College, Baltimore	1867	2314	102	91	9,300,000
4. State Teachers College, Bowie	1867	348	16	187	1,720,844
5. State Teachers College, Coppin — Baltimore	1900	206	14	21	920,216

* Source — Replies received from Questionnaire to the College Presidents, Summer 1954.

** Uses staff and facilities of Montgomery County Public Schools.

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The foregoing picture, however, gives only a part of the State's support of Negro higher education. To alleviate somewhat the condition of limited opportunities for graduate work or undergraduate work offered at the University of Maryland but not offered at any of the Negro colleges, the General Assembly of Maryland[1] in 1935 authorized the payment of partial scholarships to Negroes attending out-of-state institutions and appropriated $10,000 a year for 1936 and 1937. Additional legislation[2] provided $30,000 yearly for the 1938-39 biennium and subsequent appropriations have been made for each year since that time. Increasing demand has resulted in constantly increasing appropriations and disbursements. The 1954 appropriation was $200,000, with disbursements estimated to be $244,000. The total amount appropriated by the General Assembly for this purpose from 1936 to 1953, inclusive, is $995,000 with $1,269,745 disbursements during the same period — the difference having been made up from supplemental appropriations. The highest number of persons receiving grants was in 1953, with 907 recipients, divided among 76 out-of-state institutions. From the above data, the State appears to have been most generous in its provisions for higher education for Negroes.

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[1] Acts of 1935, Ch. 92.
[2] Acts of 1937, Ch. 506, . . . (Article 49B).

III. Table 1.

Enrollment in Maryland Public Schools: By Color, September 1953

County	All Pupils	White	Per Cent	Colored	Per Cent
Total State	409,570	325,910	79.6	83,660	20.4
Baltimore City	125,266	79,127	63.2	46,139	36.8
Total Counties	284,304	246,783	86.8	37,521	13.2
Allegany	15,837	15,553	98.2	284	1.8
Anne Arundel	24,396	19,663	80.2	4,733	19.8
Baltimore	52,341	48,520	92.7	3,821	7.3
Calvert	3,172	1,594	50.3	1,578	49.7
Caroline	3,869	2,976	76.9	893	23.1
Carroll	8,763	8,311	94.8	452	5.2
Cecil	7,164	6,695	93.5	469	6.5
Charles	5,759	3,197	55.5	2,562	44.5
Dorchester	5,249	3,607	68.7	1,642	31.3
Frederick	11,533	10,458	90.7	1,075	9.3
Garrett	4,518	4,518	100.	—	—
Harford	11,924	10,658	89.4	1,266	10.6
Howard	5,037	4,053	80.5	984	19.5
Kent	2,835	2,013	71.1	822	28.9
Montgomery	37,362	34,860	93.3	2,502	6.7
Prince George's	42,223	36,468	86.4	5,755	13.6
Queen Anne	3,086	2,238	72.5	848	27.5
St. Mary's	3,886	2,734	70.3	1,152	29.7
Somerset	3,945	2,337	59.2	1,608	40.8
Talbot	3,767	2,582	68.5	1,185	31.5
Washington	15,531	15,205	97.9	326	2.1
Wicomico	7,491	5,607	74.9	1,884	25.1
Worcester	4,616	2,936	63.6	1,680	36.4

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III. Table 1-A.

Summary Distribution

Percentage Distribution Colored Enrollment	*No. of Counties*	*Baltimore City*
0- 9.9%	8	----
10.0-19.9	4	----
20.0-29.9	5	----
30.0-39.9	3	1
40.0-49.9	3	----
Total	23	1

III. Table 2.

Maryland Public Schools

Average Salary Per Teacher:

By Color 1923-1953*

Year Ending June 30	Elementary Schools		High Schools	
	White	*Colored*	*White*	*Colored*
1923	$1,228	$ 899	$1,690	$1,455
1933	1,401	1,056	1,710	1,197
1943	1,724	1,634	1,968	1,905
1953	3,856	4,017	4,031	3,963

* For purposes of brevity, the data in these tables have been condensed to cover a 30-year period by decades only. All data in this report are from the Annual Reports or other sources on file in the Maryland State Department of Education, unless otherwise indicated.

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III. Table 3.

Maryland Public Schools

Average Days in Session: By Color 1923-1953

Year Ending June 30	Total State				Baltimore City				All Counties			
	Elementary		High		Elementary		High		Elementary		High	
	White	Col.	White	Col.	White	Col.	White	Col.	White	Col.	White	Col.
1923	187.3	172.4	186	181.1	188.9	189.1	184	184	186.4	162.5	187	171.5
1933	188	178.4	186.9	181.3	190	190	188	189.5	187.7	167.8	186.4	173
1943	184	185	186	185	188	188	188	188	183	184	183	181
1953	182.4	183.1	182.8	183	184	184	184	184	181.8	182	182.5	182.1

III. Table 4.

Number and Per Cent of Pupils Transported at Public Expense — Maryland Counties: By Color 1923-1953

Year Ending June 30	Elementary				High			
	White		Colored		White		Colored	
	No.	%	No.	%	No.	%	No.	%
1923	3,485	3.	133	1.	843	6.	—	—
1933	28,750	26.5	847	3.	10,209	33.7	502	19.
1943	45,733	42.	6,591	29.	18,804	49.	3,583	69.
1953	68,070	48.1	13,240	57.	54,060	63.7	9,649	73.5

III. Table 5.

Reduction in Number of One-Teacher Schools in Maryland Counties 1923-1953

Year Ending June 30	Total Number Elementary Schools		Number of One-Teacher Schools	
	White	Colored	White	Colored
1923	1,619	521	1,093	403
1933	901	489	406	334
1943	565	298	143	132
1953	498	182	33	26

III. Table 6.

Maryland Public Schools

High School Graduates: By Color 1923-53

Year Ending June 30	All Counties		Baltimore City	
	White	Colored	White	Colored
1923	1,953	24	(Not available)	
1933	4,921	297	2,381	661
1943	6,731	664	2,501	453
1953	8,609	1,086	2,835	826

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III. Table 7.

Maryland Public Schools

Current Expense Cost Per Pupil: By Color 1923-53

Year Ending June 30	State Average			
	Elementary		High	
	White	Colored	White	Colored
1923	$ 49.69	$ 30.68	$102.25	$ 94.35
1933	52.91	36.84	86.10	61.16
1943	65.23	57.72	113.43	103.15
1953	184.61	185.72	264.11	239.85

III. Table 8.

Maryland Public Schools

Average Number of Pupils Per Teacher: By Color 1923-53

Year Ending June 30	Elementary				High			
	All Counties		Baltimore City		All Counties		Baltimore City	
	White	Colored	White	Colored	White	Colored	White	Colored
1923	31.7	38.3	—	—	20.	15.2	—	—
1933	36.2	34.9	34.5	38.3	24.6	26.7	26.5	29.7
1943	36.8	36.3	32.	34.7	23.	25.4	21.	20.9
1953	31.4	32.	32.3	33.5	21.6	21.2	20.9	26.3

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IV.

Table (a)

Maryland Population by Counties and Races

1950

County	*Total*	*White*	*Negro*	*% White*	*% Negro*
Allegany	89,540	88,308	1,232	98.63	1.37
Anne Arundel	117,239	94,800	22,439	80.87	19.13
Baltimore County	270,124	252,247	17,877	93.39	6.61
Calvert	12,096	6,972	5,124	57.64	42.36
Caroline	18,234	14,782	3,452	81.07	18.93
Carroll	44,891	42,850	2,041	95.46	4.54
Cecil	33,348	30,742	2,606	92.19	7.81
Charles	23,406	15,190	8,216	64.90	35.10
Dorchester	27,802	20,112	7,690	72.35	27.65
Frederick	62,271	57,979	4,292	93.11	6.89
Garrett	21,258	21,249	9	99.996	.004
Harford	51,741	46,293	5,448	89.48	10.52
Howard	23,105	19,247	3,858	83.31	16.69
Kent	13,671	10,110	3,561	73.96	26.04
Montgomery	164,134	153,804	10,330	93.71	6.29
Prince George's	193,899	171,247	22,652	88.32	11.68
Queen Anne	14,576	10,708	3,868	73.47	26.53
St. Mary's	29,073	23,129	5,944	79.56	20.44
Somerset	20,742	13,416	7,326	64.69	35.31
Talbot	19,418	14,154	5,264	72.90	27.10
Washington	78,869	76,691	2,178	97.24	2.76
Wicomico	39,624	31,252	8,372	78.88	21.12
Worcester	23,142	16,048	7,094	69.35	30.65
Baltimore City	948,754	723,655	225,099	76.28	23.72

Table (b)

Number and Percentage

White and Negro School Population in Counties of Maryland — June 30, 1954

County	*Total School Population*	*White*	*Negro*	*% White*	*% Negro*
Allegany	15,480	15,207	280	98.24	1.76
Anne Arundel	24,231	19,449	4,782	80.26	19.74
Baltimore	51,888	48,272	3,616	93.03	6.97
Calvert	3,075	1,530	1,545	49.76	50.24
Caroline	3,805	2,949	856	77.50	22.50
Carroll	8,635	8,198	437	94.94	5.06
Cecil	7,029	6,567	462	93.43	6.57
Charles	5,660	3,121	2,539	55.14	44.86
Dorchester	5,153	3,522	1,631	68.35	31.65
Frederick	11,497	10,427	1,070	90.69	9.31
Garrett	4,434	4,434	0	100.00	0.00
Harford	13,234	11,930	1,304	90.15	9.85
Howard	4,960	4,007	953	80.79	19.21
Kent	2,773	1,965	808	70.86	29.14
Montgomery	42,561*	39,838	2,723	93.60	6.40
Prince George's	41,650	35,966	5,684	86.32	13.68
Queen Anne	3,246	2,351	895	72.43	27.57
St. Mary's	3,852	2,660	1,192	68.76	31.24
Somerset	3,883	2,309	1,574	59.46	40.54
Talbot	3,714	2,534	1,180	68.23	31.77
Washington	15,746	15,439	307	98.05	1.95
Wicomico	7,347	5,524	1,823	75.19	24.81
Worcester	4,474	2,859	1,615	63.91	36.09

* Plus 444 White Students in Jr. College.
60 Negro Students in Jr. College.

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TABLE (c)

WHITE AND NEGRO SCHOOL POPULATION IN THE COUNTIES OF MARYLAND — JUNE 30, 1954

(Elementary — Secondary)

County	*Population*	*White E*	*White S*	*Negro E*	*Negro S*
Allegany	15,487	8,370	6,837	163	117
Anne Arundel	24,231	12,998	6,451	3,094	1,688
Baltimore	51,888	31,283	16,932	2,262	1,354
Calvert	3,075	947	583	1,103	442
Caroline	3,805	1,771	1,178	536	320
Carroll	8,635	4,973	3,225	256	181
Cecil	7,029	4,303	2,264	280	182
Charles	5,660	1,942	1,179	1,671	868
Dorchester	5,153	2,122	1,400	1,016	615
Frederick	11,497	6,242	4,185	697	373
Garrett	4,434	2,715	1,719	0	0
Harford	13,234	8,100	3,830	766	538
Howard	4,960	2,485	1,522	587	366
Kent	2,773	1,197	768	505	303
Montgomery	42,561*	23,715	11,362	1,635	870
Prince George's	41,650	23,693	12,273	3,660	2,024
Queen Anne	3,246	1,378	973	523	372
St. Mary's	3,852	1,755	905	791	401
Somerset	3,883	1,435	874	964	583
Talbot	3,714	1,496	1,038	750	430
Washington	15,746	8,889	5,986	172	135
Wicomico	7,347	3,901	1,623	1,237	586
Worcester	4,474	1,716	1,143	1,066	549

* Plus 444 white students in junior college and 60 colored students in junior college.

Table (d)

County	*Total Teaching Personnel*	*White*	*Negro*	*% White*	*% Negro*
Allegany	606	595	11	98.2	1.8
Anne Arundel	882	719.8	162.2	81.6	18.4
Baltimore	1,877	1,725	152	91.9	8.1
Calvert	121	62	59	51.2	48.8
Caroline	163	126	37	77.3	22.7
Carroll	346	328	18	94.8	5.2
Cecil	292	275	17	94.2	5.8
Charles	231	132	99	57.1	42.9
Dorchester	203	147	56	72.5	27.5
Frederick	394.6	359.1	35.5	91.0	9.0
Garrett	175	175	0	100	0
Harford	405	360	45	88.9	11.1
Howard	217	177	40	81.6	18.4
Kent	119.5	85	34.5	71.1	28.9
Montgomery	1,700.5	1,571	129.5	92.4	7.6
Prince George's	1,530	1,312	218	85.8	14.2
Queen Anne's	137	101	36	73.7	26.3
St. Mary's	144	101	43	70.1	29.9
Somerset	162	101	61	62.3	37.7
Talbot	152.5	105	47.5	68.8	31.2
Washington	611	596	15	97.5	2.5
Wicomico	252	185	67	73.4	26.6
Worcester	182	121	61	66.5	33.5

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Table (e)

County	*Total School Buildings*	*White Elementary*	*White Secondary*	*Negro Elementary*	*Negro Secondary*
Allegany	34	25	7	1	1
Anne Arundel	63	34	8	20	1
Baltimore	77	49	13	12	3
Calvert	17	6	2	8	1
Caroline	13	4	5	3	1
Carroll	19	8	9	1	1
Cecil	30	19	8	2	1
Charles	24	6	5	11	2
Dorchester	33	17	6	9	1
Frederick	37	22	7	7	1
Garrett	31	29	2	0	0
Harford	25	17	4	2	2
Howard	16	6	5	4	1
Kent	18	8	3	6	1
Montgomery	85*	62	13	8	2
Prince George's	95	58	13	19	5
Queen Anne's	15	9	3	2	1
St. Mary's	20	9	2	7	2
Somerset	22	7	5	8	2
Talbot	21	9	2	9	1
Washington	50	38	10	1	1
Wicomico	26	15	1	9	1
Worcester	20	6	6	7	1

* Plus two junior high schools (1 white, 1 negro).

TABLE (f)

DATA ON SCHOOL BUS VEHICLES AVAILABLE FOR TRANSPORTATION OF WHITE AND NEGRO PUPILS

County	Buses For White		Buses For Negro		Total No. Buses	No. Negro Drivers % White Buses
	No.	%	No.	%		
Allegany	98	99.0	1	1.00	99	0
Anne Arundel	84	75.0	28	25.0	112	0
Baltimore	213	91.4	20	8.6	232	2
Calvert	22	59.5	15	40.5	37	0
Caroline	32	74.4	11	25.6	43	0
Carroll	60	90.9	6	9.1	66	1
Cecil	47	83.9	9	16.1	56	1
Charles	37	47.8	27	42.2	64	0
Dorchester	40	70.2	17	29.8	57	0
Frederick	90	89.1	11	10.9	101	0
Garrett	90	100	0	0	90	0
Harford	89	84.8	16	15.2	105	5
Howard	36	80.0	9	20.0	45	3
Kent	23	65.7	12	34.3	35	0
Montgomery	101	77.1	30	22.9	131	0
Prince George's	111	75.5	36	24.5	147	0
Queen Anne's	27	73.0	10	27.0	37	0
St. Mary's	28	65.1	15	34.9	43	0
Somerset	30	63.8	17	36.2	47	0
Talbot	24	70.6	10	29.4	34	0
Washington	88	97.8	2	2.2	90	0
Wicomico	45	73.8	16	26.2	61	0
Worcester	37	62.7	22	37.3	59	0

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Table (g)

School Personnel

(Superintendent and Staff)

County	*White*	*Negro*	*Total*	*No. of Negro Supervisors*	*No. of Negro V.T.'s*
Allegany	17	0	17	—	—
Anne Arundel	28	2	30	1	1
Baltimore	61	3	64	2	1
Calvert	3	1	4	1	—
Caroline	4	1	5	1	—
Carroll	9	1	10	1	—
Cecil	7	0	7	—	—
Charles	5	3	8	2	1
Dorchester	4	1	5	1	—
Frederick	8	1	9	1	—
Garrett	6	0	6	—	—
Harford	13	0	13	—	—
Howard	5	1	6	1	—
Kent	4	1	5	1	—
Montgomery	72	1	73	1	—
Prince George's	36	3	39	2	1
Queen Anne's	4	1	5	1	—
St. Mary's	5	1	6	1	—
Somerset	4	1	5	1	—
Talbot	4	½	4.5	½	—
Washington	19	0	19	0	—
Wicomico	7	1	8	1	—
Worcester	5	1	6	1	—

V(a)

DATA RELATING TO DESEGREGATION OF THE SCHOOLS IN THE CITY OF BALTIMORE

DEPARTMENT OF EDUCATION
Administration Building
Three East Twenty-Fifth Street
Baltimore 18, Maryland

Office of
The Superintendent

July 2, 1954

Mr. W. Giles Parker
Deputy Attorney General
Mathieson Building
Baltimore, Maryland

Dear Mr. Parker:

I am sending you herewith copies of several documents which have been developed in the Baltimore Public Schools to deal with the elimination of racial segregation. These include: the opinion of the City Solicitor of Baltimore, the initial statement of policy by the Board of School Commissioners, the administrative directive approved by the Board following its adoption of the policy statement, the address of the Superintendent to the teaching force, and an administrative circular concerning the handling of applications for pupil transfers.

You will note that there is no plan to reorganize the Baltimore School System. It is, rather, our basic assumption that we shall continue to operate very largely as we have in the past except that the race of a pupil will have no bearing upon any decision made affecting him. We shall take no action deliberately to integrate any school because we believe that it would be as wrong to use pupils as the means of bringing about integrated schools as it would be to use them to create segregated units.

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At the staff level we shall make no reassignments for racial purposes. As vacancies are filled, selections will be made in each case from the five persons standing highest on the appropriate eligible list. In determining which of the five persons is to be assigned to a given vacancy the specific requirements of the situation and the total qualifications of the candidate will be taken into account.

We have in Baltimore several major assets which should contribute to a smooth transition. For many years our Board has dealt equally with white and Negro schools regarding construction, maintenance, supplies, teacher qualifications, and all of the other elements affecting quality of education. Negro and white staff members have worked together in committees, workshops, and other staff activities. Pupils of both races have visited each others schools and have participated in an increasing number of joint activities.

Baltimore has never followed a rigid districting practice. Of our 175 units, only approximately 35 are districted. Each one of these is a crowded school, about which a boundary has been fixed to prevent its further over-crowding. In such cases pupils living within the boundaries have the right to attend a districted school but are not required to do so. Those who live outside the boundary are not allowed to enter the districted school. In general, any pupil is free to attend any school in the city for which he is qualified. None of our senior high schools and only one junior high school is currently districted.

I trust that I have given you the sort of information you desire but if you have any further questions I shall do my best to answer them for you.

Sincerely yours,

JOHN H. FISCHER,
Superintendent.

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V(b)

CITY SOLICITOR'S OFFICE

June 1, 1954

Board of School Commissioners
3 East 25th Street
Baltimore 18, Maryland
Attention: Mr. Walter Sondheim, Jr.

Gentlemen:

This will acknowledge receipt of your letter of May 25, 1954, making inquiry relative to the legal effect upon the duties and obligations of the Board of School Commissioners, of the recent Supreme Court decision regarding segregation of children in public schools on the basis of race.

As you know, Article 32, section 22, of the Baltimore City Code specifically sets forth the Board's duties on this regard, as follows:

> "It is hereby made the duty of the Board of School Commissioners of the City of Baltimore to organize separate schools for colored children, and to establish as many schools for the education of the colored children of Baltimore City as may in the judgment of said board be necessary."

It is the opinion of this Office that the Supreme Court, by its decision, has determined that segregation in education, as provided for by Article 32, section 22, of the Baltimore City Code, is in deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment, and is, consequently, unconstitutional and invalid.

Very truly yours,

THOMAS N. BIDDISON,
City Solicitor.

V(c)

RESOLUTION OF BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY

Adopted at Board Meeting — June 3, 1954

In view of the decision of the Supreme Court regarding segregation in our public schools, and in view of an opinion given us by the Baltimore City Solicitor dated June 1, 1954, it is the opinion of this Board that our system should be conformed to a non-segregated basis to be in effect by the opening of schools in September of this year.

In doing so, we would ask our staff to prepare material outlining the practical steps to be taken and that this material be presented at our next meeting.

V(d)

BALTIMORE-18, MARYLAND

DEPARTMENT OF EDUCATION

Office of
The Superintendent of Public Instruction

June 10, 1954

To the Board of School Commissioners:

Ladies and Gentlemen:

In view of the policy on the elimination of racial segregation in the Baltimore Public Schools enunciated by the School Board on June 3rd, the Board of Superintendents presents the following recommendations to implement that policy:

1. All of the standards and criteria which are now in force with respect to the admission of pupils to schools, grades, or curricula shall continue in force except that the race of the pupil shall not be a consideration.

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The present policy of the school system with respect to pupil transfers shall be continued. Under this policy, transfers because of changes of residence are routinely approved. Transfers for other reasons may be approved by the two principals involved or by the appropriate Assistant Superintendent.

2. As in the past, no child shall be required to attend any particular school. Baltimore has never adopted a districting policy which requires such attendance. There is to be no change in the present rule of the School Board for establishing school districts. This rule says, in effect, that where a building is overcrowded, specific district lines may be established as required by building capacity and neighborhood population. No pupil who lives beyond such a line may then enter the districted school. All pupils enrolled in any school prior to the establishment of a district line about that school are permitted to remain there.

   On the other hand, any pupil who lives within such a district and whose parents desire him to attend a more distant school may be admitted to that school if it is not districted and if the reason for seeking a transfer is considered satisfactory. As population increases occur, it may become necessary in the future, as it has in the past, to district additional schools.

3. In the assignment, promotion, and transfer of staff members, the present policy of respecting relative merit shall be scrupulously observed. As in the past, it shall be the purpose of the Department of Education to assign each employee to that position in which he is likely to render his best service to the school and to the community. No person shall be denied any opportunity because of his race.

Respectfully submitted,

JOHN H. FISCHER,

Superintendent.

V(e)

ADDRESS TO THE TEACHERS OF THE BALTIMORE PUBLIC SCHOOLS BY DR. JOHN H. FISCHER, SUPERINTENDENT

June 14-15, 1954

My fellow teachers:

Only the most urgent reason could justify calling you to an extra meeting in this busy final week of the school year. I think you will agree that what brings us here today is of the greatest importance. What I want to discuss with you is the recent action of our Board of School Commissioners eliminating racial segregation in the Baltimore Public Schools at the beginning of the next school year.

It would be better for us to talk about this in a conversational fashion, but the size of our staff denies us that pleasure here. I have no alternative, therefore, but to lay before you some of the major implications of this action for us as teachers, and to invite you to discuss the subject freely among yourselves in your respective schools, or with any of us on the central staff.

Without fear and without subterfuge our Board has met its responsibility. Paraphrasing the words of Robert E. Lee, we cannot now do more than our duty, we shall not want to do less.

The cases in which the Supreme Court handed down its historic decision of May 17 were before the Court for about two years. There was much speculation, as you well know, upon the probable decision and yet it appears extremely doubtful that any student of American history or culture could have been truly surprised when the decision was finally read.

What happened in Washington on the 17th of May 1954 was not unusual for America. The whole course of our history as a nation is marked by such actions, actions which one by one have destroyed barriers that stood between the ordinary man and a richer life. Those of you who know the

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history of democracy will recall how the prophets of doom warned against every one of these forward steps. In advance of each one, our ancestors were assured by the viewers-with-alarm that it would undoubtedly lead to the most awful consequences. And each time a strengthened people proved them wrong.

It was so when each shipload of optimists set sail for the New World.

It was so when we determined to separate our colonies from the British crown.

It was so when property qualifications upon voting were removed.

It was so when manhood sufferage was adapted, when child labor was outlawed, when compulsory school attendance was instituted, when slavery was abolished.

And always there have been the satisfied sustainers of the status quo.

In this present instance they are represented by those of both races who say, "But why should we not continue to provide equal separate education? After all, have we not done quite well under that doctrine?"

Listen, if you will, to the words of Court; a court frequently divided in its decisions, but in this one, unanimously decisive.

> "In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the nation.
>
> "Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the im-

portance of education in our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms
* * *

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

"Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

In an editorial published the day after the decision, the *New York Times* pointed out that the Constitution and the Bill of Rights can be hard masters. What the *Times* might have added is that these are masters of our own creation. From our earliest days as a nation we have set down from

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time to time in historic documents the high principles by which we mean to govern ourselves. Often these statements have run ahead of our usual behaviour but they remain our deliberately established goals and our own freely chosen standards.

It is when we become aware that our daily conduct is inconsistent with these statements of purpose that we begin to rise above our past. It is on these occasions that the American dream comes more nearly true for more Americans.

In one of these pivotal chapters of American history we are now privileged to become active participants. To a greater degree than most historic events the abolition of segregation in public schools will affect the daily lives of individuals. Because it has to do with long-established patterns of association, it will raise questions with emotional overtones. To ignore these aspects of the problem would be unwise and irresponsible.

Being teachers and, therefore, students of human behaviour we need to understand these things, and being human, we must view our own attitudes with as much objectivity as we can muster. As instructors of children and leaders of community thought, we must be sensitive to the anxieties which exist, and we should prepare ourselves to be of the greatest possible assistance in clarifying misunderstandings and providing reassurance.

Let me review some of the questions that are being asked, and let me give you such information as I can bearing upon them.

1. Will the school system be reorganized to integrate all schools?

The answer to that question is "No". There will be no such reorganization. All of our present policies for admitting or transferring pupils will remain in full effect, except that no child shall be denied entry to any school or

class because of his race. The designation of white and Negro schools will, of course, be discontinued, because every school will now receive children of both races. But no effort will be made deliberately to transfer children of either race for the purpose of "mixing" schools. We have had the last of placing children anywhere for racial reasons. Hereafter every child will be dealt with strictly on the basis of his educational requirements and in terms of his best development.

The Division of Colored Schools will cease to exist, but no one now associated with that Division will suffer any loss of status because of this administrative change.

2. Will there be a large number of pupil transfers in September?

There should not be. Because of the long-standing policy of our Board and our City Government, Negro and white schools in Baltimore are operated according to equal standards. In the construction of buildings and their maintenance, in the professional examination of teachers, in the allocation of funds for books and supplies there have been no racial distinctions.

It is no secret that we have many crowded schools, or that most Baltimore children attend school in buildings that are about as old as the homes in which they live. But this statement applies to children of both races. Where a nearby school offers advantages to any pupil, white or Negro, over the school he now attends, and the parent requests a transfer, the request should be granted. But only in rare instances should a young child be sent far from his home to another school.

At the secondary or vocational level, distance is less important, but in such cases a pupil in the middle of a three year program should be transferred only where it is clearly advisable for him to do so.

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3. Will teachers or other staff members be discharged as a result of the new policy?

Again, the answer is "No." As in the past, vacancies which occur in the future will be filled with a scrupulous regard for relative merit. There will be one eligible list for each type of position. Whenever a vacancy occurs, one of the applicants of the five standing highest on the list will be selected for employment. As in the past specific requirements of the position and the total qualifications of each available candidate will determine who is assigned. Whether we are dealing with teaching positions filled by transfer or initial placement, or promotional positions filled by selection by the Board of Superintendents, no one will be discriminated against because of his race. Nor will his race entitle anyone to preferment over another who is better qualified.

4. Will children be required to attend particular schools?

No, and again I refer to our present policy. Baltimore does not insist that any child attend the school in whose district he lives. Of our 175 school units only about 25 or 30 which are badly crowded are districted. In these cases, children living within a prescribed area have the right to attend the districted school and others are excluded. But if a child living in any district wishes to attend elsewhere, he may do so if the school of his choice is not itself districted and if there is a good reason for transferring.

No secondary school except Garrison Junior High School is now districted and every other one is accordingly available to any qualified student.

As population changes occur additional schools may have to be districted, and if this happens, the regular policy will apply. No child will be deliberately assigned to any school because of his race.

5. The question perhaps most frequently asked is, "Will it work?"

The only guide we can have for the future is our experience of the past.

At the staff level we have been working for many years in groups assembled without regard to race. In workshops, in committees, in staff conferences of all kinds we have helped and complemented each other. In the Public School Teachers Association, the Teachers Union, the Principals Association, integration has been the pattern for many years. In our staff we know it has worked.

In many of our schools Negro and white pupils have visited each other to exchange assembly programs, to engage in debates, to discuss common problems. This has worked.

For several years, the Junior Red Cross has conducted summer workshops in which white and Negro pupils have worked and played side by side with pleasure and profit. This has worked.

Here at Poly Negro boys were admitted to the "A" Course in 1952. The faculty and student body decided at the outset that there would be in this school only one class of boy — the Poly boy. The Negro students, now some 40 of them, participate in every phase of school life. Has it worked? The first boy is scheduled to graduate next June. You might ask him or his white classmates who refer to him as a "good guy".

In our adult education program for a number of years, without headlines or fanfare, Negro and white students have studied in the same classes and within the month, in this very building we have organized an adult center in which the faculty and the student body both include white and Negro members, in about the same proportions as our total school population. And this is working so well that the viewers-with-alarm couldn't have been more wrong.

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But, some say, what about the parents? How will they react? Since 1947 when our Coordinating Council of Parent Teacher Organizations was formed, it has been a unified group. Established on the basis of councilmanic districts, the executive board of the Council has included every year men and women of both races. Has it worked? The record of the Council's accomplishments is proof enough of its success.

Will it work? Review, if you please, every activity of our school system for the past fifteen or more years in which Negro and white children, adult students, or staff members have been associated. You will discover that, without exception, every one has succeeded.

In response to such facts as I have given, some will say that these experiences have occurred on too small a scale to be conclusive. They may not represent the general reaction. Many of us think that, on the contrary, these experiences do in truth represent the general reaction of pupils, teachers and parents. There is abundant evidence that good will and good sense are widely distributed among our people and that those qualities are characteristic of both our races.

To be sure, there are a few white persons who see no good in any Negro and a scattering of Negroes who look with distaste or distrust on every white person. Such people are a small minority among us. Both their number and their influence are happily on the decline. I doubt that there are any in our teaching staff. Certain it is that such people would feel uncomfortable and unwelcome in this group.

Jacques Barzun in his delightful new book, "God's Country and Mine" says, "The first thing that democracy must be is inclusive." We may add that he who would serve as a teacher in a democracy must be broadly inclusive not only in his sympathy but in his appreciation of the good in all manner of men.

When our schools face such a mission as the one we are now assigned, I value more than ever the knowledge that

ours is a great army of volunteers. Of our own choice we have enlisted to serve all our people and the cause of education. We are, therefore, entitled to share the quiet pride that only the volunteer may feel.

We are in many ways a fortunate group. We teachers enjoy priceless blessings, despite whatever problems we face. Ours is a happy task for every day we deal with youth and growth and enlightenment. All that we do is founded upon faith and hope and love. The love of truth, the love of learning, the love of children, these are great forces with which to work.

There is no doubt that the world could be transformed if only their power could be fully unleashed. More than most men and women, we are in a position to use that power.

Walter Hines Page was thinking in this vein a half century ago when at a Normal School Commencement in Athens, Georgia, he said:

> "It is a shining day in any educated man's growth when he comes to see and to know and to feel and freely to admit that it is just as important to the world that the child of his neighbor should be trained as it is that his own child should be. Until a man sees this he cannot become a worthy democrat nor get a patriotic conception of education; for no man has known the deep meaning of democracy or felt either its obligation or its lift till he has seen this truth clearly."

There are many reasons why I take pride in my twenty-four years of membership in this staff. And the response which so many of you are making wholeheartedly and voluntarily to the enormous new responsibility now placed upon you has added to this sense of great privilege which I feel. I know that in many faculties plans are being made to receive graciously new pupils and staff members of the race not now represented in your school. By chance on Friday, I saw a copy of a letter addressed by the principal

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of one of our schools to his faculty. This happens to be a white school, No. 10-10A, and the principal is Mr. James Carroll. But the tone of the message so well reflects the spirit of our entire system that I want to read it to you and with it to conclude my remarks and this meeting—

"It is probable the addition of Negro teachers and pupils to this school will be an established fact next September.

The adjustment problem may well be a simple one if you prepare yourself and your class for the change. Knowing all of you as I do, I am certain the problem will be simple with us.

For my part, I shall receive every teacher and every pupil on terms of perfect equality.

I shall give the Negro teacher or the Negro child no special favors because of his color, nor shall I withhold any privilege or right from him because he is Negro.

I shall remember that the same God made both of us — that he put my mind inside a white skin — that except for the accident of birth my mind might well have been covered by a colored skin and the mind of my new helper or pupil might have been placed inside the white skin.

My stepson found the Negro boys who fought in Korea beside him to be first-class fighting men who neither asked for nor received special favors. He learned that the colored skin received enemy bullets with the same bravery that the white skin received them.

The tax collector accepts (demands) money from the colored hand as from the white.

Segregation in the schools has ended. Let us make the transition in this school a smooth transition. Let us be proud of ourselves next June."

VI.

THE WEST RIVER PROCLAMATION

Being very deeply concerned with the results of the recent Supreme Court opinion on the conduct of education by the states, we, the parents and teachers of Owensville Elementary and Southern High Schools have assembled and given due consideration to our rights and responsibilities in the operation of public schools. Being citizens of the free and sovereign state of Maryland and being conscious of its great tradition of tolerance for the diverse religious faiths, political creeds, and natural races of mankind, we petition the State government to continue to respect the rights reserved to the people of the Federal and State Constitutions. We believe, as our ancestors proclaimed in 1776, that all men are created equal, that they are endowed with certain inalienable rights, that to secure these rights governments are instituted among men deriving their just powers only from the consent of the governed, and that among our rights is a direct voice in the education of our children.

Upon these timeless truths we base our firm resolutions as follows:

1. That any action taken in this state in consequence of the recent opinion of the Supreme Court should be based only upon due process of state law sanctioned by the people through referendum, and not merely upon arbitrary action of temporary office holders or appointed commissions.

2. That in order to assure equal protection of the law to each race and to prevent development of an inferiority complex in any child, no child should be compelled to undertake public education under instructors not of his own race without consent of his parents or guardians.

3. That the administration of free schools should be conducted on the principle of maximum local control with the objective of the greatest satisfaction to all participating students, subordinating neither the majority to the minority nor the minority to the majority.

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4. That to accomplish these objectives it is essential to give local populations a direct voice in the selection of their own Boards of Education and their school trustees, and that these locally designated representatives should retain the authority to establish equitable administrative policies for selection of instructors and for admission to the various schools in their responsibility and to make plans for necessary expansion and assignment of facilities.

We earnestly solicit the adoption of these sincere resolutions, which we henceforth will identify as the "West River Proclamation," by every fair-minded organization interested in public education in the free state of Maryland.

Formally Approved By:

Southern High School P. T. A. on August 11, 1954

Owensville School P. T. A. on August 19, 1954

Subsequently endorsed by other
Anne Arundel County Public School P. T. A.

VII.

PETITION CIRCULATED BY THE "MARYLAND PETITION COMMITTEE"

STATE-WIDE PETITION COLLECTED IN .... COUNTY

We, the undersigned citizens of the State of Maryland, being residents of voting age, do consider the ruling of the U. S. Supreme Court on May 17, 1954, against race segregation in public schools as an invasion and violation of our individual rights under a sovereign state. We believe that the heritage of our race is the one gift received from our ancestors which we may with surety transmit to our children. We believe that this God given heritage should not be taken from us by any human law or decision. We believe that it is the duty of judicial, legislative and executive agencies to protect this heritage, not to move for its destruction. We believe that the abolition of segregation in

our schools strikes through our children, at the survival of our race, because it deprives them of protection which they need until they develop adult judgment.

We, therefore, do petition the government of the State of Maryland to make provision for the establishment of a system of private schools for any group or groups which may wish to protect the continued existence of its own race; and make provision that any citizen who subscribes to the support of such a school shall be entitled to and, in fact, shall receive a rebatement of, or a freedom from all taxes collected or to be collected from him, henceforth, for all purposes of public instruction.

Joined together in this common cause, one to another, we are in full belief that our Constitution grants us the right to withdraw our children from the public schools at any time the aforementioned privileges are denied us by the State of Maryland. By affixing our signatures we do witness that we have never, nor do we intend to ever become a member of any organization advocating the overthrow of the government of the United States of America by force or violence.

NAME (SIGNATURE) MAILING ADDRESS

.....

.....

VIII(a)

MORGAN STATE COLLEGE
Baltimore 12, Maryland

June 21, 1954

To the Superintendents of Maryland Schools

The principals, supervisors and presidents of the Negro schools and colleges of the State met in a conference at Morgan State College on June 19 to consider how they might contribute to a smooth and orderly adjustment of

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our public school system to the recent decision of the Supreme Court of the United States.

The attached statement was adopted by the conference. It is hoped that you will find this statement helpful in the formulation of plans and procedures in your county.

I am also enclosing two of the papers read at the conference. In addition to the value of their content, these papers will convey to you the basic approach of the conference.

Cordially,

Martin D. Jenkins,

President of Morgan State College
and Chairman of the Conference.

cc: Boards of Education

VIII(b)

A STATEMENT ADOPTED BY THE CONFERENCE ON PUBLIC SCHOOL INTEGRATION IN MARYLAND

June 19, 1954

The Supreme Court of the United States has rendered the decision that segregation in public education is in violation of our national constitution. The principals, supervisors and presidents of Negro schools in Maryland recognize that no other decision was possible if the enduring and universal principles enunciated in our constitution were followed to the ultimate. And because we believe that this is the beginning of a new era of human relations in this state, citizens of Maryland have had their faith and belief in democracy strengthened. Each in his own way, Negro and white, will now have the opportunity to contribute to the good of society in terms of individual qualifications.

We recognize that the transfer from a dual system to a democratically organized system may give rise to many

problems of adjustment. This conference goes on record as pledging Negro educational leaders to unstinted effort to make democracy work at this time. We believe that the leaders represented at this conference will take immediate steps to prepare the general public, teachers, administrators and pupils for integrated schools. We believe, further, that all the other educational leaders of the state will want us to stand shoulder to shoulder with them in a cooperative effort to meet this situation in a democratic way. We ask only an opportunity to serve the common good.

This conference commends the educational leaders of our state for the forthright position taken looking toward implementation of the Court's decision.

We commend the educational leaders of Baltimore City for their immediate implementation of the Supreme Court's decision. We likewise commend the State Superintendent of Schools and the State Board of Education for the unequivocal statement of intent to conform to the mandate of the Supreme Court.

Excerpts from the statement of the State Superintendent and the State Board of Education follow.

> The Supreme Court of the land has spoken. It is the duty and responsibility of the State Board of Education to do all within its power to work out the problem "seemingly and in order" and in such manner that the rights and privileges of no individual are impaired by arbitrary or capricious methods * * *
>
> The detailed problem in respect to implementing the decision of the Supreme Court will rest primarily upon the local boards of education. The problems involved in any program of integration will vary among the different school systems of the State, but we are confident that they will be solved in a fair, decent, and legal manner and with good common sense. Furthermore, we are confident that the local school boards, the local school officials, and the parents will settle this problem

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without resorting to chicanery or devious methods and with due regard for the rights of all parties concerned. Any program of implementation will be based upon professional and human considerations and not with coercive designs or methods. The public school system of Maryland has always been known for its high professional attitude and for its unbiased and unprejudiced treatment of all children.

The role of the State Board of Education is not to set the detailed pattern of operation but to take an official position that the decision will be implemented with fairness and justice to all, and with due regard for the professional aspects of the program. Further, its responsibility is to act in a general over-all supervisory nature to insure that standard, equitable practices are followed throughout the State.

In view of expressed positions of the highest governing boards in the public schools of the State, this conference enunciates several assumptions which we believe will underlie any and all decisions in any and all educational subdivisions of the state.

1. We assume the Board of Education of each county will adopt and announce a policy with respect to the integration of public schools which will make clear the determination that the schools shall be organized and administered without regard to race of pupils, teachers and administrative officers and non-teaching personnel.

2. We assume and believe that Negro citizens will be called to committee work designed to lay plans for the integration of schools. We believe that Negro leaders should participate in planning from the outset and to assist in formulating calm, logical approaches which may be made at this time.

3. We assume that in each county specific plans will be made for preparing teachers and administrative personnel, both white and Negro, for integrated schools.

We believe there are many negative factors, emotional and attitudinal, which can be eliminated through careful planning and preparation.

4. We assume that there will be specific plans for preparing pupils, both Negro and white, for integrated schools. Children reflect in their personalities the mores of the community in which they live. Planning and preparation will pay large dividends in Americanism.

5. The school children are but one population of many concerned with this problem. We assume that each county will make specific plans to enlist the cooperation of parents, community leaders and community agencies, both Negro and white, in the development of positive attitudes for integrated schools.

VIII(c)

CONFERENCE ON PUBLIC SCHOOL INTEGRATION IN MARYLAND

Morgan State College

June 19, 1954

What Can Be Done to Prepare Teachers and Administrative Officers, both White and Negro, for Integrated Schools? (Outline of a Presentation by a Conference Participant)

The recent decision which was handed down by the Supreme Court of the United States anent segregation in public schools has deep and broad implications for the principal and teacher. Great and far-reaching social changes beget uncertainties, doubts, lack of a sense of security, and many obstructions to the ultimate fruition of those changes. Therefore, in order that we may chart our course with some degree of certainty and in order that we might have a few points for your studied consideration, I herewith list the following:

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Challenge 1: The Negro teacher, much more so than the Negro student, needs to become emotionally and psychologically competent in terms of the demands of integration.

A. The school principal should provide staff meetings at which time prerequisites for the successful teacher participation might cooperatively be agreed upon.

B. The principal with the teachers, could with the help of his staff, organize an instrument for the purpose of teacher self-appraisal.

C. The principal should use his influence with the chief executive officer of his school system to have teachers of his school appointed to integrated school committees.

Challenge 2: In order to eliminate possibilities of tensions during this period, what steps should be taken by administrators, supervisors, counselors and teachers?

A. Within the keeping of teachers, both white and Negro, are students who after all represent the end product; it is within their power to set the pace of their students and hold in subjection those who might tend toward being firebrands and trouble makers. This might be done by:

1. Members of the staff, including the principal, discussing with students the implications of the Supreme Court decision in a very frank, objective and unemotional manner.

2. Making every effort to see to it that students representing the school participate in every integrated county-wide and state-wide school program which may be sponsored within their systems. However, the administration should take every precaution to see to it that proper and enlightened supervision is provided.

3. Those who are charged with the guidance and direction of our boys and girls should make every

effort to arrange for the kind of programs within their respective schools which will provide the opportunity to invite white boys and girls to come into the Negro school and share in that program.

Challenge 3: There is a dire need for white teachers to develop an understanding of Negro children on social, economic, psychological and achievement levels.

A. Invitations should be extended to outstanding white teachers to participate on the staff meetings of the Negro schools.

B. There should be a constant exchange of news and information between white and colored schools.

C. Surveys and studies which are made relative to the Negro school population should be made available; however, some caution should be observed in this particular instance.

D. Administrative officers should make every effort to encourage civic and church organizations to utilize where possible the vast reservoir of talent which could be used.

IX.

The Trustee Committee on State Scholarships
MORGAN STATE COLLEGE
Baltimore 12, Maryland

July 7, 1954

A STATEMENT OF POLICY GOVERNING THE AWARDS OF STATE SCHOLARSHIPS

In compliance with an opinion of the United States Supreme Court, rendered on May 17, 1954, and in view of the action of the Board of Regents of the University of Maryland, which provides for the admission of all eligible citizens

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of the State without regard to race, creed or color, and in accordance with the ruling of the Attorney General of Maryland, the above named Committee announces its new policy as follows:

1. Beginning with the academic year 1954-55 (September, 1954), no grants will be made to new applicants for State Scholarships.

2. Current recipients of State Scholarships, whose status as candidates for degrees is definitely established on or before September 1, 1954, may have their grants renewed until they graduate, provided graduation shall be accomplished within a reasonable time. Scholarships will be terminated in June, 1958.

3. Questionnaires have been mailed to all recipients of Scholarships for the academic year 1953-54, and the Summer of 1954, as a first step in determining their eligibility for renewal privileges. These should be filled out and returned to the Secretary immediately. The next step will be a verification of the facts submitted, either from data in our files or by the University the student is attending.

4. Late in August or early in September, 1954, the Committee will consider all applicants for renewal of scholarship grants in light of the above policies. Renewal application forms will be sent on request. No such applications will be honored after August 1.

THE TRUSTEE COMMITTEE
ON STATE SCHOLARSHIPS

Ivan E. McDougle, Chairman

Willard W. Allen

Josiah F. Henry, Jr.

Martin D. Jenkins

Edw. N. Wilson, Secretary

X.

MARYLAND CONSTITUTIONAL PROVISIONS AND STATUTES RELATING TO SEGREGATION IN EDUCATION

(a) Constitution of Maryland

Article VIII.

Education

Section 1. The General Assembly, at its first session after the adoption of this Constitution, shall, by law, establish throughout the State a thorough and efficient system of free Public Schools; and shall provide by taxation or otherwise, for their maintenance.

Annotated Code of Maryland (1951 Ed.)

Article 77

Public Education

Chapter 12. State Teachers' Colleges

(b) Section 160. The state board of education and the state superintendent of schools shall be the board of trustees of each of the normal schools maintained and supported by the State; the state normal school at Towson, the state normal school at Frostburg and the state normal school at Bowie.

Chapter 18. Schools for Colored Children

(c) Section 207. It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each

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year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools.

(d) Section 208. Each colored school shall be under the direction of a district board of school trustees, to be appointed by the county board of education subject to the provisions of Section 13 of this Article, and schools for colored children shall be subject to all the provisions of this Article.

Free Scholarships

State Teachers Colleges

(e) Section 269. There shall be located in the city of Baltimore or elsewhere (if the board of education deem best) a State normal school for the instruction and practice of colored teachers in the science of education, the art of teaching and the mode of governing schools, to be known as State Normal No. 3 (now a State Teachers College); the said school shall be under the control of the State board of education, who shall appoint the principal and necessary assistants; and the faculty shall consist of a principal and as many teachers as the board shall appoint. The sessions of the school shall be determined by the State board of education, who shall prescribe the curriculum of study, which, however, shall include courses for the special preparation of instructors for teaching the elements of agriculture and mechanic arts, provide necessary quarters, supplies and apparatus, fix the qualifications for admission as students, the salary of the principal, assistant teachers and employes.

Baltimore City Code (1950 Ed.)
Article 32

Schools

Schools for Colored Children

(Originally Ordinance of Mayor and City Council of Baltimore, No. 44, July 10, 1867)

(f) Section 22. It is hereby made the duty of the Board of School Commissioners of the City of Baltimore to organize separate schools for colored children, and to establish as many schools for the education of the colored children of Baltimore City as may in the judgment of said board be necessary.

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OCT 15 1954

HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

October Term, 1954

Nos. 1, 2, 4, 5

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL., APPELLANTS

v.

R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL., APPELLANTS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCES B. GEBHART, ET AL., PETITIONERS

v.

ETHEL LOUISE BELTON, ET AL.

BRIEF OF HARRY McMULLAN

Attorney General of North Carolina, Amicus Curiae

HARRY McMULLAN
Attorney General of
North Carolina

GEORGE A. LOVE
Assistant Attorney General
of North Carolina

T. WHEELER TAYLOR
Assistant Attorney General
of North Carolina

RALPH MOODY
Assistant Attorney General
of North Carolina

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In The Supreme Court Of The United States

OCTOBER TERM, 1954

NOS. 1, 2, 3, 4

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

HARRY BRIGGS, JR., ET AL., APPELLANTS

v.

R. W. ELLIOTT, ET AL.

DOROTHY E. DAVIS, ET AL., APPELLANTS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.

FRANCIS B. GEBHART, ET AL., PETITIONERS

v.

ETHEL LOUISE BELTON, ET AL.

BRIEF OF HARRY McMULLAN

ATTORNEY GENERAL OF NORTH CAROLINA, AMICUS CURIAE

PRELIMINARY STATEMENT

The Attorney General of the State of North Carolina submits this brief as amicus curiae because of the vast importance to the State of North Carolina, and to all of the people of the State, of the decision heretofore announced and of the decrees to be issued by this Court in these cases.

The State of North Carolina is not a party to any of these actions and its Attorney General is not authorized to make it a party thereto or to enter an appearance on its behalf.

As suggested by the Court, with approval of His Excellency, William B. Umstead, Governor of North Carolina, this brief is submitted for the purpose of stating to the Court what, in our opinion, the answers should be to its Questions 4 and 5, set forth in Footnote 13 to its opinion in these cases issued May 17, 1954.

It must be frankly stated at the outset that this brief is not intended to present any solution to the extremely delicate and dangerous problem which has arisen in North Carolina by reason of this Court's decision. It is impossible for the Attorney General to present any plan to this Court for the mixing of the races in the public schools of North Carolina, and such is not the purpose of this brief.

The Kansas and Delaware cases apparently involve no further problems and, thus, there are left for the present consideration of the Court only the decrees to be entered in the cases concerning school boards of Clarendon County, South Carolina, and Prince Edward County, Virginia.

This Court apparently recognizes that in overruling its historic decisions and adopting an entirely new concept of the scope of the Fourteenth Amendment, making necessary a change in the public schools in 17 states including North Carolina and directly affecting the customs and lives of fifty million people, consideration must be given to the impact of this revolutionary pronouncement on the states which heretofore acted upon this Court's former decisions holding that they were entirely within their constitutional power in providing for the separation of the races in their public schools.

This brief is submitted for the purpose of showing the

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unparalleled gravity of nullifying the Constitution and laws of North Carolina affecting its most cherished, important, and expensive enterprise, its public schools, and for the purpose of stating sincerely and emphatically that the subsequent decrees of this Court in these cases should allow the greatest possible latitude to the District Judges in conducting subsequent hearings and in drafting final decrees, if any of the objectives sought by this Court's decision are to be attained.

From all information available, an attempt to compel the intermixture of the races in the public schools of North Carolina forthwith would result in such violent opposition as to endanger the continued existence of the schools. It is impossible at this time to foresee what the final results would be even if the Court should recognize the divergent conditions existing in this State and allow sufficient time and ample discretion in the District Judges to frame final decrees after full hearings to meet these conditions. This, however, would seem to be the only way, if any way can be found, which might possibly have the result which the decision of this Court contemplates.

The General Assembly of North Carolina has not convened since this Court handed down its decision on May 17, 1954. What action the General Assembly may take and the final decision of the people of North Carolina may depend upon what ultimate decrees are entered in this Court and in the District Courts. The Attorney General of North Carolina has no authority whatever to say what this action will be or to commit in any way the General Assembly, or the people of North Carolina, to any particular course of action in this grave situation. No other problem has so deeply moved and disturbed the people of the State since the dark days of the early 'sixties.

QUESTIONS PROPOUNDED BY THE COURT

The Court restored these cases to the docket for further argument on Questions 4 and 5 previously propounded by the Court as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which question 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

SUMMARY OF ARGUMENT

It is submitted that the answer to Question 4 (a) is clearly, "No," and the answer to Question 4 (b) is clearly, "Yes." The answer to Question 5 (a) is "No," which eliminates Questions 5 (b) and 5 (c). The answer to Question 5 (d) is that the judgments in Briggs v. Elliott and in Davis v. County School Board of Prince Edward County, Virginia, should be remanded to the courts of first instance with no instructions except the general instructions set forth in Part III of this brief.

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This Court's determination that the state constitutions and statutes before it violate the Fourteenth Amendment does not compel the issuance of a decree "providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice." On the contrary, in our opinion neither this Court nor any other federal court is authorized to issue such a decree.

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to enforce the amendment, but in the absence of legislation enacted by Congress, whatever may be the case when Congress has spoken, no federal court is authorized to legislate and give to a state or a local school board affirmative directions as to the operation of its public schools. The federal courts may compel a school board to desist from a practice which violates the Fourteenth Amendment, but they may not compel the state, or any of its agencies or subdivisions to do what, in effect, would place the courts in charge of supervising the operation of its public schools.

This Court has decided in these cases that segregation of children (1) in public schools, (2) solely on the basis of race, violates the constitutional rights of children in the minority group. The decision would not reach public schools in which pupils are separated on the basis of sex, on the basis of intelligence or achievement tests, or on any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the preservation of the public peace, morals, health or welfare. It would not, of course, have any application to any state which no longer maintains public schools.

Even if this Court had the authority to require these defendant school boards to permit a Negro child to go to school in whichever building within the district the child selects, a privilege, incidentally, which white children do not have in North Carolina, such a decree would not necessarily follow from the determination that the state constitutions and statutes before the Court are unconstitutional. This Court, in the exercise of its equity powers which the plaintiffs have

invoked, is not required to consider these plaintiffs, and others similarly situated, to the exclusion of others not similarly situated or of others similarly situated but not desiring to attend or send their children to mixed schools. A court of equity may so frame its decree as to preserve both the rights of the plaintiff and the peace of the United States, or of a single state or community. It is not necessary, in order to secure the constitutional rights of the plaintiffs, to subject to grave danger of destruction a public school system painfully evolved through the sacrifices of four successive generations, which acted in reliance upon the interpretation placed upon the Fourteenth Amendment by this Court, by the Congress, and by the courts of last resort in Northern as well as Southern states. Even if it were, this Court may and should stay its hand because of the greater interest of these plaintiffs and all others, whether similarly situated or not, in the maintenance of public schools.

The Court has well said:

> "(B)ecause of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."

This diversity exists not only between state and state, but also, and to an even more pronounced degree, between regions and communities within a single state. An averaging of the differences between parts of South Carolina approaches in result an averaging of the differences between parts of North Carolina much more closely than conditions in western North Carolina counties approach those in eastern North Carolina counties. If the public schools and the public peace are to be preserved, the decrees to be entered in the South Carolina and Virginia cases must be framed to fit the conditions in the actual communities involved, not to fit the conditions in a non-existent, average community. Only a court conversant with local conditions and granted wide discretion can tailor the decree to fit the local variations.

It may be, as Mr. Justice Jackson suggested during the oral argument of these cases, that to send the cases back to

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the lower courts, without standards to guide them in their further proceedings, will mean a generation of litigation. If so, such a result is far preferable to a generation of strife outside the courts and of chaos inside the schoolroom.

The Attorney General of North Carolina and the State Superintendent of Public Instruction prepared and sent a questionnaire to 174 county and city school superintendents throughout North Carolina. Appendix, Exhibit 6. It was designed to ascertain what consequences these men, who know more about the schools of North Carolina than any other group anywhere, anticipate would flow from an attempt to commingle forthwith Negro and white or Indian children in North Carolina schools, within the limits of normal geographic school districting. Each superintendent was asked to give his opinion with reference to his own school unit alone. Of the 165 who expressed opinions, within the time limit set by the transmittal letter (Appendix, Exhibit 6), only 7 believe such an attempt would be accepted peacefully. 145 believe it would seriously impair their conduct of their schools. 124 believe it would cause serious complications in the operation of school busses serving their schools. 135 believe they would have serious difficulty in securing a sufficient number of properly trained white teachers and only 3 believe it would be practicable to use Negro teachers. 148 believe serious problems of discipline would be created. 146 believe extra-curricular activities would be seriously affected. 141 believe parents in large numbers would withdraw their children from the public schools. 138 believe instruction would be seriously impaired by reason of the difference between the average attainments of white and Negro children. 163 are of the opinion that white children will not attend schools heretofore conducted for Negroes, none expressing a contrary opinion. It is a matter of common knowledge in North Carolina that the schools now operated for white children, like those now operated for Negro children, are so crowded it would be a physical impossibility to squeeze any substantial number of Negro children into them, unless a corresponding number of white children either go to the schools presently operated for Negroes or drop out of school.

149 of the superintendents believe a gradual adjustment over a period of time would enable their schools to cope better with the problems flowing from a conversion of the existing school system to one not based on color distinction.

The school superintendents were invited to state in their own words such explanations of their answers to the questions in this questionnaire as they might wish to make. Most of them did so. It may be of interest to the Court to read all of these statements made by those who best know all facets of the school problems in their respective communities. Therefore, these explanatory responses to each question are printed in the Appendix, Exhibit 7.

The Attorney General of North Carolina also prepared and sent another questionnaire to 438 sheriffs and chiefs of police throughout North Carolina. Appendix, Exhibit 8. It was designed to ascertain what these men, who know more about the likelihood of violence in North Carolina than any other group, believe about the likelihood of violence if an attempt were made to commingle forthwith Negro and white children in North Carolina schools within the limits of normal geographic school districting. Each officer was asked to give his opinion with reference to his police jurisdiction alone. Of 198 officers who replied within the time limit fixed by the letter of transmittal (Appendix, Exhibit 8), 191 believe there would be likelihood of violence among racial groups of students which would seriously interfere with the operation of the schools. 189 believe parents, and others not students, would be involved in such violence. 192 believe there would be danger of violence on school busses or at places where children wait for busses. 179 believe their present police forces would not be sufficient to preserve the general peace and order if such an attempt to commingle the children were made forthwith. Only 4 officers out of the 198 who replied believe white parents would permit their children to attend schools in which a substantial number of the students are Negroes, 186 expressing a contrary opinion. 71 believe Negro parents would not permit their children to attend a school in which a substantial number of the students are white. 194 believe racial conflicts would result from the disciplining

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of white children by Negro teachers, only 2 expressing a contrary view, and 146 believe such conflicts would result from the discipling of Negro children by white teachers. 172 believe there would be increased danger of malicious destruction of school buildings and school busses. Every officer of the entire 198 who answered believes the majority of the people in his jurisdiction favors segregation.

North Carolina educates more Negroes than any other state in the Union. North Carolina employs more Negro teachers than any other state in the Union. The average Negro teacher in North Carolina has more college training and is better paid than the average white teacher. North Carolina's concern for the education of her Negro children is not a recently acquired concern. North Carolina's public school system is a state-wide system, not a county system. North Carolina has built this system in good faith and in reliance upon this Court's former interpretation of the Fourteenth Amendment. One of the sills upon which the entire structure rests is the belief, still firmly held by the overwhelming majority of North Carolinians, that separate schools for the Negro, Indian and white children are essential to the peace of the state and to the proper education of the children.

The Negro population of North Carolina is not scattered evenly throughout the state, but varies from negligible numbers in western counties to a majority of the total population in nine of the eastern counties. Appendix, Exhibits 1, 2, and 3. In North Carolina's cities, as in cities elsewhere, schools are located so that there will be less commingling of the Negro and white children in the same school building in cities than in rural areas, but most of North Carolina's Negroes and most of North Carolina's white people do not live in cities. North Carolina does not have a population of many racial and sub-racial groups. Practically all of the people of North Carolina are either Negro or Anglo-Saxon.

These are conditions which distinguish North Carolina from other states. These are conditions which must be taken into consideration in formulating any decree intended to apply directly or indirectly to the schools of North Carolina. To

ignore them is to ignore reality and the accumulated experience of four generations. A decree which would cause little or no dissension and confusion in the schools of Kansas may well make effective teaching impossible in North Carolina and may even result in the abandonment of public schools. That which is a mere preference in Illinois or California, may well be a condition precedent to a North Carolina child's going to any school at all.

ARGUMENT

I

A DECREE DIRECTING A SCHOOL BOARD OF A STATE TO ADMIT NEGRO CHILDREN FORTHWITH TO THE SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING WOULD EXCEED THE AUTHORITY OF A FEDERAL COURT.

Courts of the United States may restrain an official or a school board acting under the authority of a state from denying to a Negro child the equal protection of the laws. This Court having determined that segregation in the public schools solely on the basis of race deprives Negro children of the equal protection of the laws, an injunction may properly issue from a federal court directing a state school board to desist from denying a Negro child admission to a public school solely because the child is a Negro, but a federal court may not properly require a state school board to perform affirmative duties or require it to follow procedures prescribed by the court. Such a decree would amount to the supervision by the Court of the actual operation of the public schools.

In the matter of judicial procedures this Court has said:

> "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure gives rea-

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> sonable notice and affords fair opportunity to be heard before the issues are decided."
> Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312 (1937).

That is, under the Due Process Clause of the Fourteenth Amendment, the federal courts may concern themselves only with the results of state laws and state administrative actions. If those results deprive a person of his life, liberty or property without due process of law, the federal courts may intervene to the extent of requiring the state to change the result, but the procedure or method by which the acceptable result is to be reached is a matter for state, not federal determination.

The same is true of the Equal Protection Clause of the Fourteenth Amendment. Thus, when a Negro had been convicted of a crime by a jury from which members of the Negro race were excluded, pursuant to a systematic, intentional, deliberate and invariable practice to exclude Negroes from juries, this Court reversed the result because the result violated the Equal Protection Clause, but remanded the case to the state court "for proceedings not inconsistent with" this Court's opinion, leaving to the state the choice of a procedure leading to a constitutional result. Patton v. State of Mississippi, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1948). When a state denied a Negro facilities for a legal education within its borders, this Court reversed the result because the result violated the Equal Protection Clause, but remanded the case to the state court "for further proceedings not inconsistent with" the opinion of this Court, leaving to the state the finding and selection of a new road leading to a constitutional result. State of Missouri v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). When, by state action, Negroes were denied the right to vote because of their race, a federal court enjoined the election officials from reaching that result which it said violated the Fourteenth and Fifteenth Amendments, and this Court denied certiorari, but the federal courts did not go further than to enjoin the continued reaching of the unconstitutional result. No master was appointed to supervise future elections. No detailed

decree was issued setting forth procedures to be followed by election officials. The right of the state to adopt and administer election laws so as to reach a different result was not impaired. Rice v. Elmore, 165 F. (2d) 387, Fourth Circuit, 1947, cert. den. 333 U. S. 875, 68 S. Ct. 905, 92 L. Ed. 1151 (1948).

Section 5 of the Fourteenth Amendment empowers the Congress to enforce, by appropriate legislation, the provisions of the amendment. Whether Section 5 authorizes the Congress to enact legislation requiring state school boards forthwith to admit Negro children to the schools of their choice within the limits of normal geographic school districting is not now before the Court. Congress has not so provided. Congress has provided that when a person is deprived by state action of rights guaranteed by the Constitution a federal court may enjoin the reaching of the unconstitutional result, 28 U. S. C. A. 41 (1), but Congress, even if it has the power, has not granted to any federal court the authority to administer the admission of children to schools operated by a state or to control the state in its choice of a procedure leading to a constitutional result.

It is a matter of which judicial notice may be taken that virtually every school building in North Carolina is presently crowded to its physical capacity. If a substantial number of Negro children are admitted to what is now a school crowded with white children, a corresponding number of white children must attend another school or attend no public school at all. Thus, a decree requiring a school board in North Carolina forthwith to admit Negro children to the schools of their choice will, if a substantial number of them choose a school now used by white children, necessarily require the school board to deny to white children presently enrolled in that school the right to continue to attend it. A federal court may now enjoin a state school board from denying admission of Negro children to a specific state school building because of their race alone, but no federal court is authorized to take the assignment of children to specific state school buildings out of the hands of the state school officials and place it in the hands of Negro children.

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This Court has decided in these cases that an unconstitutional result is reached when a school board, acting under state authority, denies a Negro child admission (1) to a public school, (2) solely on account of the child's race. There are, however, many ways leading to a different and constitutional result, if after an "agonizing reappraisal" of its public school system the state should determine to continue to operate it. In North Carolina, for example, the result now declared unconstitutional by this Court would not arise if any of the following courses among others should be taken: (1) Assignment of white and Negro children to schools on the basis of residence alone; (2) Segregation of children in schools on the basis of sex, the basis of intelligence tests, the basis of achievement tests, or any other basis except race, provided only that the basis has a reasonable relation to the proper conduct of the schools or to the maintenance of the public safety, morals, health or welfare (See, Hodding Carter, "The Court's Decision and the South," Reader's Digest, September, 1954); (3) Discontinuance of the present state-wide school system and leaving to each county or community the decision as to whether it will have public schools operated on the one or the other of these bases. See, Hodding Carter, "The Court's Decision and the South," supra. It is submitted that the choice to be made between these or other methods leading to a constitutional result is for the State of North Carolina.

II

IF THIS COURT HAS THE AUTHORITY TO ISSUE A DECREE REQUIRING THE ADMISSION FORTHWITH OF NEGRO CHILDREN TO SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING, IT IS NOT REQUIRED TO DO SO, BUT IN THE EXERCISE OF ITS EQUITY POWERS CAN PERMIT A GRADUAL ADJUSTMENT FROM THE EXISTING SCHOOL SYSTEM TO A SYSTEM NOT BASED ON COLOR DISTINCTIONS.

This Court's decision on the merits in these cases gives

rise to a question of equity power for which no precise precedent has been found by the Attorney General of North Carolina, or, apparently, by any of the distinguished counsel representing the parties to these cases. The public schools and resulting social structure of North Carolina, and of at least eleven other states, rest, as a house rests upon a sill, upon this Court's former interpretation of the Fourteenth Amendment, now reversed. If there has been any other judicial decision so affecting fifty million people, that decision has not been found. As the editor of the Saturday Review (October 9, 1954, page 9) has said: "This historic decision cannot be considered apart from the laborious overhaul of a whole social apparatus which it may require." Consequently, the discussion of this Court's equity powers in the formulation of the remedy to be afforded the plaintiffs must proceed from analogies which are exceedingly remote.

The nuisance and anti-trust cases, to which the attention of the Court has previously been directed by the briefs of other counsel, involved huge investments by many people. However, the confusion likely to result from dividing even so vast an enterprise as was the American Tobacco Company pales into insignificance when compared with the uncertainties confronting the people of North Carolina, and other southern states, as a result of the decision on the merits of these cases. Thus, the decrees approved in anti-trust and nuisance cases throw but a flickering light on the problem here. Nevertheless, they do direct attention to the flexibility of equitable remedies and to the fundamental principles which should guide the Chancellor in the exercise of his unusual powers.

In United States v. American Tobacco Company, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911) this Court affirmed the finding by the district court that the defendant was an illegal combination in restraint of trade. It did not, however, order its immediate dissolution, pointing out that to do so would endanger the public interest and property rights of innocent persons. The Court said:

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> "In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property." (p. 188)

In the similar and contemporaneous case of Standard Oil Company v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911) the Court likewise instructed the district court to allow a reasonable delay in carrying out the decree of dissolution "in view of the magnitude of the interests involved and their complexity" and "in view of the possible serious injury to result to the public." In Associated Press v. United States, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) the Court also recognized that the fashioning of a decree in an anti-trust case is a matter resting largely in the discretion of the Court, saying, "A full exploration of facts is usually necessary in order properly to draw such a decree." In United States v. United States Steel Corporation, 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920), the Court recognized the propriety of making a distinction in the drafting of a decree between the case of persistent, systematic, lawbreakers masquerading under legal forms, and an organization which the Court found to be a violation of law but also found to have been developed in good faith, saying that in such cases "the public interest is of paramount regard."

In International Salt Company v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947) the Court said with reference to the framing of a decree to compel compliance with the Anti-Trust Act:

> "The framing of decrees should take place in the district rather than in appellate courts. They are vested with large discretion to model their judgments to fit the exigencies of the particular case." (p.400)
> ACCORD: United States v. U. S. Gypsum Co., 340 U. S. 76, 95, 71 S. Ct. 160, 95 L. Ed. 89.

In Alexander v. Hillman, 296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192 (1935), this Court said:

> "Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the cir-

cumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all parties before them."

In his Equity Jurisprudence, 14th edition, section 28, Story says:

"But Courts of Equity (as compared with courts of common law) are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most if not all of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous; whereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law (as we have already seen) are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant."

Pomeroy emphasizes the same flexibility of equitable remedies and the discretion which the Chancellor may and should exercise in formulating his decrees, saying in section 1338 of the fifth edition:

"In determining whether an injunction will be issued to protect any right of property, to enforce any obligation or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any question, the solution to any difficulties which may arise.—The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, a violation of that right will be prohibited, *unless there*

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> *are other considerations of policy or expediency which forbid a resort to this prohibitive remedy.*" (Emphasis added. See also, Sections 60 and 109.)

Perhaps the statement of these principles most pertinent to these cases is found in a letter from Lord Hardwicke to Lord Kames, quoted by Pomeroy in Section 60 of his treatise. Lord Hardwicke said:

> "Some general rules there ought to be for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Praetor must not be so absolutely and invariably bound by them as the judges are by the rules of the common law. For if he were so bound, the consequences would follow that he must sometimes pronounce decrees which would be materially unjust, since *no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance.*" (Emphasis added.)

In United States v. American Tobacco Company, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911), the Court found that the defendant was an unlawful combination in violation of the Sherman Anti-Trust Act, but in order not to cause undue hardship to innocent investors it allowed for its dissolution what it believed to be a reasonable time under all of the circumstances. A much longer time will be required to change one of the bases of a social order believed by many millions of people to be necessary to their well being, and which they and their fathers have built in reliance upon an interpretation of the Fourteenth Amendment affirmed and reaffirmed by former decisions of this Court.

In the exercise of its equity powers, which these plaintiffs have invoked, this Court is not required to consider these plaintiffs, and others similarly situated, to the exclusion of others not similarly situated. It may frame its decree so as to preserve both the rights of the plaintiffs and the peace of the United States. These cases, by reason of the numbers of people affected, the nature of the schools involved, and the great variety of local conditions which must be taken into account, are completely distinguishable, as to the appro-

priateness of the remedy, from Sweatt v. Painter, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114, Sipuel v. University of Oklahoma, 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247, and McLaurin v. Oklahoma State Regents, 339 U. S. 637, 70 S. Ct. 851, 94 L. Ed. 1149. It is not necessary in order to grant these plaintiffs and others similarly situated their constitutional rights that the public school system of North Carolina be subjected to grave danger of destruction. Even if it were, this Court may and should stay its hand because of the greater interest of the Negroes, Indians and white people of North Carolina, alike, in the maintenance of good public schools.

III

IF THIS COURT HAS THE AUTHORITY TO ISSUE A DECREE REQUIRING THE ADMISSION FORTHWITH OF NEGRO CHILDREN TO SCHOOLS OF THEIR CHOICE WITHIN THE LIMITS OF NORMAL GEOGRAPHIC SCHOOL DISTRICTING, IT SHOULD NOT DO SO, IF SUCH A DECREE IS TO BE A PATTERN TO BE FOLLOWED IN OTHER CASES ARISING IN OTHER STATES AND OTHER SCHOOL DISTRICTS.

In its opinion of May 17, 1954, this Court recognized the variances between the cases now before it and cases which may arise, saying:

> "(B)ecause of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."

The problems and their complexities are multiplied many times if consideration is given to all the schools of a single state. If all of the states now educating white and Negro children in separate schools are to be brought within the contemplation of the decree, even though they cannot be reached directly by it, the problems and their complexities

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become infinite and their solution in a single decree impossible.

The diversity which the Court has recognized exists not only between state and state, but also between regions and communities within each state. Indeed, the differences between parts of a single state are often more pronounced than those between two states, each considered as a whole by averaging the differences to be found within its borders. If the public schools and the public peace are to be preserved for the benefit of the plaintiffs, and others, whether similarly situated or not, the decrees to be entered in the district courts in these cases must be framed to fit the conditions of Clarendon County, South Carolina, and Prince Edward County, Virginia, not some illusory community existing only in the imagination. Only a court conversant with conditions in these counties, including those not shown in the present records before this Court, and granted wide discretion can tailor a decree to fit those conditions.

It may well be true that to remand these cases without undertaking to supply the courts of first instance with specific standards to guide their further proceedings will mean a generation of litigation before an acceptable substitute can be found for the existing school systems in all of the southern states. Mr. Justice Jackson so suggested in the course of the oral argument of these cases at the October Term, 1953. But, standards, which do not fit the conditions in which a decree is to operate, do not guide. They only lead into confusion. Many of our principles of law and of our philosophy of government were hammered out through not one, but many generations of litigation. A generation of litigation is far preferable to the destruction of a social order which is the product of many generations of free men and women striving together for their mutual advancement. A generation of litigation is preferable to a generation of bitterness and strife between neighbors outside of the courts, to a generation of chaos inside the schoolroom, or a generation with no public schools at all.

It is, therefore, suggested that these cases should be remanded to the district courts with directions to frame de-

crees with respect to the admission of the Negro plaintiffs to public schools based upon facts and conditions which may be found to exist at such time. The Court should direct that the district courts should enter no final decrees until further hearings have been conducted and full consideration given to all the many factors which will be involved in adjusting to the revolutionary change in the operation of the public schools which this Court now requires. This would necessarily involve an important time element, available teaching staffs, adequate school buildings and equipment, and compliance with applicable local laws respecting the administration of these public schools as well as all other essential elements constituting the legal and practical aspects of school administration.

IV

A DECREE WHICH MAY BE WORKABLE UNDER CONDITIONS PREVAILING ELSEWHERE MAY HAVE GRAVE AND FAR REACHING CONSEQUENCES IF APPLIED TO THE PUBLIC SCHOOLS OF NORTH CAROLINA.

A.

DIVERSITY BETWEEN NORTH CAROLINA AND OTHER STATES

The diversity in local conditions which this Court has recognized in these cases is of course most pronounced as between southern states and northern and border states, although there is no such thing as a typical southern state in this respect. As has recently been stated in the Saturday Review:

> "The only single Southern attitude—in which he (the Southerner) can find no difference from the rest of the country—is that he wants to live in a white society. It is not this desire that differentiates him from his fellow-Americans, but the peculiar circumstances of his total society, and the hereditary conditioning of his historical

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> circumstance. Other sections have never faced the problem of a mixed society. Whenever a community has accumulated a density of colored population the problem has been tacitly evaded by the creation of 'black belts,' as in New York and Chicago. Where individual Negroes formed any sizable percentage of a school, even in the excellent public-school system of New York, families who could afford to immediately moved their children to private schools or moved themselves to suburbs." Clifford Dowdey, A Southerner Looks at the Supreme Court, the Saturday Review, October 9, 1954, page 10.

At least four major differences distinguish North Carolina from most of the states outside the South: The number of Negroes in proportion to white people, the intermixture of white and Negro homes throughout rural areas, the general reaction to this Court's present interpretation of the Fourteenth Amendment, and the number of Negro teachers employed.

No state outside of the South has a population of which as many as 20% are Negroes. See, Appendix, Exhibits 4 and 5. Thirty-five states have populations in which less than 8% are Negroes. Thirteen states have populations in which less than 1% are Negroes. Even if every other condition were precisely the same, the intermixture of one Negro child with 99 white children in North Dakota is obviously a far different problem for a school administrator from the problem of commingling 71 Negro children with 29 white children in Northampton County, North Carolina, or 45 Negro children with 55 white children in Mississippi.

Kansas, whose statute has been held unconstitutional in these cases, has among its population less than one Negro for each 25 persons. This fact alone would make it far easier for the Board of Education in Topeka to commingle white and Negro children than for the school boards in Clarendon County, South Carolina, or Prince Edward County, Virginia, to do so. The disruption of the public schools in Milford, Delaware, as a result of the state's undertaking to commingle eleven Negroes in a formerly white high school, pursuant to this Court's opinion, has become a matter of common knowledge, but in all of Delaware there are only 13 Negroes to

every 87 white people. Even the border states of Kentucky and West Virginia have fewer than one Negro to 13 white people. Thus, even in these two states the commingling of white and Negro children in the public schools presents a far different problem from that which would be encountered by the school boards in most counties of North Carolina.

This, however, is not the only difference between the northern and border states on the one hand, and North Carolina, and other southern states on the other hand. The northern states which have the largest Negro populations are New York, Illinois, Pennsylvania, Ohio, Michigan, and New Jersey. In these states the Negro population is almost entirely an urban population. In the North, as in the South, Negroes who live in cities are not scattered throughout those cities but are concentrated principally in certain areas through the natural tendency of people to live in close proximity to other people like themselves. As a result, school district lines can be drawn so that there are relatively few Negro children in certain schools and relatively few white children in other schools. For the residents of those areas, North and South, the problem presented by the opinion of this Court in these cases is largely academic in nature. For most of the people who live in North Carolina the Court's opinion cannot be complied with so easily and, therefore, the questions presented are not academic but are questions, the answers to which must be found in the confusion of people required to change a public school system which is a vital part of their society. This is true because most North Carolinians, white and colored, do not live in cities but live in rural areas where the residences of white and Negro neighbors are interspersed.

A distinction of major significance in this connection between the northern states and North Carolina is that in the northern states the opinion of this Court in these cases was generally approved, whereas in North Carolina the opinion conflicts with deep seated convictions and has been generally regarded as extremely unfortunate. Of course, this Court may not allow its decisions as to the interpretation of the Constitution to be guided by public opinion, but, in deter-

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mining the decree to be issued, a court of equity is not required to shut its eyes to reality, especially when the victims of an unwise decree will be children. The experience of our nation, during the period when the Eighteenth Amendment was in effect, demonstrates that a law cannot be successfully enforced by civil authorities when even a substantial minority of the people in a community believe it infringes upon their natural liberties. A court of equity may and should proceed cautiously in formulating a decree which undertakes to require the overwhelming majority of the people in one-third of the Union to change a basic principle upon which their public school systems have been built.

Another important aspect of the problem to be considered in North Carolina is that "the South is the land of opportunity for the Negro teachers." U. S. News and World Report, August 27, 1954, p. 35. North Carolina with very nearly the same Negro population as New York, employs five Negro teachers for every Negro teacher employed by New York. New York with 6 Negroes out of every 100 persons in its population, employs fewer than 2 Negroes for each 100 school teachers. North Carolina, with one Negro out of every 4 persons, employs more than one Negro teacher out of each four teachers. U. S. News and World Report, supra, pp. 36-37.

A distinguished Negro editor has said:

> "No place in the world do Negroes own and control as much as do those in the South. Atlanta is without question the Negro capital of the world. It is the center of Negro culture, education, business, and finance. And both Negroes and whites live, work, and operate business without either being conscious of the other's race.***
>
> "During the past 2 years I have spent more time in the South than I have in my office, and I have interviewed thousands of Negroes in all walks of life and I have found very few who favor mixed schools. They want their own schools, but equal facilities.***
>
> "Despite all of the hullaballoo about the liberal East and North, no Negro has been made head of a State college or university. Down South the woods are full of Negro

college and university presidents. Down in Texas a Negro college president of a State school gets $15,000 a year.

"What Negroes need to refresh their memories on is the fact that just a few years ago we were raising Cain because colored kids in the South were being taught by white teachers. We wanted them taught by Negroes. As Negroes qualified, Negro teachers replaced white teachers until now Negro teachers have completely taken over.

"Not too long ago Negroes went into court and demanded equal facilities in our schools. The courts ruled that they were right. All the Southern States embarked upon a school-building program never heard of before in the history of our Nation. And this effort to give Negroes equal school facilities is an honest one.—

"I have never contended that the South is a utopia, but I do contend that it offers the Negro his greatest opportunity. Last week as I looked at the Negro schools in St. Petersburg and Tampa, Fla., I felt proud of my race. Nowhere in the world do they have more beautiful schools than do the Negroes in Florida, Georgia, North and South Carolina, and the building program is not yet complete." Editor Davis Lee, Newark (N.J.) Telegram, as quoted in the Congressional Record, June 11, 1954, pp. A4335-A4336.

With reference to Negro teachers, the U. S. News and World Report of August 27, 1954, also said:

"Negro teachers in the South, thousands of them, are to lose their jobs when segregation ends in public schools. If they are to go on teaching, the North will have to give them jobs. But openings there will be scarce, if present use of Negro teachers is any criterion. It is a problem that causes real concern among school officials. Even in the North, objections often are raised when Negroes are assigned to teach white children." (p. 35.)

128 out of 131 school superintendents in North Carolina believe they would find it impracticable to use Negro teachers in mixed classes. See, Appendix, Exhibits 6 and 7, Question 11. A court of equity in formulating its decree should con-

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sider the effect of the decree upon Negro teachers as well as the effect upon Negro pupils.

The diversity of conditions between North Carolina and every other state in the Union, North or South, and between one part of North Carolina and another, cannot be fully presented to this Court without full hearings and litigation directly concerning schools in North Carolina, in which hearings the people of North Carolina have an opportunity to present evidence as to their own sociological, psychological, and educational conditions. However, for the purpose of demonstrating that these differences exist and are so great as to require different implementation of the Court's decision in these cases, a short account of the North Carolina school system and of its development is set forth in this brief. The people of North Carolina, both white and Negro, take a justifiable pride in the public school system which they have created, and have steadily improved, under statutes and administrative practices in conformity to the interpretation of the Fourteenth Amendment approved by this Court for sixty years, and by the Congress and the courts of the states since the Amendment was ratified in 1868.

B.

THE EXISTING NORTH CAROLINA PUBLIC SCHOOL SYSTEM

North Carolina, today, is educating more Negro children and employing more Negro teachers than any other state in the Union. She is educating them in a state-wide school system, which means that, except insofar as local tax supplements provide additional benefits, every child in North Carolina, regardless of race, residence or economic status, studies the same subjects and uses the same textbooks. The length of the school term is the same throughout the State and is the same for white children as for Negro children. This has been so for ten years.

Except where there are local tax supplements in effect, every teacher in North Carolina, having the same training and experience, and engaged in the same type of teaching,

receives the same salary. As a result of this, and of social and economic conditions outside of the schools, the teaching profession offers more financial inducement to highly qualified Negroes than it offers to white men and women of equal qualifications. For this reason the Negro teachers remain in the teaching profession longer, and receive salary increments based on experience. Consequently, the average salary of Negro teachers in North Carolina is greater than the average salary of white teachers in North Carolina, and has been so for ten years, or almost an entire public school generation. As a consequence of the same economic factor, the average Negro teacher in North Carolina has had more college training than has the average white teacher in North Carolina. This advantage in favor of the Negro schools has also existed for several years. Ashmore, The Negro and the Schools, p. 158.

Since the change in North Carolina from diverse county systems of public school education to a state-wide system, small rural schools have been consolidated into large schools, centrally located within the school district. The State furnishes to every child free transportation to and from those schools in state owned and operated school busses. The result of this consolidation program has been the replacement of the small, dilapidated, frame schoolhouse with large, modern, well-equipped, brick school buildings, more adequately staffed with better teachers teaching a more adequate curriculum. The cold biscuit in a paper sack has been replaced by a hot lunch in a well-equipped school cafeteria. The filthy, outside privy has been replaced with sanitary toilet rooms. Expenditures per pupil have increased far beyond the change in price levels. North Carolina today spends on its public schools 3.9% of its total income, being surpassed in this respect by only four other states in the Union, and being far ahead of the states of New York, Massachusetts, Michigan, Illinois, Ohio and Pennsylvania. Ashmore, The Negro and the Schools, pp. 115, 144-145.

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C.

THE DEVELOPMENT OF THE NORTH CAROLINA PUBLIC SCHOOL SYSTEM.

This North Carolina school system, in which the Negroes have so great an interest, is not the result of an eleventh hour attempt to comply with the "separate but equal" doctrine approved by this Court in 1896. It is the result of over a century of devotion to and sacrifice for the education of both white and Negro children. It is an achievement of white and Negro neighbors working together in a peaceful, friendly state. It is an achievement in which both the white and Negro people of North Carolina take a justified pride, and which would not have been possible without their adherence to their belief in the doctrine of separate but equal schools.

North Carolina's firm belief that separate schools for the races will train both white and Negro children to live together in mutual respect and friendship, while mixed schools in North Carolina will cause racial conflicts is the result not of emotions and prejudice, but of sober, earnest thought by those who have known and lived in North Carolina, and who have desired to see her children educated so as to be prepared to demonstrate to all the world that two races as fundamentally different as the Anglo-Saxon and the Negro can live side by side in freedom, peace, and mutual respect. Experience has demonstrated the soundness of that belief. There is peace and friendship between white and Negro North Carolinians today which all North Carolinians desire to preserve, and which if properly used by the State Department will, we believe, prove to be a more effective answer to Communism, at home or abroad, than will a decree of this Court which proclaims equality but destroys the conditions precedent to an actual equality of opportunity to learn.

Whether or not this Court is willing to "turn the clock back" and consider the history of public education in North Carolina or the ratification of the Fourteenth Amendment, the attitude of North Carolina on this question can at least be better understood when it is realized that it has a long history of public schools operated on a segregated basis.

North Carolina was the one southern state which had a well-established system of public schools long before the Civil War, and has believed firmly in public education from the earliest days. In its Constitution of 1776, North Carolina provided for schools with salaries of the teachers to be paid by the public. In 1839 the finances of the state were in sufficiently good condition to permit this dream to be realized. Like the schools in the northern states, those established in North Carolina prior to the Civil War were open to white children only. Their establishment and development shows the great interest and faith which the people of North Carolina have had in public education from earliest times. By 1859 the school population of North Carolina was 230,000 and of these children 155,000 were enrolled in the public schools. There were then 2,758 public schools in operation in the state, and the average monthly salary paid to the teachers was higher than in Connecticut, New Hampshire, Ohio, Wisconsin, or Illinois. Knight, Public School Education in North Carolina, page 180. Even in the dark days of 1863, the public school system in North Carolina was maintained and fully 50,000 children were enrolled. Knight, Public School Education in North Carolina, p. 182. Although the fall of the Confederacy resulted in the loss of the Literary Fund, which was the mainstay of the public school system, and, therefore, brought about a temporary disorganization of the school system, the interest of the people of North Carolina in public education continued without abatement and was immediately extended to include the education of the newly freed Negro children.

After North Carolina had rejected the Fourteenth Amendment, its State Government was taken from the hands of her people and reconstituted in accordance with the wishes of the then majority of Congress. As a result, on July 2, 1868, the amendment was ratified in the name of North Carolina by a Legislature so chosen and constituted. On July 2, 1868, Governor Holden recommended its ratification in a message to this Legislature reading as follows:

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"Executive Department of North Carolina
Raleigh
July 2, 1868

"Gentlemen of the Senate and House of Representatives:

"Allow me to congratulate you on the auspicious circumstances under which you have assembled. Our heartfelt gratitude is due to Almighty God for the suppression of the Rebellion, the preservation of the Union, the just and liberal principles on which it has been reconstructed, and the assurance that we have a future peace and tranquility. The first business to be performed by the Legislature will be the ratification of the Amendment to the Constitution of the United States, known as the Fourteenth Article, proposed by the Thirty-Ninth Congress. I respectfully recommend the immediate ratification of this Article.

Very respectfully,
W. W. Holden."

The Amendment was ratified the same day. Four months later the same governor wrote to the same Legislature as follows:

"Executive Department
Raleigh
November 17, 1868

"To the Honorable, the General Assembly of North Carolina:

"Gentlemen:

"It is proper that at your first regular session under the new Constitution, I should lay before you 'information on the affairs of the state,' and recommend to your consideration such measures as may be deemed expedient.

"The people of the state have reconstructed their government on the basis of equal rights of all.—

"I recommend, in the most earnest terms, that the General Assembly during its present session provide for a general and uniform system of public schools. *The schools for the white and colored children should be separate,* but in other respects there should be no difference in the character of the schools, or in the provision made to support them.—

> "We have indeed a free Republic, in which every man in nearly every state, is fully the equal of every other man in political and civil rights. We have no distinctions founded on color or race, save those which are social in their character, but every one is free under the law to make his own way in life, and to earn a good name for himself and his children. The Union is over us all, states as well as people. There can be no appeal from its authority.—This government is in the hands of its friends and will be administered by them. The government of North Carolina is in the hands of its friends, and of the friends of the national government, and will be administered by them.—
>
> Very respectfully
> your obedient servant,
> W. W. Holden."
>
> (Emphasis added.)

Thus, the subsequently impeached governor of North Carolina recommended to the Legislature which he called, "the friends of the national government," both that it ratify the Fourteenth Amendment and, after the amendment was ratified, that it set up a system of separate schools for the races. The same Legislature, "the friends of the national government," did both.

In his inaugural address, two days after the Fourteenth Amendment had been ratified by the Legislature pursuant to his recommendation, Governor Holden said:

> "It does not follow, nor does the Constitution require, that the white and colored races shall be educated together in the same schools. It is believed to be better for both and more satisfactory to both, that the schools should be distinct and separate."

This Legislature contained 38 Radicals (Republicans) in the Senate and 80 in the House. There were only 12 Conservatives (Democrats) in the Senate and 40 in the House. Knight, Public School Education in North Carolina, p. 231.

Less than two weeks after the amendment had been ratified, the House adopted by a vote of 91 to 2 a resolution proposed by Representative Bowman, Republican Chairman of the Committee on Education, reading as follows:

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> "That it is the duty of this and of all future General Assemblies of North Carolina to provide for and continue a system of free public schools for both races, but at the same time to provide that the white and colored children of the state, shall be taught in separate schools." House Journal, 1868, p. 54.

The resolution was adopted by the Senate by vote of 26 to 1. Senate Journal 1868, pp. 237-239.

While Senator Sumner's Civil Rights Bill to compel mixed schools was pending in Congress in 1874, Mr. Alexander McIver, State Superintendent of Public Instruction, was called upon for his opinion as to the probable effects on the public schools in North Carolina if the bill became a law. He replied:

> "No legislation in favor of mixed schools has ever been attempted in this State. Public sentiment on this subject is all one way. Opposition to mixed schools is so strong that if the people are free to choose between mixed schools and no schools, they will prefer the latter. The friends of education would therefore deprecate and most sincerely deplore any congressional legislation which might tend to force mixed schools upon the people." Knight, Public School Education in North Carolina, p. 254.

At the same time Dr. Barnas Sears, General Agent of the Peabody Board, who had resigned the presidency of Brown University in Rhode Island to accept this position, reported to his board on the subject. That board, in 1867, at the time of the establishment of the trust by Mr. Peabody of Massachusetts, included in its membership General Grant, Admiral Farragut, Mr. Hamilton Fish of New York, Mr. George W. Riggs of Washington, Bishop Charles McIlwaine of Ohio, Mr. Robert Winthrop of Massachusetts, and other northern and southern gentlemen equally interested in the welfare of the colored people and the education of all the people in the southern states, the overwhelming majority being from the North. As a result of the board's study of Dr. Sears' report it unanimously adopted in 1874 a resolution reading as follows:

> "The prospects and hopes of the public systems of edu-

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> cation in the South will receive a serious, if not fatal blow, from any legislation which should make such systems of education maintainable only upon the scheme of 'mixed schools' as the organization requisite for such public education."
> Proceedings of the Peabody Board of Trustees, Volume I, Page 411; Knight, Public School Education in North Carolina, p. 255.

Thus, in North Carolina, while the Fourteenth Amendment was being debated and ratified, and in the years immediately following its adoption, the Carpetbagger, the northern gentleman, the Scalawag and the southern gentleman were in complete agreement on two things: (1) The Fourteenth Amendment did not prevent the state from establishing separate schools for the white children and the Negro children; (2) The establishment and continuation of such separate schools was necessary and desirable.

The overwhelming majority of North Carolinians today, notwithstanding their respect for this Court, are still in agreement on both of those points. Appendix, Exhibits 6, 7, and 8. That is the reason a decree of this Court wholly acceptable, and even welcomed in another state, may well destroy public education in North Carolina.

A Convention to propose amendments to the North Carolina Constitution of 1868 was called by the General Assembly of 1875, pursuant to a referendum vote of the people. The Convention was composed of 120 delegates. The delegates were almost evenly divided between the two major political parties—Democratic and Republican.

The Journal, page 105, shows a resolution was introduced providing that the children of the white and colored races should be taught in separate public schools.

The Journal, page 130, shows that a substitute resolution was offered in the exact language that was afterwards adopted, viz., "and the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race." The foregoing was offered as an amendment to Article 9, Section 2, of the State Constitution

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of 1868 and afterwards in the Convention was known as Ordinance No. 28, and is a part of the present State Constitution.

It is noteworthy that W. T. Faircloth, a delegate from Wayne, and afterwards a Republican Chief Justice of the Supreme Court of North Carolina, and Albion W. Tourgee, a Carpetbagger and Superior Court Judge and a delegate from Guilford County, each voted for the resolution.

The statement is sometimes made that the people of the northern states do not object to the race problem being solved by the southern states, but they want the southern states to start doing something about it. The answer, both in general and so far as schools are concerned, is that North Carolina started doing something about it in 1868 and has continued to do something about it for 86 years. The record of the separate schools of North Carolina in those years is as follows:

PUBLIC SCHOOL ENROLLMENT

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	WHITE		NEGRO	
	Population of School Age (6-20 years)	Enrolled In Public Schools	Population of School Age (6-20 years)	Enrolled In Public Schools
1874	242,768	119,083	127,192	55,000
1884	314,293	167,059	189,988	111,239
1895	403,812	245,413	217,437	128,150
1905	469,646	325,290	226,976	148,821
1915	540,410	418,902	260,987	187,448
1925	643,572	559,396	297,911	250,438
1935	759,308	616,314	340,490	276,334
1945	717,390	562,621	331,218	250,205
1951	773,003	636,505	345,280	273,272
1952	774,709	641,081	337,827	273,188
1953	792,043	652,622	339,636	276,401

TEACHERS

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	NUMBER		ENROLLMENT PER TEACHER		AVERAGE ANNUAL SALARY	
	White	Negro	White	Negro	White	Negro
1884	.....	.....	.....	.....	$ 69.58	$ 64.85
1895	.....	.....	.....	.....	75.73	67.19
1905	7,005	2,682	46.4	55.5	148.22	105.10
1915	10,584	3,291	39.6	57.0	285.59	149.66
1925	16,986	5,355	32.9	46.8	835.11	455.41
1935	16,159	6,497	38.1	42.5	620.93	415.31
1945	17,392	7,142	32.4	35.0	1,294.34	1,304.46
1950	19,924	7,567	31.4	35.5	2,535.24	2,628.69
1951	20,560	7,835	31.0	34.9	2,807.74	2,910.26
1952	20,885	8,031	30.7	34.0	.....	.....

HIGH SCHOOL GRADUATES

(Source: Superintendent of Public Instruction of North Carolina.)

YEAR	WHITE	NEGRO
1925	8,246	564
1930	13,457	1,687
1935	18,547	2,826
1940	25,576	4,504
1945	21,981	4,948
1950	24,226	6,259
1951	24,288	6,524
1952	24,930	7,110
1953	26,386	7,848

These accomplishments of a single state's educational program, making use of separate schools for the races, vindicates the wisdom of the agreement reached in 1868 by Carpetbagger, Scalawag, Confederate veteran, and northern phil-

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anthropist on the proposition that if there is any slight denial of individual liberty inherent in the separate school system, it is greatly outweighed by the benefits to all the people from a public school system free from racial hatred and strife, and shows that the chief beneficiaries of this system have been the Negro people.

D.

THE FUTURE OF PUBLIC SCHOOLS IN NORTH CAROLINA IF IMMEDIATE INTEGRATION IS DIRECTED BY THE COURT

The people of North Carolina know the value of the public school. They also know the value of a social structure in which two distinct races can live together as separate groups, each proud of its own contribution to that society and recognizing its dependence upon the other group. They are determined, if possible, to educate all of the children of the State. They are also determined to maintain their society as it now exists with separate and distinct racial groups in the North Carolina community. They strongly oppose creating conditions in the public schools which tend to amalgamize the white and Negro races.

This Court has never held that the United States Constitution requires any state to educate any child. Neither has this Court ever held that the education of children must be conducted in schools attended by children of both races. In its opinion of May 17, 1954, this Court said only that segregation of children *in public schools* deprives the children of a minority group of equal educational opportunities, and then only when the segregation is *solely on the basis of race*.

Clearly, justice demands that a state, which has evolved a public school system in conformity to this Court's previous interpretation of the Fourteenth Amendment, and which has in good faith floated bond issues for many millions of dollars and invested the proceeds in school properties, be allowed to choose between constitutional alternatives in calmness and after mature deliberation. A court of equity is not required

to compel such a state forthwith to revamp its entire public school system under the threat of contempt citations, nor is it required to compel such state to select that alternative which the Court might choose.

The Legislature of North Carolina is the only body which can determine the policy to be followed in North Carolina in this matter. There has been no session of the North Carolina Legislature since the opinion of this Court in these cases was issued. Thus, there is no one now authorized to state what method North Carolina will adopt in order to reach its dual objectives of education for every child and maintenance of racial integrity in accordance with the United States Constitution as now interpreted by this Court.

The people of North Carolina firmly believe that the record of North Carolina in the field of education demonstrates the practicability of education of separate races in separate schools. They also believe that the achievements of the Negro people of North Carolina demonstrate that such an educational system has not instilled in them any sense of inferiority which handicaps them in their efforts to make lasting and substantial contributions to their state. A social order which is the product of three centuries, and a public school system which is the product of one century of conformity to the Constitution as interpreted by this Court and by Congress, cannot be transformed overnight into an entirely different social order and educational system notwithstanding the great respect which the people of North Carolina have for constitutional government and for this Court.

At least the following dangers will result in North Carolina from a decree requiring immediate intermixture of white and Negro children in the public schools throughout North Carolina: (1) Public schools may be abolished; (2) If the public schools are not abolished, the presence in the same classroom of white children and Negro children may well bring about daily confusion, physical conflicts, ridicule of one group by another, and other conditions which will make it difficult for children to study and teachers to teach; (3) If public schools are not abolished, parents financially

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able to do so may send their children to private schools, and public schools will come to be regarded as a dole to paupers, repulsive to everyone, black or white, having that pride and self respect essential to good citizenship in a democracy; (4) Conflicts in the schoolroom, on the playground, and between parents and teachers may lead to racial bitterness in a community and bring to North Carolina the bloody race riots which have disgraced cities and states where justifiable racial pride among both Negroes and white people has been ignored.

That these are not figments of imagination, but are clear and present dangers is the opinion of the overwhelming majority of North Carolina school superintendents (Appendix, Exhibits 6 and 7) and North Carolina police officers (Appendix, Exhibit 8).

E.

DIVERSE CONDITIONS WITHIN NORTH CAROLINA

(a) *Distribution of Negro Population.*

According to the United States Census of 1950, almost exactly one-fourth of North Carolina's population of 4,061,929 are Negroes. Approximately 30,000 are Indians, for whom the State now maintains schools separate and apart from either the schools for white children or the schools for Negro children. The racial loyalties of the Indians of North Carolina are as strong as those of either of the other races, perhaps stronger. The Indians will be as resentful of any compulsory integration of their children with the children of the other races as will be the people of either the white or the Negro race. The overwhelming majority of the white people of North Carolina are of English or Scotch descent and are native-born North Carolinians. The absence in North Carolina of sizable minorities of white people of non-English origins results in a race consciousness and a race pride among the people of North Carolina much more clearly defined than that to be found in states with large metropolitan areas pop-

ulated by many racial and subracial groups.

However, the one million Negroes and three million white people in North Carolina are not scattered evenly throughout the State. See Appendix, Exhibit 2. In the extreme western part of the State there are relatively few Negroes. The 1950 census shows that Graham County, for example, has 6,665 white residents and only 10 Negroes.* At the other extreme is Northampton County, in the northeastern part of the State, with 18,189 Negroes and only 10,182 white residents. There are nine counties in North Carolina (Northampton, Warren, Hertford, Bertie, Halifax, Hoke, Gates, Edgecombe, and Martin) which have more Negro residents than white residents. Eight of these are contiguous and lie in the northeastern part of the State next to the Virginia border, the ninth (Hoke) being near the South Carolina border in the south central portion of the State. On the other hand, there are twenty-seven counties in the State in which the Negro population is less than 10% of the total. These counties are mountain counties in the far western portion of the State with the exception of Randolph County, in the Piedmont area, and Dare County, on the coast. Twenty-one counties, most of which lie in the Piedmont section, which is the most industrialized part of the State, have Negro populations varying from 10% to 25% of the total, and forty-three counties, lying principally in the east and central portions of the State, have Negro populations varying from 25% to 50% of the total.

While the proportion of Negro children and white children enrolled in the public schools does not follow precisely the division of the total population by counties, obviously the far western counties of North Carolina have very few Negro school children in their schools, the Piedmont counties have more, the eastern and southern counties have even more, and the greatest enrollment of Negro children in the public

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* The census appears to be in error at this point, since inquiry of officials of Graham County discloses that there are no Negroes residing in that county and none have resided there for many years, if ever.

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schools occurs in Hoke County and in the eight northeastern counties of Northampton, Warren, Hertford, Bertie, Halifax, Gates, Edgecombe, and Martin.

It is not correct to assume that a county in which there are but a few Negroes will be a county in which there is little race consciousness, or that the county in which there are many Negroes is a county in which there are dangerous racial tensions and antipathies under the present social structure and school organization. The scarcity of Negroes in a given locality may indicate racial antagonisms so deep and severe that the Negroes prefer to live elsewhere. However, it is quite apparent that the intermixing of white children and Negro children in the same schoolroom presents a far different problem in a county where there are 10 Negroes to 6,665 white people from that which it presents in a county in which the two races are equally numerous, or in a county in which there are 18,000 Negroes to 10,000 white people. It could well be that the 10 Negroes in Graham County, for example, might include only one of school age. Granting that the racial loyalties and antipathies are as strong in the one county as in the other, it is obvious that the admission of one Negro child to one of the schools in Graham County would not create the administrative and instructional problems which would arise from an attempt to mix in schools all over Northampton County the children of 18,000 Negroes and 10,000 white people. A decree which would be an annoyance in Graham County could well bring disaster in Northampton.

(b) *Retarded children.*

In North Carolina, as elsewhere, (Report of the Second Regional Conference, State Board of Education and Chief State School Officers, Atlanta, Georgia, September 5-7, 1954, p. 36) achievement tests and intelligence tests taken by the Negro children and the white children in the same counties show the average white child attained a substantially higher rank than the average Negro child, although there were many instances of individual Negroes who showed remarkably superior intellect and equally superior achievement. No doubt, the explanation of this fact is a complex one. It seems

certain that the explanation goes far beyond the schoolroom since, as shown above, the Negro children in North Carolina have been receiving their training in the schools from higher paid teachers than have the white children. Whatever the explanation, the fact remains.

A study of the ages of the children in the North Carolina schools in the year 1949-1950, the last year for which such figures are available shows that in the elementary schools 1.69% of the white children in school were under the normal age for their respective grades, 80.84% were of normal age for their grades, 10.71% were one year over age, 4.47% two years over age, 1.59% three years over age, 0.52% four years over age, and 0.18% five years over age. Among the Negro children, 3.42% were under age, only 62.63% were of normal age, 15.70% were one year over age, 9.18% were two years over age, 4.99% three years over age, 2.45% four years over age, and 1.63% five years over age. Thus, one white child out of six was retarded, as compared with one Negro child out of three. See, State School Facts, published by the North Carolina Department of Public Instruction, January, 1952.

The same study shows that in the high schools 4.31% of the white children were under normal age as compared with 8.82% of the Negroes under normal age. 78.70% of the white children were normal age for their respective grades whereas only 57.87% of the Negro children were of normal age for their respective grades. 11.94% of the white children were one year over age as compared with 18.64% of the Negro children who were one year over age. 3.69% of the white children and 8.89% of the Negro children were two years over age. 1.01% of the white children and 3.94% of the Negro children were three years over age. 0.24% of the white children and 1.31% of the Negro children were four years over age. 0.11% of the white children and 0.53% of the Negro children were five years over age. Thus, in high school also, one white child out of six was retarded as compared with one Negro child out of three.

Obviously, it would create more numerous and more serious administrative and instructional difficulties to put in the

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same classrooms with white children the thousands of Negro children in Northampton County, one-third of whom are retarded, than it would cause to put into the classrooms of Graham County a single Negro child or even two Negro children, even if both of them should happen to be in the retarded one-third.

(c) *Urban and Rural Distribution of Negroes.*

Not only are the counties and sections of North Carolina different in the matter of the ratio of the Negro population to the total population, but they also differ in that the eastern half of the State, in which the overwhelming preponderance of the Negro population resides, is predominately an agricultural area. It is in this section primarily that the farming is done by the tenant farming system. In these eastern counties of the State the Negro population is primarily a rural population. Likewise, the white population of these counties is primarily a rural or small town population. In the Piedmont area, with its relatively smaller Negro population, manufacturing is concentrated. Farms, generally, are operated by the owner and his family. The Negro population of these counties tends to concentrate in cities and towns. In Southern cities and towns, just as in the North, residential segregation prevails apart from law. In these cities and towns there are schools now attended separately by white and Negro children. The Negro school building is located in the Negro section of the town. The white school building is located in the white section of the town. Normal geographic school districting will normally result in a continuation of separate schools for the separate races in such a community. There will, of course, be a few families of one race living in an area generally occupied by families of the other race. Most of these may be expected to prefer to cross the district line so as to attend the school they have been attending, and this would not violate any decision heretofore made by this Court. But even if such voluntary crossing of the district line is not permitted, the problem will not be nearly so difficult from an administrative and instructional point of view in cities and towns as it will be in rural communities, because in the cities and towns it will be akin to that in counties with

only a few Negroes. Therefore, the problem of mixing white children and Negro children in the public schools in North Carolina will present a far different problem in the industrial Piedmont area from that presented in the rural, agricultural, eastern half of the State, where the overwhelming majority of North Carolina's one million Negroes live. A decree which would be an irritant in a city could completely disrupt the rural schools of the same county.

F.

THE NORTH CAROLINA SCHOOL BUS SYSTEM

The opinions expressed by school superintendents and police officers (Appendix, Exhibits 6, 7 and 8) indicate that the mixture of the races in school busses is the most difficult problem confronting the school authorities in North Carolina as a result of this Court's opinion of May 17, 1954.

The State of North Carolina in recent years has carried on an intensive program of consolidation of schools for the purpose of improving the quality of the schools and providing a more extensive curriculum. Small rural schools, both elementary and high school, have been merged into large schools, with modern buildings and equipment, offering increased educational advantages to the white and Negro children in rural areas. This has necessitated the transportation of the majority of all the school children in North Carolina by school bus.

The State of North Carolina operates 7,200 public school busses. It transports to and from school each day 452,000 children, which is approximately one-ninth of the total population of the State. Over 6,000 of these busses are driven by high school students. No adult now rides on most of them. Approximately 2,000 are now used for the transportation of Negro children, 5,000 for the transportation of white children, and 85 are used for the transportation of Indian children. Practically every school bus in the State is crowded beyond its normal seating capacity. The busses travel over all kinds of country roads. Children in the first grade and in the high school ride on the same bus. To require that

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Negro children and white children be commingled forthwith on these buses, without adult supervision and police protection, is to invite conflicts on the bus, which will make riding on them so hazardous few parents will consent to their children's using them. This is a substantial danger a court of equity may well consider in formulating its decree.

CONCLUSION

The people of North Carolina have evolved a school system which, while far from the goals they have set for it, is an excellent school system. It is a school system in which children, in all parts of North Carolina and of all races, receive substantially equal opportunities for an education preparing them to assume the responsibilities of citizens under a constitutional government. It is a school system for which there is no presently available substitute in North Carolina. If it is destroyed or seriously impaired, generations of children of North Carolina will be severely handicapped, and the Negro children will be the greater losers.

As Mr. Clifford Dowdey, writing in The Saturday Review, said:

> "It is the gradation, the variation of necessary adjustments, which makes the execution of the Court's decision in the South anything except an abstraction on the road to equality. The human conditioning of environments being what it is, and individual circumstances varying as they do, it would look at this moment as if the historic decision might create historic chaos—unless, in October, when the Court listens to representatives of the locally affected scenes, it truly considers the real problems of the Southern society in which the Negro lives. Otherwise there will be a definite roadblock in the Negro's sorrowful journey toward his mortal dignity and full citizenship."
> Clifford Dowdey, The Saturday Review, October 9, 1954, p. 38.

It is respectfully submitted that in view of the good faith with which the people of North Carolina have evolved their

present excellent school system through the sacrifice of four generations, in reliance upon this Court's interpretation of the Fourteenth Amendment, the people of North Carolina are entitled in simple justice and equity to the entry of such a decree in these cases as will not seriously impair or destroy their public schools.

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EXHIBIT 1

'OPULATION B

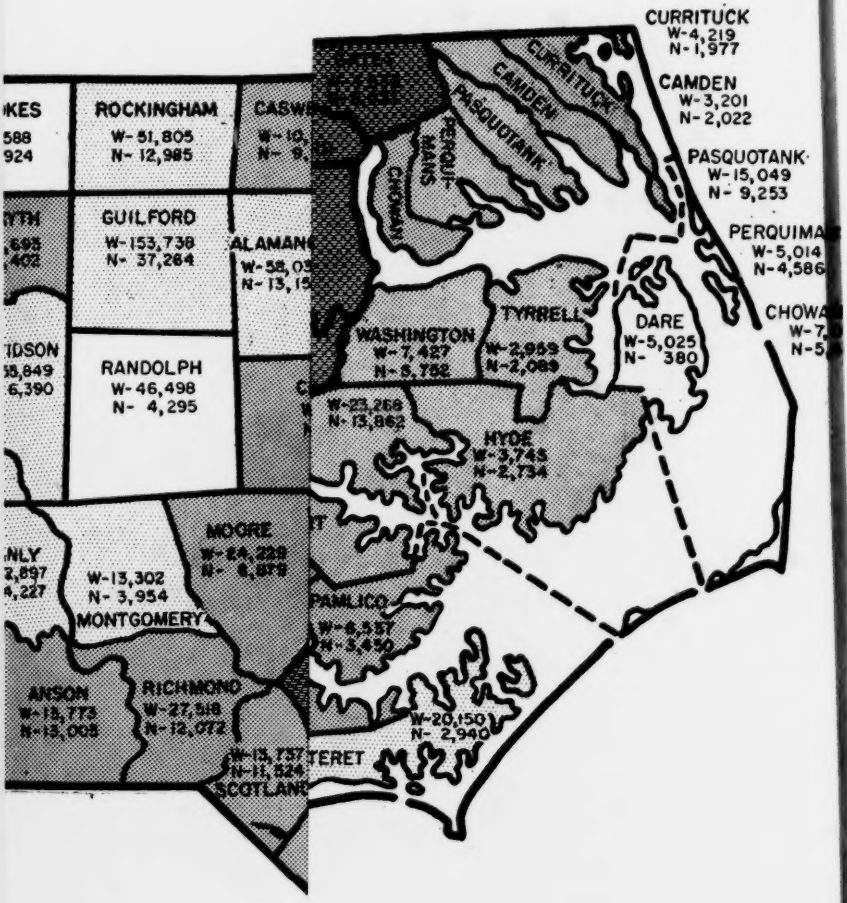

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EXHIBIT 2

TABLE I

North Carolina Population By Counties And Races, 1950

County	Total Population	White Population	Negro Population	% White	% Negro
Alamance	71,220	58,038	13,159	81.49	18.48
Alexander	14,554	13,521	1,021	92.90	7.02
Alleghany	8,155	7,887	268	96.71	3.29
Anson	26,781	13,773	13,003	51.43	48.55
Ashe	21,878	21,599	277	98.72	1.27
Avery	13,352	13,148	204	98.47	1.53
Beaufort	37,134	23,268	13,862	62.66	37.33
Bertie	26,439	10,628	15,809	40.20	59.79
Bladen	29,703	17,474	12,163	58.83	40.95
Brunswick	19,238	12,204	7,031	63.44	36.55
Buncombe	124,403	109,126	15,228	87.72	12.24
Burke	45,518	42,116	3,383	92.53	7.43
Cabarrus	63,783	54,024	9,735	84.70	15.26
Caldwell	43,352	40,354	2,992	93.08	6.90
Camden	5,223	3,201	2,022	61.29	38.71
Carteret	23,059	20,150	2,904	87.38	12.59
Caswell	20,870	10,942	9,922	52.43	47.54
Catawba	61,794	56,196	5,594	90.94	9.05
Chatham	25,392	17,251	8,135	67.94	32.04
Cherokee	18,294	17,978	290	98.27	1.59
Chowan	12,540	7,072	5,465	56.40	43.58
Clay	6,006	5,939	66	98.88	1.10
Cleveland	64,357	50,284	14,063	78.13	21.85
Columbus	50,621	33,448	16,705	66.08	33.00
Craven	48,823	32,996	15,804	67.58	32.37
Cumberland	96,006	69,131	26,417	72.01	27.52
Currituck	6,201	4,219	1,977	68.04	31.88
Dare	5,405	5,025	380	92.97	7.03
Davidson	62,244	55,849	6,390	89.73	10.27
Davie	15,420	13,267	2,150	86.04	13.94
Duplin	41,074	25,890	15,179	63.03	36.96
Durham	101,639	67,816	33,781	66.72	33.24
Edgecombe	51,634	24,818	26,802	48.07	51.91
Forsyth	146,135	104,693	41,402	71.64	28.33

TABLE I (CONTINUED)

County	Total Population	White Population	Negro Population	% White	% Negro
Franklin	31,341	17,044	14,293	54.38	45.60
Gaston	110,836	95,950	14,850	86.57	13.40
Gates	9,555	4,532	5,021	47.43	52.55
Graham	6,886	6,665	10	96.79	0.15
Granville	31,793	16,946	14,841	53.30	46.68
Greene	18,024	9,634	8,386	53.45	46.53
Guilford	191,057	153,738	37,264	80.47	19.50
Halifax	58,377	25,349	32,988	43.42	56.51
Harnett	47,605	35,107	12,096	73.75	25.41
Haywood	37,631	36,801	826	97.79	2.19
Henderson	30,921	28,851	2,066	93.31	6.68
Hertford	21,453	8,591	12,860	40.05	59.94
Hoke	15,756	6,214	8,778	39.44	55.71
Hyde	6,479	3,745	2,734	57.80	42.20
Iredell	56,303	46,305	9,990	82.24	17.74
Jackson	19,261	17,796	411	92.39	2.13
Johnston	65,906	51,586	14,313	78.27	21.72
Jones	11,004	6,011	4,992	54.63	45.37
Lee	23,522	17,400	6,119	73.97	26.01
Lenoir	45,953	26,131	19,817	56.86	43.12
Lincoln	27,459	23,978	3,479	87.32	12.67
McDowell	25,720	24,279	1,438	94.40	5.59
Macon	16,174	15,813	354	97.77	2.19
Madison	20,522	20,329	188	99.06	0.92
Martin	27,938	13,858	14,077	49.60	50.39
Mecklenburg	197,052	147,079	49,923	74.64	25.33
Mitchell	15,143	15,094	49	99.68	0.32
Montgomery	17,260	13,302	3,954	77.07	22.91
Moore	33,129	24,229	8,879	73.14	26.80
Nash	59,919	34,489	25,405	57.56	42.40
New Hanover	63,272	43,430	19,804	68.64	31.30
Northampton	28,432	10,182	18,189	35.81	63.97
Onslow	42,047	35,365	6,620	84.11	15.74
Orange	34,435	25,779	8,597	74.86	24.97
Pamlico	9,993	6,537	3,450	65.42	34.52
Pasquotank	24,347	15,049	9,253	61.81	38.00
Pender	18,423	9,473	8,897	51.42	48.29

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TABLE I (CONTINUED)

County	Total Population	White Population	Negro Population	% White	% Negro
Perquimans	9,602	5,014	4,586	52.22	47.76
Person	24,361	15,536	8,657	63.77	35.54
Pitt	63,789	34,273	29,503	53.73	46.25
Polk	11,627	10,118	1,504	87.02	12.94
Randolph	50,804	46,498	4,295	91.52	8.45
Richmond	39,597	27,518	12,072	69.50	30.49
Robeson	87,769	37,490	27,726	42.71	31.59
Rockingham	64,816	51,805	12,985	79.93	20.03
Rowan	75,410	62,538	12,846	82.93	17.03
Rutherford	46,356	40,675	5,678	87.74	12.25
Sampson	49,780	31,468	17,526	63.21	35.21
Scotland	26,336	13,737	11,524	52.16	43.76
Stanly	37,130	32,897	4,227	88.60	11.38
Stokes	21,520	19,588	1,924	91.02	8.94
Surry	45,593	42,984	2,605	94.28	5.71
Swain	9,921	8,370	139	84.37	1.40
Transylvania	15,194	14,442	746	95.05	4.91
Tyrrell	5,048	2,959	2,089	58.62	41.38
Union	42,034	32,544	9,469	77.45	22.53
Vance	32,101	17,488	14,602	54.48	45.49
Wake	136,450	96,409	39,949	70.66	29.28
Warren	23,539	7,901	14,817	33.57	62.95
Washington	13,180	7,427	5,752	56.35	43.64
Watauga	18,342	18,114	226	98.76	1.23
Wayne	64,267	37,142	27,090	57.79	42.15
Wilkes	45,243	42,521	2,707	93.98	5.98
Wilson	54,506	32,462	22,036	59.56	40.43
Yadkin	22,133	21,035	1,097	95.04	4.96
Yancey	16,306	16,121	182	98.87	1.12

Source: Population data from the U. S. Bureau of the Census, 1950.

EXHIBIT 3

TABLE II

NORTH CAROLINA COUNTIES BY PERCENTAGE OF NEGRO POPULATION, 1950

I. Counties with over 50% Negro population

COUNTY	% WHITE	% NEGRO
Northampton	35.81	63.97
Warren	33.57	62.95
Hertford	40.05	59.94
Bertie	40.20	59.79
Halifax	43.42	56.51
Hoke	39.44	55.71
Gates	47.43	52.55
Edgecombe	48.07	51.91
Martin	49.60	50.39

II. Counties with 25% to 50% Negro population

COUNTY	% WHITE	% NEGRO
Anson	51.43	48.55
Pender	51.42	48.29
Perquimans	52.22	47.76
Caswell	52.43	47.54
Granville	53.30	46.68
Greene	53.45	46.53
Pitt	53.73	46.25
Franklin	54.38	45.60
Vance	54.48	45.49
Jones	54.63	45.37
Scotland	52.16	43.76
Washington	56.35	43.64
Chowan	56.40	43.58
Lenoir	56.86	43.12
Nash	57.56	42.40
Hyde	57.80	42.20
Wayne	57.79	42.15
Tyrrell	58.62	41.38
Bladen	58.83	40.95
Wilson	59.56	40.43
Camden	61.29	38.71
Pasquotank	61.81	38.00

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TABLE II (CONTINUED)

COUNTY	% WHITE	% NEGRO
Beaufort	62.66	37.33
Duplin	63.03	36.96
Brunswick	63.44	36.55
Person	63.77	35.54
Sampson	63.21	35.21
Pamlico	65.42	34.52
Durham	66.72	33.24
Columbus	66.08	33.00
Craven	67.58	32.37
Chatham	67.94	32.04
Currituck	68.04	31.88
Robeson	42.71	31.59
New Hanover	68.64	31.30
Richmond	69.50	30.49
Wake	70.66	29.28
Forsyth	71.64	28.33
Cumberland	72.01	27.52
Moore	73.14	26.80
Lee	73.97	26.01
Harnett	73.75	25.41
Mecklenburg	74.64	25.33

III. Counties with 10% to 25% Negro Population

COUNTY	% WHITE	% NEGRO
Orange	74.86	24.97
Montgomery	77.07	22.91
Union	77.45	22.53
Cleveland	78.13	21.85
Johnston	78.27	21.72
Rockingham	79.93	20.03
Guilford	80.47	19.50
Alamance	81.49	18.48
Iredell	82.24	17.74
Rowan	82.93	17.03
Onslow	84.11	15.74
Cabarrus	84.70	15.26
Davie	86.04	13.94
Gaston	86.57	13.40

TABLE II (CONTINUED)

COUNTY	% WHITE	% NEGRO
Polk	87.02	12.94
Lincoln	87.32	12.67
Carteret	87.38	12.59
Rutherford	87.74	12.25
Buncombe	87.72	12.24
Stanly	88.60	11.38
Davidson	89.73	10.27

IV. Counties with less than 10% Negro population

COUNTY	% WHITE	% NEGRO
Catawba	90.94	9.05
Stokes	91.02	8.94
Randolph	91.52	8.45
Burke	92.53	7.43
Dare	92.97	7.03
Alexander	92.90	7.02
Caldwell	93.08	6.90
Henderson	93.31	6.68
Wilkes	93.98	5.98
Surry	94.28	5.71
McDowell	94.40	5.59
Yadkin	95.04	4.96
Transylvania	95.05	4.91
Alleghany	96.71	3.29
Haywood	97.79	2.19
Macon	97.77	2.19
Jackson	92.39	2.13
Cherokee	98.27	1.59
Avery	98.47	1.53
Swain	84.37	1.40
Ashe	98.72	1.27
Watauga	98.76	1.23
Yancey	98.87	1.12
Clay	98.88	1.10
Madison	99.06	0.92
Mitchell	99.68	0.32
Graham	96.79	0.15

Source: Population data from the U. S. Bureau of the Census, 1950.

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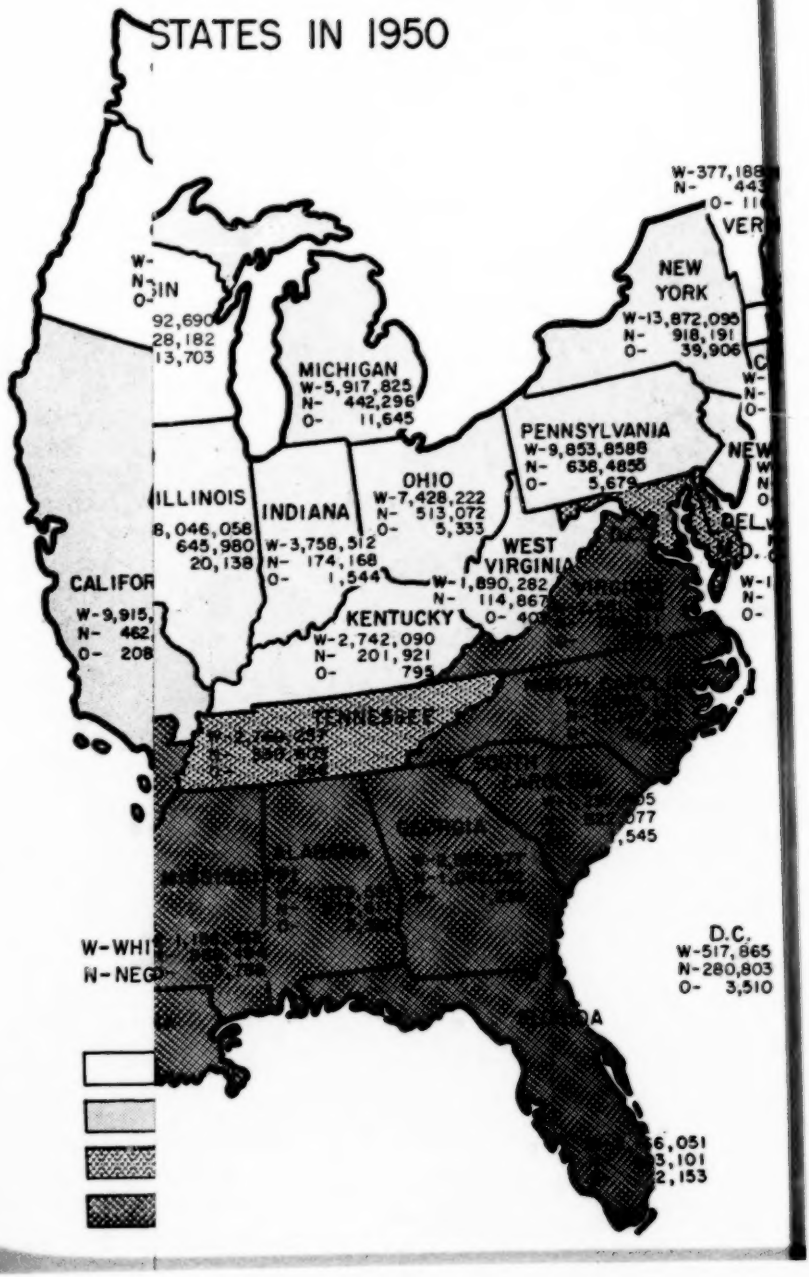

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EXHIBIT 5

TABLE III

STATES BY PERCENTAGE OF NEGRO POPULATION, 1950

State	Total Population	% Negro	% White	% Other Races
Mississippi	2,178,914	45.27	54.55	.17
South Carolina	2,117,027	38.83	61.10	.07
District of Columbia	802,178	35.01	64.55	.44
Louisiana	2,683,516	32.88	66.95	.16
Alabama	3,061,743	32.00	67.92	.08
Georgia	3,444,578	30.85	69.11	.04
North Carolina	4,061,929	25.78	73.44	.77
Arkansas	1,909,511	22.34	77.59	.07
Virginia	3,318,680	22.12	77.79	.09
Florida	2,771,305	21.76	78.16	.08
Maryland	2,343,001	16.47	83.44	.09
Tennessee	3,291,718	16.12	83.85	.03
Delaware	318,085	13.71	86.10	.19
Texas	7,711,194	12.68	87.23	.09
Missouri	3,954,653	7.51	92.44	.05
Illinois	8,712,176	7.41	92.35	.23
Michigan	6,371,766	6.94	92.88	.18
Kentucky	2,944,806	6.86	93.12	.02
New Jersey	4,835,329	6.59	93.30	.11
Oklahoma	2,233,351	6.52	91.00	2.48
Ohio	7,946,627	6.45	93.48	.07
New York	14,830,192	6.19	93.54	.27
Pennsylvania	10,498,012	6.08	93.86	.05
West Virginia	2,005,552	5.73	94.25	.02
Indiana	3,934,224	4.43	95.53	.04
California	10,586,223	4.37	93.66	1.97
Kansas	1,905,299	3.84	95.99	.17
Arizona	749,587	3.46	87.32	9.22
Nevada	160,083	2.69	93.64	3.67
Connecticut	2,007,280	2.66	97.26	.07
Rhode Island	791,896	1.76	98.12	.12
Massachusetts	4,690,514	1.56	98.32	.12
Colorado	1,325,089	1.52	97.85	.62
Nebraska	1,325,510	1.45	98.18	.37

TABLE III (CONTINUED)

State	Total Population	% Negro	% White	% Other Races
Washington	2,378,963	1.29	97.37	1.34
New Mexico	681,178	1.23	92.52	6.25
Wyoming	290,529	0.88	97.76	1.36
Wisconsin	3,434,575	0.82	98.78	.40
Oregon	1,521,341	0.76	98.41	.83
Iowa	2,621,073	0.75	99.18	.07
Minnesota	2,982,483	0.47	99.03	.50
Utah	688,862	0.40	98.26	1.34
Montana	591,024	0.21	96.79	3.00
Idaho	588,637	0.18	98.77	1.05
New Hampshire	533,242	0.14	99.82	.04
Maine	913,774	0.13	99.68	.19
Vermont	377,747	0.12	99.85	.03
South Dakota	652,740	0.11	96.29	3.60
North Dakota	619,636	0.04	98.19	1.76

Source: Population data from the U. S. Bureau of the Census, 1950.

EXHIBIT 6

LETTER OF TRANSMITTAL AND QUESTIONNAIRE TO COUNTY AND CITY SUPERINTENDENTS OF SCHOOLS WITH TABULATIONS OF ANSWERS TO QUESTIONS FROM 8 TO 18 INCLUSIVE

STATE OF NORTH CAROLINA

DEPARTMENT OF PUBLIC INSTRUCTION

RALEIGH

October 5, 1954

County and City Superintendents
Greetings:

In the school segregation cases pending for re-argument in the Supreme Court of the United States, beginning December 6, this State has accepted the invitation of the Court to appear amicus curiae and file a brief containing answers suggested by this State to the two questions formulated by the Supreme Court to be considered at that time. The first question is: "Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of

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their choice?" The second question is: "May this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

We enclose three copies of a questionnaire which we are sending to county and city superintendents throughout the State as to what may happen at the time steps are taken to compel integration in the public schools, which is necessarily a matter of opinion. We would like to have your opinion, based upon your own knowledge and observations and such information as you have been able to obtain in conference with school and other officials and others in your administrative unit, in answer to the questions contained in this questionnaire, to assist us in presenting our brief and argument in the Supreme Court.

It is important that nothing be done to intensify feelings on this subject. For that reason, we request that you do not discuss this questionnaire with anyone except in a confidential way.

"YES" and "NO" answers are requested to most of the questions in order that we may get results of the questionnaire in composite and tabulative form. Please be sure to furnish these answers if you can with such other and further explanations as you think should be made. Promptness in your reply is extremely important as time is very limited. *Please give this your immediate and preferred attention and mail two copies of the questionnaire with your answers by October 11 to Harry McMullan, Attorney General, Raleigh, North Carolina.*

There will be no disclosure of the names of the various superintendents answering this questionnaire. The results of the tabulation only will be made public by probably being included in the brief to be filed with the Supreme Court.

Yours very truly,
s/ Chas. F. Carroll
Chas. F. Carroll
State Superintendent Public Instruction
Harry McMullan
Attorney General

QUESTIONS FOR SCHOOL SUPERINTENDENTS

1. Name of administrative unit: .....
   (county, city)
2. What is the total 1954 enrollment? .....
   a. White enrollment?.....
   b. Indian enrollment?.....
   c. Negro enrollment?.....
3. How many schools are there in your unit?.....
   a. White?.....
   b. Indian?.....
   c. Negro?.....
4. How many teachers and principals in your unit?.....
   a. White?.....
   b. Indian?.....
   c. Negro?.....
5. How many school busses are operated?.....
   a. White?.....
   b. Indian?.....
   c. Negro?.....
6. How many of the schools in your unit, now used exclusively for white children, could accommodate any substantial number of Negro children without displacing any white children?.....
7. How many of the schools in your unit, now used exclusively for Negro children, could accommodate any substantial number of white children without displacing any Negro children?.....
8. In the event the Supreme Court of the United States shall decree in the pending school segregation cases that, within the limits set by normal geographic school districting, Negro children should *forthwith* be admitted to schools of their choice in your county or city administrative unit, and if Negro children in substantial numbers elect to attend the public schools heretofore exclusively operated for white children, do you have reason to believe that white school children and their parents would peacefully accept this decision and attend such mixed schools? (Answer "Yes" or "No") Yes—7 No—158 D.K.—1

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Make such explanation of your answer as you care to make.

9. If your answer to Question No. 8 is "No," do you have reason to believe that the attempt to integrate the public schools in your administrative unit will seriously interfere with and impair your ability to conduct these schools for the year 1955-56?
(Answer "Yes" or "No") Yes—147 No—13 D.K.—1
Make such explanation of your answer as you care to make.
10. Would immediate mixing of the races in the public schools in your administrative unit cause serious complications in the operation of school busses serving your schools?
(Answer "Yes" or "No") Yes—126 No—25 D.K.—1
Make such explanation of your answer as you care to make.
11. In the event of immediate integration of your schools, would you find it practicable to use Negro teachers in mixed classes?
(Answer "Yes" or "No") Yes—3 No—162 D.K.—
Make such explanation of your answer as you care to make.
12. In the event of immediate integration of your public schools, would you have any serious difficulties in securing a sufficient number of properly trained white school teachers to teach in mixed schools?
(Answer "Yes" or "No") Yes—137 No—23 D.K.—4
Make such explanation of your answer as you care to make.
13. In the event of immediate integration, would you have any reason to believe that the mixing of the races in the public schools of your unit would create serious problems of discipline in these schools?
(Answer "Yes" or "No") Yes—150 No—13 D.K.—2
Make such explanation of your answer as you care to make.
14. Would such an integrated program seriously affect the extra-curricular activities in the schools in your administrative unit?

(Answer "Yes" or "No") Yes—148 No—16 D.K.—1
Make such explanation of your answer as you care to make.

15. Would, in your opinion, such immediate integration of the races cause parents in large numbers to withdraw their children from such schools?
(Answer "Yes" or "No") Yes—142 No—20 D.K.—2
Make such explanation of your answer as you care to make.

16. Is there such difference in the average attainments between white and Negro children as to seriously impair instruction in mixed schools?
(Answer "Yes" or "No") Yes—140 No—22 D.K.—3
Make such explanation of your answer as you care to make.

17. Would, in your opinion, white children or their parents elect to attend any school heretofore conducted for Negro children?
(Answer "Yes" or "No") Yes— No—165 D.K.—
Make such explanation of your answer as you care to make.

18. In the event that the Supreme Court should decree that there should be a *gradual* adjustment brought about from the existing segregated system of public schools to a system not based on color distinction, and provided that sufficient length of time were allowed for such gradual adjustment, would the schools of your unit be better able to cope with the problems presented by such a decision?
(Answer "Yes" or "No") Yes—151 No—9 D.K.—5
Make such explanation of your answer as you care to make.

Name and Position of person answering this questionnaire:

....
Name Position

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EXHIBIT 7

A

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 8 of the questionnaire, which reads as follows:

> "In the event the Supreme Court of the United States shall decree in the pending school segregation cases that, within the limits set by normal geographic school districting, Negro children should *forthwith* be admitted to schools of their choice in your county or city administrative unit, and if Negro children in substantial numbers elect to attend the public schools heretofore exclusively operated for white children, do you have reason to believe that white school children and their parents would peacefully accept this decision and attend such mixed schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(4427) N(26)
"I believe that the *majority* would accept the decision reluctantly, but a very substantial minority would fight such a decision to the limit."

W(6724) N(1827)
"A large portion of the people would probably tolerate mixing of children but there would be strong protests, much unhappiness, and many disturbing incidents. A small portion of the people would not accept the decision at all unless force were used."

W(3281) N(811)
"If a large number of Negro children should elect to attend any one white school here, the white people would rebel. We have one situation here where Negroes, because of transporttation, would go in large numbers to a white school."

W(1051) N(441)
"Integration would not be unanimously accepted. Should the county take the Negroes from our attendance area, the unit would be seriously affected unless other children were assigned to this area."

W(2301) N(1702)
"There would be riots, boycotts, and other serious disturbances. It will take a minimum of 25 years to bring about desegregation."

W(2262) N(1835)
"Individual members (all of them) on our School Board say that it will not work here."

W(2432) N(1661)
"The health and moral standards and intellectual abilities are inferior in our Negro children to those of the white children."

W(3534) N(646)
"Our people, in my opinion, would rebel against any immediate plan of integration. Those inclined to accept the mandate of the Supreme Court would be overwhelmed by the others."

W(1710) N(1208)
"If children attend the schools nearest to where they live there will be a minimum of trouble."

W(2256) N(1506)
"Violence will be inevitable and swift."

W(1523) N(1455)
"Parents have expressed their opinion very freely on this subject, and very few are willing to send their children to nonsegregated schools."

W(3375) N(2733)
"All schools are accommodating from 25 to 50 per cent more

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students than their reasonable capacity; therefore, no room for additions."

W(1795) N(194)
"The change factor here, if nothing more, would be sufficient to prohibit *peaceful acceptance*. I do not mean to say that there would be acceptance otherwise."

W(3256) N(1455)
"Children and parents would not peacefully accept this decision and attend mixed schools."

W(13,032) N(3557)
"From all that I have heard in this county, practically nobody is of the opinion that the Supreme Court's decision can be put into effect at this time."

W(17,926) N(7984)
"Judging by the telephone calls and the conversations provoked, I expect some very unhappy developments."

W(1878) N(0)
"I believe a majority would comply reluctantly, not peacefully, however."

W(8578) N(3442)
"My only reason for answering No is based on the number and frequency of questions asked by white parents about the Supreme Court decision."

W(2117) N(1172)
"In my opinion any considerable mixing of the races in the public schools here would bring complete chaos to the educational program in the community."

W(2398) N(875)
"Judging by what is happening elsewhere."

W(2812) N(1868)
"Precedent: Threatened action of patrons of one of our

schools few years ago when one child of reputed and alleged mixed blood sought entrance."

W(2603) N(7753)
"I do not believe that children and parents in this area, which is so heavily populated by Negroes, would accept peacefully a decision that they must attend mixed schools. Neither race is prepared or willing to accept the decision."

W(1006) N(1127) I(1100)
"This question should be expanded to include Negroes and Indians and by the very nature of the parents and children they absolutely would refuse to accept the idea of mixed schools. Our problem is tri in nature, or even actually quadrangular because we have whites, Negroes, Indians and a fourth group that neither race will claim, and the very instinctive nature of the people will make this possible task prohibitive."

W(5120) N(1683)
"Definitely No.—Our white patrons would strongly protest entrance of Negro children into the white schools. Many of them would keep their children out of school. A few would allow their children to attend with reluctance."

W(3295) N(1900)
"Many of our parents have indicated that they are seeking to get the compulsory school attendance law repealed in the next session of the General Assembly to enable them to teach or have their children taught at home. One and two teacher private schools will appear throughout our communities. If force is attempted to integrate rapidly, violence will occur, in my opinion."

W(6253) N(50)
• "There will be considerable resentment."

W(1132) N(118)
"Many people, because of tradition and prejudice, will not

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peacefully submit to mixed schools."

W(3901) N(777)
"Rural white and textile whites will not easily mix with Negroes."

W(2795) N(1111)
"I believe that this change would be too drastic to be accepted without serious dissatisfaction and without challenge to constituted authority."

W(6487) N(2276)
"We have only one white school with any space left. There is a much more modern Negro school one block from it."

W(696) N(157)
"We have many people who would accept integration, but we have many who would violently oppose it. This latter group would be composed almost wholly of people who could not send students to private schools."

W(3228) N(2515)
"Recent experiences in border states, where there is but a sprinkling of Negro students, indicate the strife that will accompany integration in the South. Problems that have arisen in the border states would doubtless be greatly multiplied in the South."

W(1408) N(2212) I(230)
"Almost all white children would stay at home. Most of the Negro children would do likewise. I have heard Negro parents say they would not allow their children to attend mixed schools as trouble would arise."

W(3494) N(4163)
"An example of the attitude of the people occurred last winter in the School District. I am not proud of it, but it did happen. The colored high school at ..... had a good glee club, and the colored principal asked the white principal about

bringing them over to the white school to sing at the chapel program. The invitation was extended to the colored school and the white principal made an announcement to the children about the program. The children thought nothing about it, but the parents descended on the principal and school board almost in mob violence; so the invitation had to be retracted. This occurrence opened my eyes, and I am just giving you this as an example of what did occur. I think it would be much worse should integration be attempted."

W(552) N(371)
"I have not heard any parent express a willingness to send their children to school where the Negroes are attending."

W(1755) N(1030)
"No one has expressed himself in favor of integration, but the general consensus is against integration. Some high school children have been sent to private schools this year."

W(2460) N(2597)
"I do not know whether you would call it prejudice, but under present conditions the white people will not submit peacefully to this change."

W(3270) N(409)
"Answer based on belief that some of our people would object strongly enough to create a difficult problem."

W(3919) N(2223)
"Practically all of our people feel that such a decision would not be accepted peacefully."

W(9127) N(257)
"Some of the parents might accept it, but others would not under any circumstances, law or no law. Some of these mountain people have definite opinions. Even some of the best informed people have expressed a very bitter attitude."

W(3885) N(74)
"My opinion is that although there might not be any violence

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there would be considerable disturbance which would result in a very unhappy and unhealthy situation, especially for the Negro children."

W(9783) N(2305)
"During the month of August we had telephone calls from parents protesting the mixing. People thought the order was effective for the current year."

W(4224) N(66)
"Probably a portion of the parents and children in the urban areas would accept the Negroes, but I doubt that those in the rural areas would."

W(2774) N(3036)
"Expressions already made indicate there would be intense feelings and disturbances."

W(1826) N(1190)
"Our adults would not peacefully accept the decision because: 1. They feel that the Negroes are as well housed as the white children. 2. They think that the Negro children are insanitary and unhygienic. 3. They think that such a social disturbance should not have been thrust upon them so suddenly. 4. They consider the decision an infringement of local and state rights."

W(2905) N(798)
"I think there would be ranging from some to quite considerable oral protests and complaints. If properly presented by school authorities I do not believe there would be any physical violence. Some, but not a considerable number of white children be held out, withdrawn or strike. This I believe would be temporary."

W(2297) N(397)
"This problem would perhaps not be quite so serious in ..... as in some other places, due to the fact that our Negro population is small and concentrated entirely in one district."

W(1937) N(928)
"Neither parents nor students are ready or willing to have mixed schools."

W(1139) N(750)
"I base my answer upon comments and statements I have heard white people make."

W(7416) N(148)
"In view of the small number of Negro children in this county, resistance might be less violent than in other counties."

W(4165) N(3107)
"The attitude of the majority of the people is one of watchful waiting. Insofar as I can tell there is no desire on the part of the great majority of the Negro pupils and parents to have the schools integrated. There is a determination, quiet at present on the part of a big majority of the white people to maintain separate schools regardless of the cost."

W(1130) N(811)
"I am of the opinion that parents of white children will do some drastic before they will allow their children to be immediately integrated with Negro children."

W(2577) N(148)
"Only one white elementary school in my unit would ever be involved. Some of the parents and some of the children would resist such a move just as they have in Washington, D. C.; Ohio; Maryland; and other places where it has been tried."

W(4068) N(27)
"Some parents would accept the decision peacefully, perhaps the majority. A few would organize resistance and would take their children out of school. Many parents would want to send the children to schools in the county that would be free of Negroes."

W(9983) N(4822)
"The spirit of harmony, developed since the days of Aycock,

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was rudely disrupted by a racketeer group that started an 'equalization' suit 4 years ago. They found the schools so nearly equal in facilities that an advisor stated 'you can lose this suit.' It was withdrawn from Court but not before this group had succeeded in arousing racial bitterness and distrust. In a speech to county officials this group boasted that 'regardless of how equal we find facilities in your county —you haven't a chance to win.' They boasted that the Court was with them all down the line. Confidence in Federal justice was severely shaken."

W(1778) N(619)
"In my opinion, this would result in an armed riot with possible blood shed on both sides."

W(3250) N(1288)
"It was rumored that on September 13, 1954, Negro children would go to the ..... School for enrollment. White people from all over ..... County were at or near the school on that date. Patrolmen, the sheriff, and policemen were present. No Negro children appeared and nothing happened but the feeling was running high for three days. The news had spread to all parts of the county and many were ready to come to the place of the scene if needed. I am sure that violence would have occurred if any Negro children had shown up for entrance. Many parents kept their children at home for these three days for fear of a riot. At our request, we had no publicity in the papers about this."

W(1835) N( ) I(393)
"Our people have provided equal schools for both colored and white and they feel that it is best for the white and colored children to go to their own schools."

W(3388) N(329)
"We have six white schools in ..... County. Two of these schools, ... and ..... school districts have no Negro children. Negroes are not allowed to move into these two communities. Our ..... school would have 55 Negro chil-

dren, and there is an unwritten law in the ..... school district that does not permit the sun to set on a Negro in that community. Our ..... school would have 75 Negro children and the entire community of one thousand whites are strongly opposed. Our ..... school would have 30 Negro children, strongly opposed by the whites. The rest of our 329 Negro children enrolled in ..... County would be enrolled in the ..... school in which our one Negro school is located. That would place a total of 169 in the ..... School. Not a single person in the ..... community has stated they would go along with integration."

W(1831) N(235)
"We believe both races would be highly resentful."

W(1787) N(1575)
"Many citizens tell me that it can never happen here. The disturbances which are occurring in Delaware; Baltimore; Maryland; Washington, D. C.; and other places seem to indicate that integration can be accomplished only by force."

W(3738) N( )
"I believe there will be incidents which could be serious, particularly if complete integration is attempted suddenly."

W(4781) N(715)
"Geographical location of Negro children, with some few exceptions, would make the Negro school the logical one for them to attend."

W(2272) N(2638)
"Great disturbances would occur."

W(1000) N(675)
"I am afraid integration will bring about a great deal of trouble to this community which now has splendid race relations."

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W(1270) N(1090)
"My opinion is based upon comments of parents and high school pupils."

W(638) N(721)
"If you think other areas have had a rough time, you don't know anything as to what would happen here."

W(6468) N(4337)
"The situation in Washington, Maryland, and Delaware is only a slight breeze compared to the storm we shall have here. It is my opinion that there will be bloodshed."

W(1571) N(2236)
"Because of recent remarks and definite stands on this question by all white parents and citizens in this community with exception of a few ministers."

W(2694) N(1492)
"Those parents and school students who have talked to me have expressed opposition to having the children of Negro and white parents attend the same school."

W(1821) N(428)
"I believe that it would take time. However, I do not believe we would have any Negroes who would want to change unless outside persons interferred."

W(6314) N(3521) I(250)
"It is my opinion that white children and white parents will not accept school attendance in the same buildings in ..... County."

W(3137) N(2210)
"I believe there will be trouble."

W(7175) N(6916)
"Time for public opinion to adjust itself to integration will be necessary and that will take more than one, or two, or three years."

W(13,996) N(1604)
"Remember the ..... case. In certain sections of the county it will be worse. If the local School Board, the State School Board and the State as a whole couldn't operate buses at ....., how can they keep them going this time?"

W(2125) N(15) I(113)
"Parents have expressed their feelings on this matter and say they will not allow their children to attend public school with the colored people."

W(8112) N(2177)
"All answers have been given after consultation with Board of Education and District School Committeemen."

W(3330) N(2681)
"Our hope is in 'schools of their choice.' We have outlined new boundaries and in each case it will be a ratio of 95 to 5. We suggest the minority attend the school of their choice."

W(2629) N(953)
"The feeling on the part of our school patrons is that excellent facilities have already been provided in the Negro school to take care of their needs. For the most part, our Negro citizens live in the general vicinity of their own school."

W(2342) N(2685)
"It is my considered opinion that the people of ..... County will not peacefully accept integrated schools, now or at any time in the foreseeable future."

W(5284) N(All colored children in the county are transported to a consolidated school in the ..... city Unit.)
"The total colored school population in the county is approximately 150. This would range from 1 to 20 pupils to be distributed in 10 white schools each. The percentage of colored children against the whites in any one school would be so

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low that it would make a very unfair hardship on the colored child to make the necessary adjustments. The same would apply to transportation problems."

W(2409) N(562)
"The patrons of our schools are very determined that we not have mixed schools."

W(6631) N(313)
"They will not accept it. Some will stop their children. In some cases there might be violence."

W(1926) N(533)
"I believe the parents of children in the lower grades would be prone to accept but not those of children in the upper grades. There are many parents, although not in majority, who would not initially accept this arrangement but might in the future."

W(15,551) N(410)
"I do not believe that the decision of the Supreme Court will be willingly followed by the people in this section."

W(1550) N(107)
"Many of our mountain people are given to taking the law into their own hands and settling their emotional differences violently."

W(8661) N(3624)
"There is extreme feeling about this matter on the part of a militant minority—parents and teachers."

W(675) N(764)
"Even discussion of the possibility brings very strong emotional reaction. There was, and still is, strong opposition to those connected with the building program in which approximately 2/3 of the money was spent on Negro schools. With 'better' Negro buildings available there would be a possibility of violent reaction to Negroes *attempting* to enroll in white schools."

W(2379) N(4469)
"It will take an army to enforce segregation in ..... County at this time. I am afraid that riots and bloodshed will result. You cannot change the customs and traditions of people over night."

W(999) N(1062)
"Integration of the races is not desired by either the whites or the Negroes in this Eastern North Carolina community."

W(5542) N(3469)
"The answer is based on comments made by many patrons."

W(4083) N(2344)
"The people have no idea of accepting a decision of integrating the schools."

W(8331) N(4023)
"Do not feel the public would accept such a change without a strong fight—maybe not then."

B

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 8 of the questionnaire, which reads as follows:

> "In the event the Supreme Court of the United States shall decree in the pending school segregation cases that, within the limits set by normal geographic school districting, Negro children should *forthwith* be admitted to schools of their choice in your county or city administrative unit, and if Negro children in substantial numbers elect to attend the public schools heretofore exclusively operated for white children, do you have reason to believe that white school children and their parents would peacefully accept this decision and attend such mixed schools?"

The W, N or I followed by numerals indicate the white,

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Negro or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2796) N(782)
"In my opinion, about 75% of the people, if they had to, would accept it peacefully, even though it would be very distasteful to them. The others will likely withdraw or complain and fight the action—gradually this will likely give way to submission."

W(3669)
"Our situation is not typical of the state. We have only 8 colored children and they are now being transported to ..... They could be absorbed by the schools at ..... without difficulty, if we can trust what the white children say. The P.T.A. of 200 members, expresses this same opinion."

W(1392) N(604)
"We have relative few Negroes in this area, and the majority of the younger people have no racial prejudices."

W(4112) N(55)
"Majority of Negro children prefer to attend the Negro school."

W(14,452) N(2,475)
"Consultation with a substantial number of Negro patrons indicates that very few, if any, Negro children would elect to attend white schools."

W(11,458) N(4,441)
"This I do not know. The problem is unquestionably an explosive one, but our Polio Hospital School has been integrated since 1948. Our newest and finest Hospital is integrated. Our Social Agency Council is non-segregated. A Negro has been elected Councilman, and another Negro has been appointed a member of the Board of Education."

C

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 9 of the questionnaire, which reads as follows:

> "If your answer to Question No. 8 is 'No,' do you have reason to believe that the attempt to integrate the public schools in your administrative unit will seriously interfere with and impair your ability to conduct these schools for the year 1955-56?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2577) N(148)
"As stated above, only one of five elementary schools would ever be affected in any way. At some future date, some of the Negro pupils may ask to come to the white school for certain vocational courses. I do not believe this will happen soon."

W(4068) N(27)
"All the Negro children of the county live in ....., except two of school age. These two would probably want to attend school here. Only one school in our county would have Negro children in it."

W(1679)
"No Negroes in ..... County."

W(638) N(721)
"I think we can handle our local situation with support at *state level.*"

W(2125) N(15) I(113)
"We have only 22 colored students—8 high school and 14 elementary. Elementary children would attend their own

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school because it is located in the center of the colored district. The colored high school pupils would not care to attend our white high school. They are transported to ..... County to a colored high school there."

W(2629) N(953)
"I have little reason to believe that our Negro patrons desire admission into the white schools. It is further my belief that unless outside influence and pressure is brought to bear upon our Negro citizens, little trouble need be anticipated."

W(15,551) N(410)
"We are transporting high school children from ..... County to ..... We have two elementary schools that are as well equipped as the white."

W(4427) N(26)
"The small number of Negro children in the county tends to minimize the scope of the problem. Only one school would be materially affected. If Question 9 is made to apply to that one school only, the answer would be 'yes'."

W(1051) N(441)
"From an administrative standpoint of students, teachers, and principals, no; parents could seriously interfere with our ability to conduct the schools for 1955-56."

W(8578) N(3442)
"Possibly No, if careful study is made in redistricting."

D

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 9 of the questionnaire, which reads as follows:

> "If you answer to Question No. 8 is 'No,' do you have reason to believe that the attempt to integrate the public

schools in your administrative unit will seriously interfere with and impair your ability to conduct these schools for the year 1955-56?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(6724) N(1827)
"Since Negro children are as well, if not better, provided for in our schools than the white children, we do not see that it would be an advantage to the Negro children to mix them with whites. The people would say that such a decision would be arbitrary and without justification. The intimate and personal relationships which exist between pupils and teachers and between teachers and parents would be broken down. There would be conflicts in the area of social relationships. By mixing children, we would sacrifice many of the things which make for quality of public education for a mythical goal which is commonly termed 'equality'."

W(3281) N(811)
"Unless the process is a very gradual one, the results will be detrimental to both white and colored."

W(2796) N(782)
"Yes, if integration must take place by then. A gradual program begining with the primary children only might be effected without too much serious interference."

W(2262) N(1835)
"Some of the ..... Club members have told that they simply *will not* allow their children to attend school with Negroes."

W(2432) N(1661)
"Any abrupt change would seriously interfere in operation of our schools."

W(2373) N(4419)
"If many Negro children entered the difference would create a great problem."

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W(9619) N(7122)
"We should have more time for our folks to become emotionally ready for integration in the public schools."

W(3534) N(646)
"The most popular candidate for our current race for school trustees is an outspoken, radical opponent of integration, even though he has done very little for our schools in the past and has never been actively affiliated with school progress."

W(1710) N(1208)
"We have no extra classroom space."

W(2256) N(1506)
"Attendance will fall off very sharply as well-to-do parents send children to private schools. Truancy will become a very great problem—other parents will not try hard to make children go to school."

W(1523) N(1455)
"Many white parents have said they would not send their children to integrated schools. Negroes have told us they would keep their children at home rather than risk having them get into trouble with white children or parents. Another problem would be objections to using Negro teachers to teach white pupils. Very few white parents would tolerate this situation. Children in this unit usually offer no discipline problem, but I do not believe the Negro teacher could handle white children."

W(3494) N(4163)
"I think that it would mean that only the Negro children would attend the public schools. From the experience noted above, it is evident that the white people do not intend to go with Negroes. The Negroes will go to the white schools if they are ordered to do so, though I do not think many of them really want to go to the white schools. If integration is ordered, it is my sincere opinion that it will mean the

end of the public school system. I do not think that I would have the nerve or the fortitude to withstand the embarrassments and insults that would be hurled at me. I think that the strain will take its toll of superintendents."

W(552) N(371)
"You can not administer a school system without the support of the majority of the people. In this instance, it appears that all the white people and 98% of the Negroes of this county are opposed to integration."

W(6211) N(1837)
"..... County recently—the last 4 years—has gone 'all out' to bring the building program and equipment up to, or to surpass, that provided for the white race. The County now has only 3 Negro Schools:
1. ..... with 24 elem. teachers and 11 H.S. teachers
2. .....with 12 elem. teachers
3. ..... with 10 elem. teachers
Approximately $515,000 has been put in these buildings with equipment in the last 2 years. The white race will feel that the Negro race has as good as they have, and that the Negro race should be satisfied with their own schools—that both races would thus be better off with separate schools."

W(1755) N(1030)
"Some petitions outside of school circles have been circulated against integration. It is not general knowledge but one such meeting (against integration) has been held."

W(2460) N(2597)
"I just would not know how to suggest the mixing of the races in this county with any peace."

W(3665) N(22)
"Considering the fact that we have only a small number of Negro students, I find considerable feeling against integration."

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W(9127) N(257)
"Having only a small number makes the problem even more difficult. It would not be safe for the minority group. As we are situated, there would not be over fifty colored children in any one school. These in school with several hundred white children would be in danger for a long time to come. We have already had evidence of this by children on buses passing each other clashing. It would be bad for even the colored children."

W(1987) N(1303)
"The situation resulting would be disastrous."

W(9783) N(2305)
"The pattern set by schools in the states north of our state will likely to be followed in North Carolina."

W(2774) N(3036)
"In order to conduct schools properly any administration would need a large percentage of cooperation from parents and pupils. We would not have this!"

W(2297) N(397)
"At the present time every classroom is filled and any integration would simply mean the swapping of pupils as between the races."

W(1937) N(928)
"Absenteeism, strikes and riots would be the order of the day."

W(3273) N(875)
"All my energies will be taken up keeping the peace."

W(2603) N(7753)
"It is my opinion that an attempt to integrate the public schools in this administrative unit would prevent the operation of schools in the year 1955-56. There would be such wide-

spread disorder, and perhaps even violence, as to cause operation of schools to be impossible."

W(4548) N(916)
"Definitely—*all* schools in our units are filled to capacity or overflowing. Any transfer of pupils would seriously affect those schools having increases. For example, our schools in the eastern part of our unit have no Negro population. Parents now living in our more thickly populated centers have said they would move to the eastern section. This would create a demand on the limited facilities of those small schools that we could not care for."

W(2812) N(1868)
"Yes—emphatically."

W(1006) N(1127) I(1100)
"I believe this answer to be totally unbiased, that neither myself nor any living human being can conduct our schools on an integrated or partially on an integrated basis for the school year 1955-56 and I believe if it is a decision of the Supreme Court that this be commenced within the foreseeable future, our only alternative would be to close the doors of every school. The racial lines are drawn by the very inherent nature of our people and certainly these barriers cannot be removed, regardless of the efforts that may be exerted by the Supreme Court, local school board or local school people."

W(5120) N(1683)
"It would probably result in reduced appropriations on the local level. It might slow down our building program. It would reduce attendance. It would cause general confusion. There might be a reign of terror. Such an attempt would be loaded with the explosive ingredients of the atom."

W(3295) N(1900)
"In the school districts where the Negro pupils exceed the white pupils in number, the cultural, moral, and general

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educational achievement of the Negro pupils is less than that of the white pupils and less than that of Negro pupils in districts where they constitute a small percentage of the total pupil population. In my opinion the white parents in those districts where Negro children are more numerous than white children will not send their children to integrated schools next year. Attempts to use force will, in my opinion, create violence. Some program to provide gradual integration spread out over a period of many years seems essential to maintain a semblance of efficiency in public schools."

W(1132) N(118)
"Time spent in the solution of problems of integration, the loss of morale, and the loss of a high degree of the public support of schools, would certainly interfere with the successful operation of the schools."

W(6253) N(50)
"People here have not been able to convince themselves that this should be done."

W(1878)
"But I do not believe it would create an impossible situation."

W(755) N(522)
"I believe that an attempt to integrate the public schools in this year for the 1955-56 year would result in such an emotional reaction that the normal conduct of the schools would be practically impossible."

W(17,926) N(7,984)
"Too often people are saying 'See what is happening in Delaware, Maryland, Ohio and West Virginia'."

W(13,032) N(3557)
"While I cannot predict with any great degree of certainty as to what will take place, I am positive in my thinking that there will be rebellion, and that it will take years to overcome the conditions that will cause such. If rebellion comes,

and there are serious consequences, it may take years to overcome the results of such consequences."

W(3256) N(1455)
"Many parents have expressed themselves that they will remove their children from school."

W(1795) N(194)
"At present—with the advice of architects, professional School Survey persons and our School Board—together with all available money, we will not have sufficient white classroom space in 1955-56 under our present program."

W(3901) N(777)
"Integration will be difficult at any time. With all white and Negro school buildings now crowded, mixing the races with pupils necessarily thrown together in crowded conditions would seriously increase difficulty of integrating."

W(2795) N(1111)
"The emotional climate of the integrated schools would make it difficult to administer them effectively, in my opinion."

W(6487) N(2276)
"Very few of our parents of white students are ready to accept integration. The citizens living in areas where the average income is low, and where there are Negro residential sections, seem to harbor more resentment on mixing the races than better informed parents in higher economic areas."

W(696) N(157)
"I think attendance would be seriously impaired, that community-school relationships would be completely disrupted, and that student discipline might be destroyed."

W(3228) N(2515)
"Schools accomplish results through a co-operative effort with the community in which they are located. Arguments and strife which would doubtless accompany integration would

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obviously set our school program back many years and destroy much of what has been accomplished in improved race relations of recent years."

W(1408) N(2212) I(230)
"Not only during the year 1955-56, but all during the foreseeable future. Our people have been most cautious and conservative in their statements. But it needs only an overt act to blow things up. A good illustration of the way our people feel. This week, a prominent citizen made this statement. "Just last week I guaranteed a $93.00 hospital bill for my daughter's cook. For some reason the Welfare Dept. could not help her. I didn't want her to die even though I had never seen her but one time. I didn't mind helping her out, but I'll be damned if my grand children are going to school with her children."

W(7416) N(148)
"The people of this county would not accept integration in 1955-56."

W(4165) N(3107)
"If the situation described in No. 8 should develop it would mean that for every Negro pupil admitted to a now white school that an equal number of white pupils would be forced to attend a now Negro school. This would lead to boycotts, demonstrations or perhaps worse. A militant police program of enforcement would be required for a number of years. Educational opportunities for both races would suffer."

W(1130) N(811)
"I don't believe that an integrated school can be conducted in this unit now, nor for years to come."

W(9983) N(4822)
"(1) Negro schools are organized to take care of their racial needs, e.g. bright, average and low mentality groups are given courses of study quite different in academic levels. Integration would call for a drastic change of this organization

very detrimental to the Negro.

(2) The white schools would either have to lower their standards or fill our primary grades with over-age Negro children. (A chart showing this situation is available.)

(3) At the high school level at least 40% of the Negro students would be dropped according to even the lowest provision of adjusted courses in the white school.

(4) The difference in attitudes, accent, viewpoints, rate of physical growth, mentality, or in other words, Race, makes the experiment one unprecedented in history. Egypt integrated her peasants with about the same percentage of Negro that we have. They, however, did this over a period of many centuries, producing the modern fellaheen."

W(1778) N(619)
"I do not believe that we could operate the schools at all with integrated classes during the 1955-1956 school year."

W(1571) N(2236)
"With the large number of Negro children in this county and the attitude of the vast majority of white citizens against integrated schools, no one will be able to conduct our schools satisfactorily, if at all. There would be 'violent reaction' to any move to integrate ..... County Schools."

W(6468) N(4337)
"It will be impossible to have such schools or to administer such schools. The Army would experience trouble in conducting such schools."

W(1270) N(1090)
"Most of the people I have talked with do not believe the schools should be mixed."

W(1000) N(675)
"The impact will be too great. No decision can change the customs and feelings of people which have been a part of them for years in so short a time."

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W(2272) N(2638)
"Public relations and the resistance of white patrons, pupils and teachers to integration would make administration an almost impossible task."

W(3738) N( )
"This answer is given with the understanding that schools would be seriously affected and my ability to administer them likewise affected if complete integration is to be attempted *in toto* and without such being done gradually."

W(1787) N(1575)
"In some schools there would not be classroom space if segregation is abolished and Negro children admitted to schools previously operated for white children only. If the Negro high school students now attending the ..... county ..... School at ..... are integrated at ....., there would not be classrooms for them."

W(1831) N(235)
"Both races will object with vigor. Many children will quit school. Many others will be in and out so much that it will be most difficult to conduct a satisfactory program."

W(3388) N(329)
"The people in ..... County will not accept an integrated public school system. It just won't work here. The ratio percentage of Negro children to white children is only about 8%, but this fact hasn't meant anything to the average citizen when I attempted to explain that our Negro school child problem was quite simple as compared with other areas in North Carolina, and more especially the deep South."

W(3250) N(1288)
"Our school busses and our classrooms are crowded. For the school year 1955-1956, we would be faced with an impossibility."

W(999) N(1062)
"The trouble that is now being experienced in Ohio, West

Virginia, Delaware and the District of Columbia is indicative of the feeling that exists over this matter, and the feeling in Eastern North Carolina where we have almost equal numbers of whites and Negroes is even more intense than it is in these border and Northern states."

W(2379) N(4469)
"It will take an army to enforce segregation in ..... County at this time. I am afraid that riots and bloodshed will result. You cannot change the customs and traditions of people over night."

W(675) N(764)
"Even discussion of the possibility brings very strong emotional reaction. There was, and still is, strong opposition to those connected with the building program in which approximately 2/3 of the money was spent on Negro schools. With 'better' Negro buildings available there would be a possibility of violent reaction to Negroes *attempting* to enroll in white schools."

W(8661) N(3624)
"Many teachers would quit (white). Attendance would be poor (white and Negro). Antagonistic feelings and attitudes would seriously impair the program."

W(1550) N(107)
"I personally believe that should the action be state-wide, we would not have too much trouble."

W(1821) N(428)
"The race relations are excellent now. No problem as it now stands."

W(6314) N(3521) I(250)
"I believe that if integration is perfected in our public schools in ..... County that our white children will not attend school in 1955-56. Our parents and children are not ready for integration."

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W(3137) N(2210)
"I do not believe *either* race is ready for integration."

W(7175) N(6916)
"Two problems that cannot be solved so quickly:

1. White population cannot be brought to accept it by 1955-56.
2. Building facilities and organization sufficient to handle situation will not be ready in 1955-56."

W(9335) N(1587)
"People are quite well pleased with our schools as they are, both white and Negro. I'm sure it would create a great deal of turmoil if integration of the races were attempted."

W(3330) N(2681)
"We have many people from all areas who are not willing to accept integration yet. If it has to come, it seems that a gradual introduction would be best."

W(5284) N(All colored children in the county are transported to a consolidated school in the ..... City Unit.)
"The sentiment at the present among our colored population in the various communities of the county is that they prefer to continue under the present set-up."

W(2409) N(562)
"Our Negro population is very happy with the present set-up as their school facilities are as good as the white children have. We would have no trouble if outsiders will leave the Negroes alone."

W(6631) N(313)
"I think it will seriously disorganize the schools. Neither race in this county wants to go to the same schools. They are satisfied as it is now. Ninety-five per cent of the colored would vote to keep it as it is now."

W(1926) N(533)
"1. Do not believe enough white teachers can be employed to fill positions.
2. Do not believe white patrons will send children to school under Negro teachers.
3. Building locations are wrong for an integrated program.
4. Resentment by certain groups to integration."

W(8331) N(4023)
"Public would lose interest in public education. Would not vote bond issues or tax levies for the continued advancement of schools—attendance would be less regular—compulsion would be impossible."

W(4083) N(2344)
"The Negroes want to attend their schools, and we all believe there will be no decision preventing the democratic method of choosing the school they are to attend. If the people are given a choice in choosing their school, there will be no problem in ..... County. The whites will attend theirs, and the Negroes will attend theirs; yet they can be given the information that they have a legal right to integrate."

E

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 10 of the questionnaire which reads as follows:

> "Would immediate mixing of the races in the public schools in your administrative unit cause serious complications in the operation of school busses serving your schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(4068) N(27)
"We only have about twenty-seven (27) Negro grade school

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and fifteen (15) high school children and most of them would be in walking distance of the school."

W(2795) N(1111)
"We do not operate school busses at present. I would think that bus transportation problems would be even more difficult to deal with than classroom or building problems."

W(6487) N(2276)
"Negro high school students from this and other counties are transported to our Negro High School."

W(11,458) N(4441)
"Bus loads would be affected little, if at all."

W(3330) N(2681)
"We have only two, from a completely white housing area."

W(1926) N(533)
"Negro buses bring in mostly county students which would then go to county schools."

W(2125) N(15) I(113)
"Only one colored bus and it carries the high school students to ..... County colored high school."

W(2629) N(953)
"The only buses operating in our schools are those transporting high school students residing in the rural areas into our unit. The ..... County Schools do not operate a secondary school for Negroes."

W(1550) N(107)
"In our case all Negroes could be transported on one bus. They are segregated in two small communities not too far apart."

W(2297) N(397)
"No white pupils are transported."

W(3885) N(74)
"Provided buses continue to operate as now. At the present time we are operating only one bus for the Negroes and this bus could continue for the same purpose."

W(3270) N(409)
"Our buses cover a small geographic area for white children and a much larger area for Negro children."

W(6724) N(1827)
"Negro children do not live in areas now being served by busses for white children and white children do not live in areas now being served by busses for Negro children."

W(6253) N(50)
"Not enough would be affected."

F

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 10 of the questionnaire, which reads as follows:

> "Would immediate mixing of the races in the public schools in your administrative unit cause serious complications in the operation of school busses serving your schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(1523) N(1455)
"Our most serious problem would be the operation of non-segregated busses. Teachers would not be present to supervise and it is the opinion of our Board of Education that school transportation would have to be abolished. If so, this would abolish our school system."

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W(2256) N(1506)
"At present our busses are being driven by 16, 17, and 18 year old children. They are incapable of driving safely when racial fights and arguments are going on behind them—and this will happen."

W(2432) N(1661)
"Routing and serving overcrowded schools for both races would complicate our present districting."

W(3375) N(2733)
"Both white and Negro children, as well as their parents, prefer that they be permitted to go to their own schools."

W(1051) N(441)
"This seems to be the area from which you hear so much complaint."

W(2398) N(875)
"Only Negroes are brought at present in County buses. Could this segregated bus be continued?"

W(3898) N(2681) I(5746)
"We have three races in our county. There is very little apparent disposition or sentiment in either of the races to mix the school population on busses or in schools."

W(1878)
"This would be an impossible situation unless adult bus drivers were employed to maintain discipline."

W(13,032) N(3557)
"There may be greater complications on account of necessity of children being packed close together. Practically all of our busses are loaded to capacity, including standing room."

W(3256) N(1455)
"This would create a greater problem than in the school room, because on the bus there is no supervision."

W(1795) N(194)
"Already operating on 'Overloads,' to white schools."

W(4548) N(916)
"Busses operating to the two centers of population of the unit travel the same routes. All busses, negro and white, are loaded to seating capacity. A mixing of the races on these busses would result in serious trouble."

W(1006) N(1127) I(1100)
"In our situation we have a total of 17 busses. Nine are hauling white children; eight are hauling Negro children, and it is my belief that the reaction of mixing the races on the busses would result in neither of the busses arriving at their destination, and I further believe that these busses would be destroyed by a combination of student and people reaction."

W(5120) N(1683)
"Due to the close bodily contact of children in school, white children would refuse to ride the same busses with Negro children. If ever forced to enter the same busses, the situation would become explosive."

W(3295) N(1900)
"The operation of busses on an integrated basis will constitute one of the greatest problems of integration. At the school the principal and teachers may be able to maintain order. The student drivers whom we employ to drive busses will not be able to cope with the problem that will arise on the routes."

W(1132) N(118)
"Personal contact on over-crowded busses would cause more problems than would result in classrooms under teacher supervision."

W(3494) N(4163)
"I think that this perhaps presents the biggest problem. If I were a parent, either white or colored, I do not think I

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would let a child of mine attempt to ride a school bus unless there were an officer of the law in charge of the bus."

W(552) N(371)
"White and Negro children will not mix peacefully in this county, any more than oil and water."

W(6211) N(1837)
"Principals say that the most serious problem would be that of the busses. They say now that 90 per cent of disciplinary problems arise from bus transportation."

W(1755) N(1030)
"Parents and pupil comments."

W(2460) N(2597)
"The most of the trouble we have on busses is where one or two families are not on the best of terms. You are going to raise this to the "N" parents, when you add negroes."

W(9127) N(257)
"Most all busses would have a few colored children. The minority would be in constant trouble."

W(3885) N(74)
"At the present time we are operating only one bus for the Negroes and this bus could continue for the same purpose."

W(9782) N(2305)
"Comments from parents indicate that we may expect trouble."

W(4224) N(66)
"It would not so far as the physical or numbers of pupils per bus is concerned, but it would be a very serious social problem."

W(2774) N(3036)
"Lack of adult supervision on buses would make the situation

there more unacceptable than in classrooms. We have heard many expressions of this nature."

W(1826) N(1190)
"It seems that buses would have to transport white, Negro and Indian children in the same bus. With buses crowded, this would invite trouble from children and adults. It would be almost impossible to secure bus drivers if 2 or 3 races were allowed to ride same bus. Race prejudices would be manifest in violence."

W(1937) N(928)
"Whites would stay home rather than ride with Negroes."

W(1270) N(1090)
"My answer here is based on comments I have heard from parents and pupils."

W(8661) N(3624)
"In many instances Negro children would not be permitted to ride; if so, white children would not. Doubt if drivers could be secured."

W(675) N(764)
"Adequate supervision could not be provided. I could not take responsibility for what would happen. The situation is too explosive."

W(999) N(1062)
"It would necessitate the riding of Negro tenant children and white landlord children on the same bus and our people are not ready for this radical change without causing serious complications."

W(3250) N(1288)
"All is well at present. All busses are loaded to capacity. Why cause confusion by changing from the best to the worst?"

W(3388) N(329)
"Since we have only one Negro school in ..... County, and

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that is located at ..... in the exact center of the county, and to this school we haul all Negro children out of every school district in the county, with the exception of two, there would be a few colored children on all of the 44 busses in this county with the exception of seven. It just won't work."

W(1831) N(235)
"Separate buses are presently crowded, and require more coverage of area than could be successfully done with an integrated program."

W(1787) N(1575)
"A superintendent in New York State once told me that many fights occurred between Negro and white pupils there while riding the school buses. There will be many more here for a long time."

W(1778) N(619)
"School busses are of necessity under limited supervision because teachers seldom ride the busses. We could not successfully transport both races together."

W(1130) N(811)
"This is where our most serious complications would begin."

W(1408) N(2212) I(230)
"The white people will come nearer letting the children sit together in school than they will ride on the same busses."

W(696) N(157)
"Many families will not, under any circumstances, put white children on a bus where the races are mixed."

W(9983) N(4822)
"The friction, flare of tempers, and family feuds are bad enough on the crowded busses. If the racial problem were added, racial hatred would develop faster than for any other one phase of the amalgamation process decreed by the court. This county has Negroes on every bus line."

W(4910) N(2638)
"I fear serious trouble would result. Strikes, fights, and other mass resistance, I fear would occur."

W(1000) N(675)
"More trouble will occur on busses than anywhere as less adequate supervision is available."

W(6468) N(4337)
"It would mean the end of free transportation to school. White families would boycott school busses. In my opinion, the Legislature would abolish free school bus service making it necessary for each family to provide transportation. The poor of neither race would get to school."

W(1571) N(2236)
"White parents would seriously object to mixing pupils on school busses."

W(4781) N(715)
"City busses transport white children. Public school bus transports Negro children. Present city busses would not adequately serve Negro children."

W(638) N(721)
"White and colored children just aren't going to ride together—that is, not without serious trouble."

W(1821) N(428)
"Would complicate the routing, timing, and general transportation problems."

W(6314) N(3521) I(250)
"I am sure that mixing of the races in our unit would complicate school bus operations to the extent that it would be impossible."

W(3137) N(2210)
"I believe the white children would refuse to ride, and I

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believe it would take force to make some of them agree to ride."

W(7175) N(6916)
"There would certainly be trouble between the races at this time."

W(9335) N(1587)
"We could serve all the children, but I think complications would develop in trying to transport both races on the same bus."

W(2342) N(2685)
"It is my opinion that student drivers can no longer be used if it becomes necessary to eliminate our dual transportation system."

W(15,551) N(410)
"With present buses loaded, unable to increase bus loads."

W(8331) N(4023)
"Would make an almost unbearable situation."

W(4083) N(2344)
"One of the most serious problems connected with integration."

W(5542) N(3469)
"Considerable re-routing would likely be necessary. White and colored children would likely not get along well on same bus."

G

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 11 of the questionnaire, which reads as follows:

"In the event of immediate integration of your schools, would you find it practicable to use Negro teachers in mixed classes?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(1051) N(441)
"The Negro personnel here is above the average in training."

W(2905) N(798)
"I believe it would be practicable to use Negro teachers if Negro children are in the majority."

W(6487) N(2276)
"We have some very fine Negro staff members. If I had children I would feel they were very fortunate to be taught by these superior teachers, but I doubt that many of our parents are ready to accept them as yet."

H

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 11 of the questionnaire which reads as follows:

"In the event of immediate integration of your schools, would you find it practicable to use Negro teachers in mixed classes?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(4427) N(26)
"Even those parents who might accept integration as being inevitable would absolutely defy any attempts to used colored teachers in mixed classes."

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W(1490) N(1784)
"Not practical from a standpoint of administration."

W(2301) N(1702)
"This simply cannot be done in our part of the state."

W(6724) N(1827)
"The protests would be more violent with regard to placing white children under a Negro teacher than they would be with regard to mixing white and colored children."

W(3281) N(811)
"Our people will not agree to this. It will take a long time before this could happen here."

W(2256) N(1506)
"The public will not permit it."

W(2432) N(1661)
"The average Negro teacher would be an inferior teacher when placed in a mixed situation."

W(5120) N(1683)
"White parents would not like for their children to be disciplined by Negro teachers. White children would resent Negro teachers. White children under Negro teachers would become objects of ridicule by pupils fortunate enough to have white teachers."

W(3295) N(1900)
"Under the existing machinery set up for electing teachers it is doubtful if any of our committees will elect Negro teachers for mixed classes."

W(1132) N(118)
"Our people would not accept Negro teachers at this time or in the foreseeable future."

W(1392) N(604)
"There is a general public feeling that Negro teachers are

not properly trained for the work."

W(6253) N(50)
"People here will not accept the Colored teacher."

W(8578) N(3442)
"No, unless the classes are predominantly Negro."

W(1795) N(194)
"Immediate integration or otherwise—there will probably be many factors available, other than race or color, for failure to recommend a Negro teacher for a white or mixed school."

W(3256) N(1455)
"The white parents would not allow colored teachers to teach their children."

W(13,032) N(3557)
"Right now I am positive that such would not work in this county, and that there would be no way of enforcing it."

W(2398) N(875)
"It would depend on the school, I think. Negro teachers would be used only in the schools that are now Negro schools."

W(1878)
"Our Board would not employ Negroes to teach mixed classes."

W(17,926) N(7984)
"White parents are not ready to accept Negro teachers."

W(4548) N(916)
"Our white parents will not accept Negro teachers for their children."

W(1006) N(1127) I(1100)
"I think the use of Negro teachers as instructional or administrative personnel would, out of absolute necessity, be

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even farther in the future than total integration. The former is at this time impossible and the latter totally impossible."

W(2774) N(3036)
"We answer 'no' to the practicability, because observations made on numerous occasions have been to the effect that Negro teachers would not be acceptable with white parents and pupils—also, that Negro teachers would not be elected in the first place."

W(1826) N(1190)
"The scarcity of white teachers may force this to be done, and it is possible that it may work in classes made up of the primary age."

W(1937) N(928)
"Whites would not stand for it."

W(2297) N(397)
"Our people simply would not accept Negro instructors at the present time."

W(3885) N(74)
"In my opinion any white students would not attend mixed classes taught by Negro teachers."

W(8900) N(272)
"We have only 9 Negro teachers in our unit and I doubt if they would be accepted."

W(3494) N(4163)
"No, but you would have to do it due to shortage of white teachers."

W(6211) N(1837)
"I do not believe that a Negro teacher would be employed to teach white children under present law."

W(1755) N(1030)
"Both parents and teachers have expressed themselves to this effect."

W(2460) N(2597)
"I just believe the white children would make teaching so unpleasant that the teacher would leave the room."

W(3919) N(2223)
"Except where Negro students would be in great preponderance."

W(9127) N(257)
"I never expect this to take place in this county for years and years to come. We would not have any class in which a majority would be colored. The majority will control right or wrong."

W(9783) N(2305)
"Comments from parents have indicated objections to the practice."

W(4224) N(66)
"Our people absolutely will not accept Negro teachers."

W(696) N(157)
"I would not, under any circumstances, recommend a Negro teacher to teach white children in this town in the foreseeable future."

W(9983) N(4822)
"(a) Too many Negro teachers have been indoctrinated in ideas repulsive and antagonistic to the white race. I would not want to be responsible for what would happen if white pupils carried home some of the statements of Negro teachers. (b) Many Negro teachers have obtained high certificates without corresponding ability and knowledge. The ease with which higher degrees have often been obtained is a National disgrace.

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(c) Negro teachers have been accustomed to teaching pupils of much lower mental ability and achievement. It would be a great tragedy for the white race to have to fall to their level of experience. It is so much easier to fall than to climb."

W(1139) N(750)
"I would not dare employ a Negro teacher to teach white children in this community."

W(3901) N(777)
"White children would not attend school taught by Negro teachers now; with small and gradual integration, this might be possible—But not now."

W(3228) N(2515)
"White parents and some teachers would not accept it."

W(7416) N(148)
"Negro teachers would, under all circumstances, be unacceptable to white children."

W(4068) N(27)
"We have a surplus of white teachers in our county and only one Negro teacher certified to teach. This teacher holds a "B" certificate."

W(2795) N(1111)
"I believe that there would be difficulty in administering discipline and conducting instruction in most instances."

W(1778) N(619)
"It would not be practical to place Negro teachers in mixed classes. Parents of white children would not send their children to school. Older children would rebel."

W(1130) N(811)
"Whites will refuse to send their children to Negro teachers."

W(4165) N(3107)
"There is no logical reason to believe that the situation here

would be different from that which has existed throughout the years in the non-segregated areas of this nation. The majority race which has controlled and will continue to control employment policies will not permit it."

W(1550) N(107)
"We have several sections of each grade in our school and a Negro teacher in only one or two sections would seriously hamper grade distribution."

W(1270) N(1090)
"We have white parents who will not let their children be taught by Negro teachers."

W(8661) N(91)
"Bad enough to have mixed classes."

W(675) N(764)
"White parents do not want them. I have hesitated about permitting Negro supervisors to visit in white schools because there is some feeling against Negroes going into white schools except as janitors or repairmen."

W(999) N(1062)
"The majority of white patrons would demand white teachers for their children. I believe that most Negro children prefer Negro teachers."

W(3250) N(1288)
"No principal would be able to operate a school under these circumstances because he could not be mentally happy. Whose children would be placed in this classroom? None of our white people will agree to this. Our principals would resign to work in other fields at less salary. Our white children would stay at home."

W(3388) N(329)
"There is no place for a Negro teacher in ..... County white schools. There would not be enough Negro children in any

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one grade in any one school to give a majority of Negro children in the classroom that would justify the employment of a Negro teacher. Our Negro agriculture and home economics teachers would not have a job because the three white high schools, ..., ... and ..... all have vocational agriculture and home economics teachers. There would be only a few colored children in each of the six departments. There would actually be a saving in school personnel through integration of seven teachers."

W(1831) N(235)
"I do not think Negro teachers would be competent to teach white children. Their basic understanding and concepts are different and their standards are different."

W(1787) N(1575)
"Most white parents and children will object to Negro teachers teaching white children."

W(2272) N(2638)
"We have many well qualified Negro teachers, but using them under these conditions would just make matters worse."

W(1000) N(675)
"They would not be able to maintain discipline. White parents and white children will not accept them as teachers."

W(10,805) N(6468)
"Our schools would follow the pattern of the North. The only difference being we would have even fewer Negro teachers, if any."

W(1571) N(2236)
"White parents would not permit Negro teachers to teach their children."

W(638) N(721)
"We aren't employing any Negro teachers until the last white is used up."

W(1821) N(428)
"Integration would have to be slow."

W(2571) N(1559)
"Except where a large majority of the classes were Negroes."

W(2409) N(562)
"Our white patrons might finally submit to mixed classes, but they will never send their children to school to be taught by Negro teachers."

W(6631) N(313)
"White committeemen would resign before they would elect them. We would have very few colored children in any class."

W(11,458) N(4441)
"I do not believe Negro teachers will be accepted as yet. This conclusion is based upon what has happened in the North and West."

W(3330) N(2681)
"We do not believe that white children will accept Negro teachers yet. The problem of discipline will be bad."

W(1926) N(533)
"White patrons would not send children to school."

W(2125) N(15) I(113)
"Only one colored teacher in the county."

W(6314) N(3521) I(250)
"I do not believe that white parents will allow Negro teachers to teach their children."

W(3137) N(2210)
"The few parents who might agree to integration would oppose Negro teachers teaching their children."

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W(7175) N(6915)
"When public opinion accepts integration of pupils it will probably accept some good Negro teachers in mixed classes."

W(9335) N(1587)
"I don't believe white parents would agree to have their children taught by Negro teachers."

W(8331) N(4023)
"This is one choice the public would demand."

W(5542) N(3469)
"Answer based upon comments made by parents."

I

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 12 of the questionnaire which reads as follows:

> "In the event of immediate integration of your public schools, would you have any serious difficulties in securing a sufficient number of properly trained white school teachers to teach in mixed schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(3669)
"No; that is, any more than we are already having."

W(14,452) N(2475)
"This is my present opinion. I could be wrong."

W(1051) N(441)
"Most teachers work for a living and because of the satisfaction from a job well done, we think they would continue to teach."

W(6211) N(1837)
"We could get teachers. Camp ..... Marine wives would be available."

W(2774) N(3036)
"Applications from older teachers and former teachers now married in community this past year were much more numerous than open positions. This source would be explored in event of the above."

W(2905) N(798)
"It would be little if any more difficult than now. Unfortunately too many of our teachers teach of necessity for this reason mixed classes will not matter. For those who teach from choice because they like children and have chosen teaching as an avenue for civic service the color of the child will make no difference."

W(4068) N(27)
"Only one school would have Negro children in it. Teachers that objected to teaching them could be used in the other schools."

W(7416) N(148)
"The answer is no because in this unit the number of Negro teachers is not appreciable. It is qualified in that we have difficulty in finding white teachers any way."

W(1550) N(107)
"We have at present only four Negro teachers out of fifty-four."

W(999) N(1062)
"At present we have difficulty in securing enough properly trained white teachers to teach in our all white schools, but a Negro high school principal told me that integration of the races would be another Pearl Harbor. He says that many white teachers would return to the schools rather than see

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Negro teachers teach their children. I believe he is right. If so, we could find a supply of white teachers."

W(3388) N(329)
"I have a few white teachers who have expressed to me their willingness to teach a mixed group if absolutely necessary but I have many teachers who now say that they will leave the profession if they have to teach Negro children."

W(1270) N(1090)
"We get an unusual number of applications for teaching in ..... at present. I can't say what the situation would be if the schools were mixed."

J

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 12 of the questionnaire, which reads as follows:

> "In the event of immediate integration of your public schools, would you have any serious difficulties in securing a sufficient number of properly trained white school teachers to teach in mixed schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2256) N(1506)
"Negro teachers for white children will not find acceptance in areas with considerable Negro population. The legislatures will be likely to reduce requirements so that more white teachers will become available. Also, as the need becomes acute, salaries will rise, thus bringing many newcomers into the profession. So white teachers will shortly be available."

W(1523) N(1455)
"A number of qualified white persons have indicated they

would come back into the profession, yet we do not have enough of such to replace all Negro teachers."

W(3534) N(646)
"Our local white teachers, of long experience and influence, have expressed a feeling to resign if this should happen."

W(9619) N(7122)
"We could probably secure teachers because the city pays a good supplement. We cannot now secure enough good white teachers to fill our vacancies."

W(2262) N(1835)
"Some of the white teachers have told me they will quit teaching if forced to teach Negroes."

W(2796) N(782)
"Many of the white teachers now teaching would stop if they had to teach colored children."

W(3281) N(811)
"My opinion is that many of our white teachers would resign. Since we already have a shortage, this could create a very bad situation."

W(6724) N(1827)
"It is all that we can do to secure qualified white teachers for white children now."

W(1490) N(1784)
"We have serious difficulties as it is."

W(545) N(652)
"White teachers not available."

W(4427) N(26)
"Already a problem, it would be intensified by integration. I have heard teachers remark that if and when integration came they would leave the teaching profession."

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W(1795) N(194)
"I have white vacancies *now*, in white schools and no qualified white teachers available. The above would overload further."

W(3256) N(1455)
"A large percentage would drop out. A large number is married and do not have to teach for a living—they would drop out of the profession."

W(13,032) N(3557)
"We have great difficulty in securing enough white teachers for the white schools. There is a surplus of Negro teachers in this area. We employ the best of the latter. Most of them are not strong teachers."

W(2398) N(875)
"I do not think any white teacher would go to Negro schools (at present Negro). I think they would, most of them, teach in the present schools even with integrated classes."

W(1132) N(118)
"A serious shortage of white teachers already exists and some now teaching will leave the profession rather than teach in mixed schools."

W(3295) N(1900)
"The present supply of adequately trained white teachers is insufficient to teach the white children in the presently segregated schools. The additional white teachers that would be needed for mixed classes are not currently available."

W(7118) N(5259)
"If these were formerly all white schools and the proportion of Negro pupils relatively low, perhaps not. If they were formerly Negro schools, I do not believe white teachers would teach in them at all."

W(5120) N(1683)
"Many white teachers would refuse to teach Negro children.

This condition added to the present shortage of white teachers would create a very serious situation."

W(1006) N(1127) I(1100)
"If immediate integration is effected in our public schools, the loss of white teachers and the refusal of the people to allow Negro teachers to serve as instructional personnel would close the schools entirely."

W(4548) N(916)
"We have 30 Negro and 156 white teachers. Our difficulty at present is securing white teachers from the limited supply."

W(2603) N(7753)
"There is at present a severe shortage of properly trained white teachers. I believe that many of those now teaching would discontinue teaching and that many who may be preparing to teach would not enter the profession."

W(17,926) N(7,984)
"Cannot keep vacancies filled now. Anything that makes teaching less desirable will be disastrous."

W(1878)
"Perhaps 20% of our teachers have indicated they would resign from the profession."

W(3885) N(74)
"At the present time it is difficult to secure a sufficient number of trained white teachers for the white schools and it would be even more difficult to secure white teachers for mixed schools."

W(1937) N(928)
"Can't find sufficient number of properly trained white teachers as it is now."

W(3494) N(4163)
"I do not think that it would be possible to find a sufficient

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number of white teachers. I am sure that the husbands of many of the married teachers would make them stop if colored children were placed under them. I have heard many white teachers state that they would not attempt to teach a class of mixed races."

W(1755) N(1030)
"Some teachers have expressed themselves to the effect that they would leave the profession."

W(2460) N(2597)
"We can not get enough for the white schools now so I can not see where the extra teachers are coming from to teach an integrated room."

W(9127) N(257)
"Some teachers would accept it, but for many years to come many of the teachers would not. We have many teachers who do not have to teach. They are married and do not have to teach for the money. They are doing it for love of the work and profession. They would stop immediately. Right now we are short five teachers and many are just filling in. We would have a real problem."

W(1987) N(1303)
"We believe that 20% of our white teachers would leave."

W(2297) N(397)
"It is now difficult to secure properly trained teachers for strictly white schools."

W(9783) N(2305)
"We do not have sufficient number of properly trained white teachers to teach in the white schools now."

W(3228) N(2515)
"Some white teachers would drop out of teaching in public schools and go to private schools; it would doubtless be in-

creasingly more difficult to persuade young people to prepare to teach."

W(1139) N(750)
"I find it difficult to find teachers (white) now. Many of them will seek other employment if integration comes."

W(9983) N(4822)
"(a) The salary schedule does not attract teachers.
(b) They have too many other attractive fields to choose.
(c) It is the popular fad—inspired by communistic and anti-public education and religious groups—to harass and annoy teachers.
(d) Teacher certification prevents the use of many college graduates who did not take the required 'education' courses.
(e) The out-of-State teacher who would enter our State has difficulty qualifying in North Carolina."

W(1408) N(2212)
"We have trouble getting properly trained white teachers to teach in all white schools at the present. It would be an impossibility to staff the whole system with white teachers who were properly trained. It might be possible to staff the schools with white people, who are not teachers. I do not know."

W(2577) N(148)
"I am crossing my bridges only as I come to them. I have not discussed this with any of my teachers, because I believe the least said the better. My guess is that no teacher wants to have a mixed group."

W(696) N(157)
"This is purely my personal opinion. This small school system has been more fortunate in relation to teachers than many systems, particularly rural areas. However, I have now some very competent teachers who would likely quit teaching rather than teach mixed classes."

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W(6487) N(2276)
"Our Negro and white principals have been meeting jointly for years, and it seems to work very well, but our Negro and white teachers do not mix as well. I doubt that our white teachers would accept Negro childen in their classrooms at this time."

W(4165) N(3107)
"The answer 'yes,' based on the present teacher certification requirements. There is reason to believe that a modification of the requirements would relieve this situation to some extent."

W(1778) N(619)
"At the present time, the white teachers would not teach Negro children."

W(2795) N(1111)
"The 'yes' answer is my opinion for immediate integration; time and gradual adjustment might improve this difficult situation."

W(3901) N(777)
"Scarcity of competent white teachers."

W(1571) N(2236)
"Not available now."

W(638) N(721)
"To the same extent that we have difficulty in securing sufficient number now."

W(1835) N(—) I(393)
"It's hard to find qualified white teachers for all white schools. Many of our teachers would not teach in mixed schools."

W(3738) N(None)
"Such is not possible now. Injecting the racial issue and resulting tension would make it harder to secure the proper people."

W(8661) N(3624) I(91)
"Shortage now."

W(5050) N(303)
"We have difficulty now. Any pupil increase would make the problem more serious."

W(675) N(764)
"We have difficulty in getting enough for our white schools. Some whom we have persuaded to come in might refuse to teach with Negroes."

W(3250) N(1288)
"Too many of our white teachers would resign. Our young white people who might go into the teaching profession would not be interested. The Negro teachers would take over."

W(1831) N(235)
"Many white teachers would leave the field to avoid the complex problems of a social and disciplinary nature. Much chaos would naturally result and the rewards of teaching are not sufficient to keep many of our teachers on the job."

W(1787) N(1575)
"We are having difficulty securing enough properly trained white teachers now."

W(2272) N(2638)
"It would be probably impossible. Then too, I believe that many white teachers would refuse to teach mixed classes."

W(1000) N(675)
"We are all having trouble now in securing well trained white teachers. It will be much more difficult if Negro teachers are employed in white schools. As long as employment can be had elsewhere, young people will not go into the profession and most of those who now can retire will do so."

W(6468) N(4337)
"We are unable to get them for white schools now. Our

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troubles would be multiplied. The source of white teachers which is very inadequate, would decrease."

W(9335) N(1587)
"1. They aren't available.
2. Some of them probably would refuse to teach mixed classes."

W(2342) N(2685)
"Unquestionably, integration of the schools would aggravate further the task of securing satisfactory teaching personnel for our schools. Some white teachers would leave the profession, affecting further the shortage of white teachers."

W(8669) N(644)
"There is at present a shortage of trained white teachers. Some of our white teachers would not teach mixed groups."

W(5284) N(All colored children in the county are transported to a consolidated school in the ..... School Unit.)
"Inasmuch as there is a shortage of qualified white teachers now, and with the prospect of withdrawals due to integration, I think the shortage would become more acute."

W(6631) N(313)
"We have difficulty now and while some of our white teachers would be willing to teach in mixed schools, some would not. It would make our present shortage more acute."

W(11,458) N(4441)
"We are having difficulty already. Integration would certainly accentuate the problem."

W(3330) N(2681)
"I feel that our present teachers, the greater part at least would accept mixed classes. To find additional teachers will be very difficult."

W(6314) N(3521) I(250)
"I believe that it would be difficult for us to secure sufficient number of properly trained white teachers to teach in mixed schools. We have very few extra white teachers in our area from which to draw in cases of emergencies at present. Teachers will have to become more plentiful if greater demands are met."

W(1926) N(533)
"Many of present white teachers would leave the profession and it is difficult to find properly trained white teachers for white students at the present."

W(3137) N(2210)
"We are having trouble as it is, but I am sure if we had immediate integration we would not be able to secure a sufficient number of properly trained white teachers to teach in mixed schools."

W(8331) N(4023)
"We would lose those teachers now teaching to help out—also those who feel extremely bitter about the decision."

K

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 13 of the questionnaire which reads as follows:

> "In the event of immediate integration, would you have any reason to believe that the mixing of the races in the public schools of your unit would create serious problems of discipline in these schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2125) N(15) I(113)
"I say no because we have so few colored students. It could

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be that we would have trouble with the white students, because they would resent them."

W(11,458) N(4441)
"Young people are less prejudiced than adults. Any problems are more likely to emanate from parents than from pupils."

W(3669)
"Answer is based on what our pupils say. However, in practice, the situation could be quite different. What the reaction would be actually when three colored high school pupils are thrown in with 340 white is difficult to foresee. The colored pupils may not be beaten up but they would probably feel out of place to the extent that they would drop out of school."

W(1826) N(1190)
"No, unless outside agitation caused it."

W(1550) N(107)
"I believe our students would accept the situation once they realize it is inevitable."

L

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 13 of the questionnaire, which reads as follows:

> "In the event of immediate integration, would you have any reason to believe that the mixing of the races in the public schools of your unit would create serious problems of discipline in these schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2432) N(1661)
"Evidenced by inter-racial conflicts this year that have never occurred before."

W(3375) N(2733)
"Many of these problems can possibly be worked out on a time basis, but to be forced to go immediately into them would, in all probability, bring about difficulty of adjustment."

W(1051) N(441)
"In high schools the reaction is more noticed than in elementary schools."

W(2256) N(1506)
"(1) Fist fights daily, on class, in corridor, on campus. (2) All elections on racial lines—no Negroes will be able to win. (3) Moral tone between the two races is at a distinct variance. Morals are not a real necessity to perhaps a majority of colored race. White people do not share this point of view."

W(2262) N(1835)
"This is my honest opinion after listening to adults. Many of them are leaders in the Church and Community."

W(2796) N(782)
"If older students are integrated, there will naturally result serious disciplinary problems. Should the integration begin in the primary grades, there would not likely develop many serious disciplinary problems within the school itself."

W(3281) N(811)
"This would be true on the high school level. In the primary grades, no."

W(4427) N(26)
"It appears to me that such problems are the inevitable consequence of integration in any system."

W(6724) N(1827)
"You cannot force social relationships upon people. Normal social activities now carried on by schools, such as class dances and parties, would be impossible. Colored children would have a tendency to resent and reject control by white

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teachers and white children would not accept correction from colored teachers. An accusation of unfairness would be made in most instances when it became necessary for colored children to be disciplined. If Negroes are permitted to force their way into the white schools, they will have a tendency to attempt to use the same tactics in freeing themselves of the normal controls which are necessary in schools. Such a situation is reported to exist in California and other areas where children are now mixed."

W(1795) N(194)
"Different standards of conduct?
Different standards of moral responsibility?
(If a Negro child is corrected or punished (disciplined) you are, at once on the defensive?")

W(3256) N(1455)
"The trouble would start with the parents and carry over to the students into the school."

W(13,032) N(3557)
"In sections of this county, we have difficulty between the races if the children use the same bus stops even though they they get on separate busses. Our best solution under present conditions is to have these students to congregate at separate places, and to keep them separate."

W(2398) N(875)
"Judging by what is happening elsewhere."

W(6253) N(50)
"Among the children themselves."

W(3295) N(1900)
"Immediate integration will bring some problems of discipline in the classrooms. The greater the problems of discipline will be created in the cafeterias and extra-curricular activities such as athletics, glee clubs, and physical education activities."

W(5120) N(1683)
"There would be incidents frequently which would be very difficult to handle. All activities of a recreational or social nature would be filled with incidents and very explosive. We could conduct 'classes' provided we could have enough special police officers posted at the right places to keep order before and after school and at recesses. Every school of 300 would require at least two such officers."

W(420) N(333)
"We would have serious trouble."

W(1006) N(1127) I(1100)
"I think the matter of guiding public reaction and maintaining order or affecting discipline would be impossible and I believe in all sincerity that chaos would engulf our school district."

W(2812) N(1868)
"Definitely!"

W(4548) N(916)
"Definitely—disciplinary problems would increase."

W(17,926) N(7984)
"Hazing and 'ganging up' on the unwanted will be at a maximum in my judgment."

W(1878)
"Discipline problems would be numerous in the elementary schools, possibly not many problems at the high school level. Our high school pupils are well conditioned in discipline."

W(1937) N(928)
"I am afraid that fighting and rioting would get out of hand."

W(3885) N(74)
"It would be practically impossible to secure the cooperation

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of the parents in the matter of maintaining discipline should there be immediate integration."

W(9783) N(2305)
"The pattern of strikes by students in other states would be followed in this area."

W(2297) N(397)
"I do not believe that white children would immediately accept integration without serious objection. However, I believe that children would come nearer doing so than adults."

W(9127) N(257)
"In time this could be overcome, probably. But from all evidence now, I can see serious problems arising from the angle of white and colored. Both would create problems for each race."

W(2460) N(2597)
"I am satisfied that the large boys and their parents would resort to violence."

W(3494) N(4163)
"Both races would be at a disadvantage. I think there could be no extra-curricular activities, except possibly in athletics, and I doubt it even here. Perhaps the many athletic contests viewed by visitors to all sorts of contests where Negroes are playing and seeing so many Negroes on TV in baseball, basketball, football, and boxing might cause the impact to be less in athletics. All class plays, banquets, dances, and activities of this nature would be suspended."

W(4224) N(66)
"This would be an influence from the homes which would be rather difficult to cope with."

W(5928) N(777)
"Particularly in the high schools."

W(2774) N(3036)
"Comments and even threats support the above answer."

W(3270) N(409)
"The problems would be much more serious than the numbers involved would indicate."

W(1130) N(811)
"This would be one of our most serious problems."

W(2577) N(148)
"How serious I do not know, but it certainly would create some problems of discipline."

W(696) N(157)
"I have no doubt but that discipline problems would arise. Many of the objections to integration are based on deep feeling not just spur-of-the-moment behavior. Some students would come to school, if compelled to attend, with the intention of making trouble and with the tacit encouragement of parents."

W(6487) N(2276)
"There continues to be considerable antagonism between teen-agers of the two races. I doubt if this can be attached to either race. It seems to be largely a mutual feeling."

W(4165) N(3107)
"It would mean the elimination of most of the school sponsored social activities that are now carried on in the schools of both races. These activities are important factors in building and maintaining pupil morale and school spirit."

W(1778) N(619)
"Riots."

W(3228) N(2515)
"Serious problems would arise in all grades, particularly on

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the high school level. Adult prejudice would perhaps be the greatest factor."

W(9983) N(4822)
"(a) Sexually the Negro race develops much earlier than the white race. Court records of recent weeks show Negro 6, 7 and 8 years olds guilty of sex offences. This situation would 'blow the top' off the lid when the white parents learned of the difference in standards of sex behavior.
(b) The over-age Negroes are easy victims of dope vendors, et cetera because they crave money to keep up with the white boys. Northern Superintendents tell us this is a major problem in mixed schools. We may expect the racketeer to move in as he has in northern mixed schools.
(c) The white pupil of low mentality, on par with the Negro, would most violently resent being classified with him in classes. The result would be obvious to any Principal."

W(1408) N(2212) I(230)
"I was a teacher and principal for 19 years. I do not believe that there was a day of those 19 years that, at least, 2 little boys didn't get in a fight. If the races are integrated, the boys will fight, not because one was white and one was black, but because they were little boys. Each would go home and tell about the fight. Then the fathers would go hunting for one another, and your race riots would start."

W(2795) N(1111)
"I believe that prejudices that are stronger among adults than among children would seriously interfere with the school program. In addition, parents whose minds are open would be seriously concerned by the possibility of controversy, disturbances, enforcement of the strict discipline that would be necessary, and by the possibility of physical injury to children through internal or external agitation."

W(3901) N(777)
"Although for years the relations between races have greatly improved and is continuing to improve gradually, and forced

mixing would seriously interfere with the improving relations between races. Good folks get along all right with good folks regardless of color; forcing a mixture of races in or out of schools simply gives opportunity for the wrong people regardless of race to make trouble."

W(1675) N(675)
"They have never before been together in any form of activities. Therefore, they are not prepared for such a thing. There will be trouble where it is begun."

W(6468) N(4337)
"I am sure it would be impossible to maintain discipline. Several of our principals who can earn a living doing something else have stated they would not undertake it. They would resign and leave it for others to attempt. These are our best and most capable principals."

W(3807) N(2236)
"Due to strength of both groups, race hatred and bitterness would soon develop."

W(638) N(721)
"Fights, cuttings, mob action would employ all of our time. Our Negroes do not want to come to white schools and the whites aren't going to have them."

W(1835) N(None)
"A great many of our parents are determined that their white children will not attend mixed schools."

W(8661) N(3624) I(91)
"Best example is where it is now being tried."

W(999) N(1062)
"What is now happening in the Northern and border States would be multiplied in Eastern North Carolina."

W(3388) N(329)
"The children in all probability would behave in their rela-

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tionship to other children in the way they were instructed at home. Ordinary problems of discipline in the schools could be taken care of without too much trouble. The new type problems of discipline would be something that we would have no experience as a precedent in coping with."

W(1270) N(1090)
"My answer is based on my knowledge of and experience with high school boys and girls."

W(675) N(764)
"The maturity and achievement level, in general, are so different that integration would be difficult. There is some friction from 'advanced' pupils being in the same grade with all members of the same race."

W(3250) N(1288)
"In all the grades, both elementary and high school, there would be bedlam! Moral and immoral together would make a poor combination. The immoral generally win out. In the first place, the white people in ..... County will not send their children to a mixed school."

W(2272) N(2638)
"Prejudice of races in patrons, pupils and teachers would, in my opinion, make the problem of discipline unbearable."

W(13,996) N(1604)
"In some areas."

W(8669) N(644)
"Most of the trouble would come from the influence of the parents on the students."

W(663[illegible]) N(313)
"Neither race wants it and when people of either color are forced into a situation they resent, trouble usually follows."

W(3330) N(2681)
"In the following areas:
1. Lunchrooms
2. Toilets
3. Social contacts"

W(1926) N(533)
"Not in the lower grades but there would be disciplinary problems in upper grades due to adult influence."

W(2629) N(953)
"Perhaps gradual integration could be worked without serious problems of discipline, however, immediate integration would thrust upon both races a new world for which they are totally unprepared."

W(6314) N(3521) I(250)
"It is my opinion that it will be many years before children of mixed races will be able to attend school under the same roof peaceably."

W(3137) N(2210)
"When the white child is punished, I am afraid in many cases the friends and relatives will take the law in their own hands. When the Negro child is punished, and it is believed to be wrong, the relatives and friends will appeal to the courts on the grounds of discrimination."

W(2342) N(2685)
"54% of ..... school children are Negro, 46% white. Mixing of the races in schools would present serious problems in the area of school management. Assignment of children geographically, irrespective of race, would leave white in the minority in some school situations. Prejudice and hostility would be engendered on both sides."

W(14,452) N(2475)
"It would certainly cause problems. Their seriousness is hard to forecast."

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W(5542) N(3469)
"It is believed that Negro children will not be accepted in a friendly way by white people."

W(8331) N(4023)
"Especially in High School."

M

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 14 of the questionnaire which reads as follows:

> "Would such an integrated program seriously affect the extra-curricular activites in the school in your administrative unit?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(7416) N(148)
"This is a qualified 'no' and the reason is due to the small number of children."

W(2577) N(148)
"Not seriously, because only a very small number of Negro children would be involved. Possibly 15 Negro children in a school of 400. Zoning as we now practice it for white children would keep them from entering any other school."

W(2905) N(798)
"Negro children would probably be given or have less opportunity for participation especially for positions of leadership."

W(6253) N(50)
"Not enough involved to affect this item seriously."

W(11,458) N(4441)
"Only social functions would be materially affected. We

have few of those. The ones we have would have to be eliminated or modified."

W(3330) N(2681)
"We have few 'extra' activities. Possibly the athletic team might give some difficulty."

W(1926) N(533)
"Not unless strict integration is imposed initially."

N

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 14 of the questionnaire, which reads as follows:

> "Would such an integrated program seriously affect the extra-curricular activities in the schools in your administrative unit?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(6724) N(1827)
"There are many people who would accept the mixing of children in school classes who would not accept under any circumstances the mixing of children where 'sex,' marriage, and boy-girl relationships are involved. The mixing of children would be a divisive force among students and would cause disruption of any extra-curricular activities."

W(4427) N(26)
"Again, answer applies primarily to the one school seriously affected. In the area of inter-school athletics, this problem could be troublesome in all schools."

W(2796) N(782)
"Social activities such as junior-senior dances would be seri-

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ously affected and would likely be dropped as school-sponsored activities. Athletics and sports will probably work out all right."

W(2262) N(1835)
"I do not believe that the high school white youth will mix with Negroes (at least not yet)."

W(1051) N(441)
"Mostly in high school. In music and athletics, it would help the extra-curricular program. Clubs and social activities would create a problem."

W(2301) N(1702)
"In an integrated program, all extra-curricular programs would have to be eliminated."

W(1523) N(1455)
"Social functions, probably athletic programs, class activities, would have to be curtailed or completely eliminated."

W(3534) N(646)
"We would be forced to eliminate all socials to avoid violence. It is doubtful of the continuance of athletics for sometime."

W(9619) N(7122)
"Many extra-curricular activities sponsored by the schools are of a social nature and controlling these would present some serious problems. It will be difficult to control integration in the classrooms and shops, to say nothing of the extra-curricular program."

W(1132) N(118)
"In about the same degree as it would affect all other school activities."

W(3295) N(1900)
"White people in our area are nearly unanimous in their desire to maintain racial integrity, socially and biologically. If

there is immediate integration, such extra-curricular activities as dramatics, so-called 'Junior class plays and Senior class plays' in high schools, and Junior-Senior class banquets will have to be abolished. Athletics might survive."

W(6253) N(50)
"Not enough involved to seriously affect in this item."

W(2398) N(875)
"This would require complete revision."

W(13,032) N(3557)
"If an attempt is made to force integration, and any degree of success is achieved, I believe that all extra-curricular activities would be abolished since there would be no participation without force on the part of white students."

W(4711) N(1455)
"Extra curricular would come to a standstill and be abandoned."

W(1795) N(194)
"What about school parties, dances, etc.? Athletics (dressing rooms, toilets), Glee Club, Band (uniforms), Trips, (buses), School Plays?"

W(1878)
"Except in the field of athletics. Integration would not work at their banquets and proms."

W(17,926) N(7984)
"We make much of our home room, club and class social activities. With both races in the school these social activities will be at a minimum or not exist."

W(2603) N(7753)
"For the same reasons that there would be serious discipline problems."

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W(4548) N(916)
"This would probably be affected to a lesser degree than any other phase of school life, yet it would create unnecessary problems."

W(2812) N(1868)
"Yes, I think such activities would have to be curtailed or discontinued."

W(1006) N(1127) I(1100)
"Not only would such an integrated program seriously affect the extra-curricular activities, but it would dissolve the program of extra-curricular activities and at the same time deactivate what is commonly known as the public schools and all of the educative processes that are characteristic at the present time of this school district."

W(7118) N(5259)
"It would completely eliminate most social functions."

W(5120) N(1683)
"Extra-curricular activities would have to be abolished where there are Negroes in large numbers. It is the 'social element' involved in extra-curricular activities which would be so explosive. The old southern family proverb, 'You can work with them, but you can't play with them,' applies here."

W(4224) N(66)
"Both races would be at a disadvantage. I think there could be no extra-curricular activities, except possibly in athletics, and I doubt it even here. Perhaps the many athletic contests viewed by visitors to all sorts of contests where Negroes are playing and seeing so many Negroes on TV in baseball, basketball, football and boxing might cause the impact to be less in athletics. All class plays, banquets, dances, and activities of this nature would be suspended."

W(2774) N(3036)
"Objections have already been made to this phase of the pro-

gram. In fact, the prospect of any social integration is alarming to white patrons of our communities."

W(6211) N(1837)
"Markedly so. Would eliminate extra-curricular activities and social aspects of high school program—at least for some years. This is the opinion of principals."

W(1987) N(1303)
"It is our belief that all extra-curricular activities would have to close."

W(9127) N(257)
"We have never seen discrimination such as would exist if they were put together. The few colored children would not get a chance."

W(2460) N(2597)
"I believe pupils would have to understand each other fairly well to work on any of the extra-curricular activities. This means understanding each other socially. Not many of our older pupils could do this."

W(3885) N(74)
"At the present time the Negro students participate in extra-curricular activities in their own school. Should they attend a mixed school, the white children, in all probability, would not accept the Negro children as participants in extra-curricular activity."

W(9783) N(2305)
"Considerable difficulty would follow in the social activities, athletic program and other extra-curricular activities."

W(1937) N(928)
"Whites will not mix socially with Negroes."

W(5928) N(777)
"Negroes would not be chosen to participate in extra-curricular activities."

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W(1139) N(750)
"Dances, Proms, Banquets, etc., would be discontinued by our schools. Parents would demand this be done."

W(1130) N(811)
"Extra-curricular activities would be hampered even more than co-curricular activities."

W(696) N(157)
"Extra-curricular activities are often social in nature, and even those whites who would not object to being in a formal class with Negroes are not willing to enter into any social situations with them. In fact, they have no intention of doing so."

W(6487) N(2276)
"Integration would terminate some extra-curricular activities, particularly those of a social nature. There exists considerable anxiety on the part of parents of white girls about their safety and welfare."

W(4165) N(3107)
"The difficulty of supervision would lead to the elimination of many activities and the curtailment of others."

W(3228) N(2515)
"The school could not sponsor social activites, including folk dancing and similar activities. Junior-Senior banquets and school dances would have to be abolished."

W(1408) N(2212) I(230)
"Everything other than the baccalaureate and graduation exercises would have to be discontinued. Bus trips to Washington, Raleigh, Chapel Hill, Durham, to any college, Jr.-Sr. Banquet, Jr.-Sr. Prom, Junior or Senior Play, any dance, class picnic or party in fact, anything even bordering on the social would have to be cut out."

W(2795) N(1111)
"The many phases of a good extra-curriculum program in-

clude social, cultural, personal, and small-group activities. A radical and sudden change in the pattern would make it difficult to administer effectively most, if not all, extra-curricular activities, in my opinion."

W(3901) N(777)
"In athletics some occasional trouble would arise. In all other group activities an integrated program would encounter trouble whether in day or night time."

W(9983) N(4822)
"(a) The choice would be, racial amalgamation or no social activities.
(b) The Negroes' earlier physical development would give him a great advantage in athletics to the detriment of the white pupil.
(c) The racial characteristics of Negro music would be submerged and rendered less attractive in mixed groups, as happens in the north.
(d) Clubs, societies and travel groups would have to accept the Negro or the Negro would lose all that they now have of their own in agencies to develop leadership and self confidence. Now all Negro high school organizations have Negro leaders, (and they are excellent). The cases of leadership would be rare if amalgamation were attempted.
(e) Class meetings in homes of parents would be difficult to arrange."

W(1835) N(None) I(393)
"In a social way."

W(1571) N(2236)
"Race hatred and bitterness would soon develop."

W(6468) N(4337)
"It would not only seriously affect extra-curricular activities, it would bring an end to such activities. We would not be foolish enough to have a mixed audience of white and Negro parents to observe such an activity. Our graduation exercises

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would be simply to hand the diploma to seniors on the last day of school and wish them well. A class party or dance would be out of the question. It would bring an end to all extra-curricular activities."

W(1000) N(675)
"All social activities of our schools would have to be discontinued."

W(2272) N(2638)
"I think it would affect the extra-curricular activities due to their nature, more than it would the regular curriculum. I believe that with integration it would be necessary to curtail greatly all extra-curricular activities."

W(3250) N(1288)
"In the Negro schools as they are now, leaders are selected and have a chance to lead. In a mixed school, these chances would fade out of the picture. They would be losing the chances they now have. This would seriously injure the Negro children and hamper the chances of all others."

W(675) N(764)
"They would probably be abolished since white pupils would refuse to participate, with rare exception. Actually, there would likely be no white pupils, or few, in the 'mixed' school."

W(1270) N(1090)
"Many of the extra curricula activities are social in nature. We would have to eliminate many of the activities as they are now."

W(3388) N(329)
"Actually this is what our people are concerned about. It is the extra-curricular, especially social activities in our schools that the parents are concerned about. What about your Junior-Senior proms? What about your football-basketball coca-cola parties? How would you handle your junior-senior ban-

quets? How about cafeteria and lunchroom situations? This breaking down of the racial and social barriers and throwing the children together in intimate social and personal contact will lead to love and affection with inter-marriage. Then you have what Hitler said, 'A Mongrel Race'."

W(999) N(1062)
"It might not in the purely academic activities but it would in all of the social activities. Our people are not ready to accept mixed parties, dances, and other social activities."

W(1550) N(107)
"In the extra-curricular activities, music, athletics, and dramatics, there would be contact with the general public where controls are much more difficult than in regular classroom activity."

W(1787) N(1575)
"It would be most difficult to have any type of extra-curricular activities."

W(2342) N(2685)
"Integration of the races would require many changes in existing school organization, including the entire program of pupil activities."

W(9335) N(1587)
"I think the danger of real trouble would be greatest in what we consider the social phase of school life."

W(3137) N(2210)
"Extra-curricular activities are different. Individual differences would increase. In many instances, I believe the white children would refuse to accept the Negro children unless *force* was applied."

W(6314) N(3521) I(250)
"If children of different races attend the same school, I believe that many problems dealing with extra curricular activi-

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ties will be increased. It will take an extensive educational program and much time before Negro and white children will be able to carry on school activities in mixed groups."

W(2409) N(562)
"We consider this one of the most difficult problems, with the most serious results, that we would have to face."

W(8669) N(644)
"It would definitely curtail all student activity that is based on voluntary student participation."

W(13,996) N(1604)
"All social events will be called off."

W(8331) N(4023)
"Would eliminate all social activities."

O

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 15 of the questionnaire which reads as follows:

> "Would, in your opinion, such immediate integration of the races cause parents in large numbers to withdraw their children from such schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2373) N(4419)
"Not permanently."

W(1132) N(118)
"Not in large numbers, but some would do so."

W(1878)
"Not in *large* numbers, but there would be several."

W(9783) N(2305)
"It is not believed that large numbers would withdraw but there would be some withdrawal of children who would be sent to private schools."

W(11,458) N(4441)
"I think there would be little withdrawal from the local schools. I anticipate that a number of people would request transfers where a sizeable percentage of Negro pupils has been enrolled."

W(2571) N(1559)
"We could anticipate a temporary withdrawal but absence of other school facilities would probably force the return of pupils to public schools."

W(3330) N(2681)
"They might for a few days or weeks. There is no place for many of them to go. Eventually they would return."

W(2629) N(953)
"I am quite certain that some parents would withdraw their children from mixed schools. I do not feel at the present time that the number would be large."

W(2795) N(1111)
"My 'no' answer is based on the small number and capacity of private schools in North Carolina where the public schools have been and are effective and upon the cost of instruction in private schools. I believe many parents would eventually make the change, withdrawing children from public schools, as quickly as conditions would permit."

P

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 15 of the questionnaire which reads as follows:

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"Would, in your opinion, such immediate integration of the races cause parents in large numbers to withdraw their children from such schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(3494) N(4163)
"From what is now happening in Washington, D. C., Delaware, Maryland, Ohio, and West Virginia, I am sure that the parents in ..... County would not for a moment accept integration."

W(6211) N(1837)
"I believe that most parents would send their children to school, since they would have little alternative to do otherwise."

W(1755) N(1030)
"Many white parents have expressed themselves."

W(2460) N(2597)
"Our people are not prepared to accept integrated schools. I am curious to know how we can prepare them."

W(9127) N(257)
"In some schools. Take ..... for instance. This school covers a large area of the mountain section of our county. They are looking for an excuse to keep their children out, and do. Many would stay out. I have already been told in no uncertain terms that when Negro children come in the whites will go out."

W(2774) N(3036)
"We cannot anticipate the duration of the withdrawals, but it would require strict force to compel attendance."

W(1826) N(1190)
"Yes, if immediate. No, if gradual."

W(2297) N(397)
"Not in large numbers. Most parents would have no choice if their children are to attend school anywhere."

W(3885) N(74)
"Parents in large numbers are strongly opposed to the Integration to the public schools."

W(2301) N(1702)
"Parents have told me that they will start private tuition schools if the integration program is carried out now."

W(2262) N(1835)
"Several ..... Club members—good, solid, substantial citizens—have told me that they would pay *any price* to send their children to all-white private schools."

W(2796) N(782)
"Many who could afford it would send their children to private schools."

W(6724) N(1827)
"Sufficient evidence is coming to us from 'fringe' areas such as Delaware to indicate that parents would protest and withdraw their children from schools. If there are protests there, there could be violence in the deep south."

W(3281) N(811)
"This would happen at first, but later the children would return."

W(2398) N(875)
"Most would not stay away long. Those who could would send their children to private schools."

W(13,032) N(3557)
"I cannot conceive of there being enough law enforcement in this county to make the majority of the people send their children to integrated schools. Most of them will stop school.

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As many as can will either move their place of residence or send their children away from home to private schools."

W(3256) N(1455)
"Parents would withdraw their children from school."

W(1795) N(194)
"Financial ability considered—would either send to private school or take them out of school to avoid possible trouble or violence?"

W(420) N(333)
"A large number have voiced the opinion that they would send the children to private schools."

W(17,926) N(7984)
"Even the attempt at integration in the parochial schools in ..... has had that effect."

W(2703) N(7753)
"I have heard many people make this statement."

W(4548) N(916)
"They would move to those sections where there is no Negro population."

W(9983) N(4822)
"(a) In the north, few parents who can afford the cost of private schools send their children to mixed schools, if the percentage of Negroes is appreciable. Note: Please name a northern school system that has an acceptable or tolerable plan of mixed schools.
(b) Parents who are able move away from districts with mixed schools.
(c) Religious and private groups are already preparing space to take care of a major exodus from the public schools.
(d) Many parents are making plans for private school education for their children in case the integration takes place.

This would cause a social caste system that would be most un-democratic."

W(3901) N(777)
"Rural and textile people will not readily integrate; and urban people will not too readily do so. Most people regardless of race are pleased with present segregation basis."

W(1408) N(2212) I(230)
"Parents of both races would refuse to send their children to mixed schools. Quite a number of Negro parents in ..... County have stated that they would not send their children for fear of trouble."

W(3228) N(2515)
"It would probably lead to rapid growth of private schools."

W(4165) N(3107)
"Many parents who are financially able would send their children to private schools. This would mean the loss of the support for public education of a rather influential group of our citizens."

W(6487) N(2276)
"I have heard many parents say they would enroll their children in private schools, if possible, before they would allow them to attend classes in which there were Negro children."

W(638) N(721)
"If physical violence would not predominate and prevent integration previously."

W(1550) N(107)
"The issue might be used for a while as an excuse for a few who would just as soon their children stay at home. We have few families who could or would try to send their children to private schools."

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W(999) N(1062)
"A number of parents have already told me that they will send their children to a private school if non-segregation ever becomes a fact in the public schools. This would be a serious blow to public school morale if the well-to-do send their children to all white schools and the poorer classes have to send their children to non-segregated schools."

W(3388) N(329)
"The parents in withdrawing their children from school would not necessarily send them to another school. There would be a vast number who would take advantage of our unsettled situation to keep them out of school, thereby carrying out a latent wish always held by them. There are a few parents, not over 10% who would try to get their children into private or parochial schools. In our part of the country we do have Missouri Lutheran church schools."

W(3250) N(1288)
"The wealthy or those who could afford to do so would send their children to private schools. The poor whites would be at a great disadvantage. This would cause us to have the high grade and the low grade among the whites. India has enough of the caste system. We need to avoid this."

W(2272) N(2638)
"The reactions in West Virginia, Delaware, Maryland and the District of Columbia are only minor compared to the withdrawal of children from school by parents that would take place here."

W(1006) N(1127) I(1100)
"Statements by political and community leaders have indicated that there might be two elements of our population who would not withdraw their children from schools; these being, namely; the less fortunate whites and low-moral Negroes. My personal opinion is that our system of public schools would be destroyed and only those referred to above would attend school for the novelty created, and as soon as

this became old to them, they would revert to their present mode of living where the attendance laws have to be constantly exercised at the present time."

W(7118) N(5259)
"The number would depend upon other facilities available. Some would perhaps withdraw them in the absence of any facilities unless forced by law to send them."

W(5120) N(1683)
"Nearly all parents of white children would withdraw their children from school at first, but some would later allow their children to attend with reluctance. The attendance laws could not be enforced. There would be demand for abolishing all compulsory school attendance laws. There would be agitation for reduced school appropriations and probably complete abolition of the public school system."

W(3270) N(409)
"I would consider 100 or more children to be large numbers."

W(1000) N(675)
"Private classes will be organized with some of our older and better teachers leaving the public schools for this type of work."

W(6468) N(4337)
"Poorly equipped private schools with poorly trained teachers would be the result. Our schools would lose the gains of forty years within a year. Some of our churches are now planning to establish private schools. The families with above average income would attend those. The children of the poor would attend no school at all."

W(1571) N(2236)
"Remarks by parents in recent conversations."

W(1835) N(None) I(393)
"In our district we already have one first to eighth grade

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parochial school. If immediate integration is ordered, we will have many, many more children to attend these church schools."

W(1821) N(428)
"Only a few."

W(696) N(157)
"Even the large element of our ..... population which come here from Northern states would likely enter their children in private schools. There have been some meetings already in this area to consider forming a private school here. Some of those who have publicly endorsed integration in the name of 'equal rights,' etc., attended such a meeting. Some of my teachers were invited."

W(1130) N(811)
"They would either withdraw children or refuse to allow Negro children in now-all-white-schools."

W(1139) N(750)
"Feeling here, with our large percentage of Negroes, is bound to be greater than that displayed in Delaware, Baltimore, and Washington. Private schools would get some of our children from wealthier families. Others would boycott the schools."

W(2577) N(148)
"Some parents would withdraw their children and send them to another school or even move to another part of town."

W(7416) N(148)
"This might depend to some degree on the reaction in other localities."

W(4194) N(3378)
"We have had several parents who have said in the event of integration of the races that they would withdraw their children from public schools and send them to private schools.

Many of the white parents have said that they would do all in their power to prevent the mixing of the races."

W(2125) N(15) I(113)
"Many parents have stated that they will refuse to allow their children to attend school with the colored people."

W(8669) N(644)
"To attend private schools and other public schools that would not have any Negroes. (Some of our elementary school districts do not have any Negroes living in them.)

W(6314) N(3521) I(250)
"I have talked with many parents relative to the problems connected with integration of races in our public schools. I have not met the first parent that is willing to send his child to any school where other than white children are present. I am confident that our white patrons would withdraw their children from our schools."

W(3137) N(2210)
"As stated before, I believe the white children would walk out and it would take force to make them attend."

W(9335) N(1587)
"I've heard some say that."

W(15,551) N(410)
"It is my opinion that the enrollment in private schools would increase rapidly."

W(1926) N(533)
"All parents financially able to do so will send children to private schools. Many parents will have to be forced to send their children to school."

W(6631) N(313)
"Many will withdraw their children from such schools and organize private schools where they are able to finance it. Others will keep them at home."

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W(8112) N(2177)
"One private school has already begun operation."

W(8331) N(4023)
"Some would send to private schools others would use the issue as a basis for non-attendance."

W(5542) N(3469)
"I cannot predict what will happen."

Q

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 16 of the questionnaire, which reads as follows:

> "Is there such difference in the average attainments between white and Negro children as to seriously impair instruction in mixed schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(3168) N(3059)
"Equal school plant facilities will provide equal instructional program."

W(3901) N(777)
"I do not believe that ability of pupils in either race would have much influence in either segregating or not segregating."

W(3669)
"The small number of colored children to be absorbed would make little difference."

W(6253) N(50)
"Not enough affected."

W(2460) N(2597)
"I do not know how to answer. There is not as much difference as the white people think there is."

W(9127) N(257)
"I don't think so."

W(1826) N(1190)
"The range of achievement and intelligence may be some greater, but this would be no great handicap."

W(2297) N(397)
"The average attainment is somewhat lower in our Negro schools, but there is a wide variation in any grade and we have learned somewhat to teach pupils on their own level."

W(11,458) N(4441)
"The average is only about one to two grades. The spread in any regular grade is much greater than that."

W(2125) N(15) I(113)
"Our one colored teacher is a very fine teacher. Her pupils compare favorably with the white children, who have about the same opportunities."

W(8669) N(644)
"There is not as much difference in this county as in many others due to the fact that the Negro child in this county has had better educational opportunities than many of our white children. The average intelligence of our Negroes is above that of many other sections."

R

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 16 of the questionnaire, which reads as follows:

"Is there such difference in the average attainments be-

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tween white and Negro children as to seriously impair instruction in mixed schools?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2256) N(1506)
"We feel that Negro children are almost two grades behind white children; that is, the Negro 10th grader could not do the work of the white 9th grade and would have to be sent to the 8th."

W(3375) N(2733)
"The educational background of children has a tremendous influence on the level of the attainment in the various grades in any school system. The average educational level of Negro parents and homes is far below that of whites. That would have a tendency in the average case to set up serious difficulties of attainment at the various grade levels."

W(5074) N(1287)
"We have records covering 18 years and they show considerable difference. Our achievement records show Negro children are over 2 years behind whites by the time they reach 8th grade. These are continuous records—given and kept by trained testing persons."

W(4427) N(26)
"This question is debatable, but there is some evidence to the effect that average attainment differs between the races."

W(1523) N(1455)
"According to standard tests, the white children will average two years above the Negro children in achievement."

W(3534) N(646)
"Achievement scores of tests given to colored and white children in the 4th and 6th grades during 1953-54 showed differences as follows:

4th Grade—White children scored an average of 1.6 (nearly 2 years) higher than colored.
6th Grade—White children scored an average of .9 (full year) higher than colored.
On Grade Expectancy, white children scored an average of 1.4 (1 year, 4 months) higher than colored children in the 6th grade.
In the 2nd grade, white children scored an average of .8 (nearly a year) higher than colored children."

W(2373) N(4419)
"This is one of the major problems."

W(2262) N(1835)
"Our I. Q. Test records and achievement test records show a great gulf in the *average* ability of any given Negro group as contrasted with a similar grade, or group, of white children."

W(2796) N(782)
"In general, I do not believe the degree of excellence or attainment is found in the average colored school that is expected in white schools. If mixed, children of like grades would likely range even more than they do now in the individual schools. Proper classification of students will probably bring forth cries of 'discrimination'."

W(6724) N(1827)
"We have evidence from test records that the achievement of the average colored student is about two years below the average for white children."

W(3281) N(811)
"My observation in both white and Negro schools leads me to this conclusion."

W(9619) N(7122)
"Last year, a Stanford Achievement Test was given during the 7th school month to all the white and Negro children in

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the 5th and 7th grades of the city schools. The normal score for the average 5th grade child at that period in the school year should have been 5.7 (5 years and 7 months of school), and for the child in the 7th grade, 7.7. When these tests were scored and checked, we found the results indicated below:

Fifth Grade

	White	*Negro*
Median Chronological age	11 yrs. 2 mos.	11 yrs. 4 mos.
Median I. Q.	99	85
Median Achievement Level	5.8	4.6

Seventh Grade

	White	*Negro*
Median Chronological Age	13 yrs. 2 mos.	13 yrs. 4 mos.
Median I. Q.	98	85
Median Achievement Level	7.7	6.7

These test results indicate quite clearly that in these two grades the Negro children, while 2 months older than the white children in the same grade, have, on the average, lower intelligent quotients, and their grade achievement (the ability to do the work of a particular grade) is from a year (7.7 - 6.7) to a year and 2 months (5.8 - 4.6) below that of the white children of that grade."

W(1878)
"This answer is not based on observation; it is merely my own opinion."

W(2603) N(7753)
"Generally speaking, the attainment of pupils in a given grade is lower in the Negro schools than in the white schools."

W(17,926) N(7984)
"In the high schools the difference in grade level amounts, on the average, to 3-5 grades."

W(1795) N(194)
"Check the results made in ..... Tests (..... Co.). Levels of attainment at present would increase our problems? Please note—I am giving only a small number of reasons—with ques-

tion marks, as no time allotted for proofs, etc. Many more valid reasons are applicable, I am sure."

W(3256) N(1455)
"It would seriously impair instruction and achievement. The requirements for promotion in Negro schools seem to be lower than those of the whites. This being true, it would seriously retard the achievement and the level of instruction several decades.

W(13,032) N(3557)
"We have had, down through the years, evidence to show that the Negro students are two or three grades behind the white students, on a basis of objective test results. The results show that the difference is greater, the higher in the grade level, even though the selection of the Negro students in the higher grades, due to the loss from schools of those who don't succeed in school, is decidedly in favor of the Negroes. There are greater differences in experiences, background, etc., than in the subject matter field between the Negroes and whites."

W(2398) N(875)
"Standard test scores do indicate from one to two years difference."

W(8578) N(3442)
"Almost any good test given anywhere in the State would substantiate this answer."

W(3295) N(1900)
"There is a difference in cultural achievement of white and Negro children largely because of environmental background. White children as a rule at a given age have larger vocabularies and have developed more concepts which enable them to learn new subject matter more rapidly. This information is factual and has been obtained from administering objective achievement tests."

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W(5707) N(1147)
"This answer based on test score given over a period of years."

W(7118) N(5259)
"The results of all standard tests which we give to both races show the average Negro pupil as two grades behind the average white pupil."

W(755) N(522)
"This reply is based upon the scores made by students on standard achievements given twice each year."

W(2812) N(1868)
"Test results and observations indicate conclusively that achievement of Negro children is below that of whites. Economic and social history have possibly been contributory factors. It is my opinion that the same comparison between white and Negro teachers would produce similar conclusions."

W(4548) N(916)
"The great majority of Negro children do not have the home background and mental ability to compete with white children of the same age. Some do have high intelligence and could compete most successfully."

W(5120) N(1683)
"Some of the Negro children could keep pace with the white children in scholastic attainment, especially those of mixed blood, but on the average, the ability of the Negro group would be much lower than the white. This would tend to accentuate the problem of maintaining a high standard of scholastic attainment."

W(1006) N(1127) I(1100)
"Not only is there a major difference in the average attainments between white and Negro children, there is a radical difference in hereditary and environmental backgrounds. The major percentage of our white people are what could be re-

ferred to as 'country gentlemen' and most have tremendous property holdings with Negroes and Indians serving as tenants and tillers of the soil. It would be in total violation of established tradition for Negroes, Indians and whites to associate on a compatible basis and I, in all sincerity, cannot foresee this barrier being removed wholly or partially within the present life tenure of our people."

W(2774) N(3036)
"Economic, social, educational, and cultural backgrounds make for a tremendous difference."

W(1937) N(928)
"Our achievement tests show about two years difference in achievement. The Negroes are that much lower than whites."

W(3885) N(74)
"Results of standard tests indicate average Negro child is below the average white child in scholastic attainments."

W(9783) N(2305)
"A study of results of achievement tests and mental ability tests indicates a wide difference in ability and achievement between the white and Negro children."

W(8900) N(272)
"At present, yes."

W(6211) N(1837)
"Supt. ..... of ..... got out an interesting study on this in the ..... schools."

W(5928) N(777)
"The Negro, from the fourth grade through the twelfth, will average two years below the white child in the age-grade."

W(4224) N(66)
"I frankly believe that the white children have far greater abilities to progress than Negroes; therefore, this would surely impair progress."

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W(3494) N(4163)
"Here is where we would really be criticized for discrimination, for I think that the average Negro eighth grade student would be from one to two years behind the white eighth grade student because of three reasons—(1) native intelligence, (2) poorer teachers, and (3) poorer school attendance on the part of the Negro. I think that we would necessarily have to call upon some impartial organization, such as NEA to test all the children for grade placement."

W(1755) N(1030)
"Standard Tests (mental achievement, readiness, etc.) and supervision clearly show this to be true."

W(2460) N(2597)
"I do not know how to answer—there is not as much difference as the white people think there is."

W(1778) N(619)
"In our administrative unit Negro children are retarded on the average two years as measured by any Standard Test we have given."

W(6465) N(1449)
"The 1950-51 Survey conducted by the North Carolina State Department of Public Instruction in ..... County found a wide difference in educational achievement between white and Negro school children in ..... County."

W(16,038) N(2,354)
"Our tests prove so."

W(2795) N(1111)
"My 'yes' answer does not refer to intellectual capacity when opportunities have been comparable for an extended period of time. However, a sudden or immediate integration would, I think, necessarily lower standards."

W(9983) N(4822)
"This is a major problem far beyond the conception of even

the most extreme Southerner.

(a) The North has attracted the higher bracket in intelligence of Negro citizens.

(b) Negroes who become specialists, college professors, or pass Civil Service, go to centers of Negro and Government jobs. This has left the deep South with the average and below masses. These are, however, the most loyal and dependable American citizens of the race. (Anyone who would think of Washington, D. C. as the place to 'model' the racial integration program is too naive to be taken seriously in the solution of the Negro problem. For many decades all southern communities have been sending their top half (mentally) of the Negro race to Washington for Government jobs. Also, Raleigh, Durham, Greensboro, et cetera, would have a much larger percentage of high I. Q. Negroes than you would find in the typical southern town."

W(1408) N(2212) I(230)

"Five years ago a battery of tests was given to our Negro Supervisor to administer to the fourth and fifth grades. They are still on a shelf in her office. Why didn't she give them? She didn't want a comparison made with tests given to same grades in the white schools. It is my studied opinion, based on observation and checking school papers at random, that the Negro children in ..... County will rate at least 3 grades below the white children on the average. For additional confirmation see statistics from the ..... Schools that can be furnished by Superintendent ....., and the never-released report of the Educational Commission that made studies in several selected counties and cities."

W(3228) N(2515)

"Standard achievement test results in our local elementary schools show white pupils approximately a year above the national norm, while our Negro pupils are approximately two years below the norm. An average variance of three years in a given grade would work an extreme hardship on teachers and pupils alike."

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W(4165) N(3107)
"On a grade level of achievement it would mean that approximately 75% of the Negro pupils would be demoted one grade level."

W(6487) N(2276)
"Our Negro Supervisor has expressed the opinion that she feels it would be unfair competition for the Negro children to be in the same classrooms with whites. She based this statement on the fact that the Negroes have only had a relatively short educational history and that their background and opportunities have been more limited. She feels that there are some Negro children who could 'hold their own', but that the group as a whole could not."

W(696) N(157)
"Partially in upper grades."

W(1130) N(811)
"Negro principals in this unit agree that the average Negro school child is from two to five years behind the average white child in the same grade."

W(1139) N(750)
"Negro pupils are an average of two grades below white pupils. This was proved by an achievement test we gave all 6th grade pupils several years ago."

W(2577) N(148)
"In the upper grades, 7 to 12, there is about 2 years difference in achievement of the two races in each grade level."

W(1835) N(None) I(393)
"Enough difference to pose a problem."

W(638) N(721)
"About 1 grade level difference now, but rapidly approaching equal."

W(3388) N(329)
"We have in the past given tests recommended by the State Department on a county-wide basis and have discovered that there is at least a year and one-half to two years difference in the attainment in the same age and grade groups (I admit it has been three years since this comparative study was made). Our people believe that we will in our schools, pull the white child down to the Negro child, rather than bring the colored child to the white child's level. More than likely what would happen is that the Negro child and the white child would probably meet on the level somewhere between the top and the bottom—the white child down a little and the colored child up a little."

W(3250) N(1288)
"I have noticed that black birds do not associate with red birds. They live in the same big world and have the same opportunities. They just like to roost in different trees. The Maker perhaps arranged this. I have observed that the mental capacities of children of the white race are superior."

W(1000) N(675)
"Placement tests will have to be given the children in order to do the right thing for all children. This will mean that a large percentage of Negro children will be placed together even in white schools."

W(2272) N(2638)
"I think that the span of difference is great enough to seriously impair the instructional program."

W(1571) N(2236)
"Observation of work and tests made in white and Negro schools indicates that to classify them for successful teaching would develop such a great social problem that instruction would be greatly hampered."

W(675) N(764)
"Standard tests administered show that there are wide varia-

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tions between the groups. While there are variations within the races the 'spread' is magnified."

W(1270) N(1090)
"We gave standard tests last year (1953-54): White I. Q. average, 100. Negro I. Q. average, 80. The whole program of academic work would have to be adjusted downward."

W(1787) N(1585)
"The white pupils usually average about two grades above the Negro pupils according to standard tests when the upper grammar grades are reached."

W(1831) N(235)
"The teachers in the Negro schools and the children of same are both considerably lower in attainment."

W(8661) N(3624)
"Various tests (achievement) administered over the years show a marked difference in attainment between white and Negro children in the same grades."

W(2694) N(1492)
"The average I. Q. score in 1953-54 for the county as a whole was: White, 91.6; Negro, 82.0."

W(4781) N(715)
"Recent achievement tests show that Negro children are below white children here in attainment for each individual grade."

W(1821) N(428)
"But the gap is decreasing."

W(999) N(1062)
"Possibly 20% or 25% of the Negro children would fit into the pattern all right, but for the masses of Negro children they would be misfits. I am sure that an inferiority complex would develop if they were forced to mix with white chil-

dren in their classes. This would result in a serious handicap for the Negro children."

W(3693) N(197)
"Standard tests reveal a difference of a whole year."

W(2571) N(1559)
"Annual testing program conducted for the past several years shows a variation in achievement becoming more pronounced with each successive grade. Average achievement of Negro pupils in the eighth grade is two years, four months below average achievement of white pupils in eighth grade (1953-54)."

W(6631) N(313)
"The colored would be in grades about one year behind the white ones. Mainly because of home conditions, lack of books and newspapers and general conditions."

W(1626) N(533)
"I believe this to be true in this school unit at present. With proper equipment and facilities children of equal mental abilities can obtain equal attainment. As a whole the percentages of mental abilities in the Negro children indicate lower abilities at present in the Negro school than in the white."

W(9335) N(1587)
"Tests show Negro children considerably behind white children in the same grades."

W(3137) N(2210)
"Standard of living of the whites higher than that of the Negroes."

W(6314) N(3521) I(250)
"According to test and other information available there is a noticeable gap between the average attainment of white

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pupils and Negro pupils. Therefore, the problem of child placement would become more acute."

W(2409) N(562)
"Very definitely a difference."

W(2342) N(2685)
"The evidence available, which includes the statistical evidence of achievement and other tests, reveals such wide range in achievement of white and Negro pupils as to require extensive class and grade re-organization for instructional purposes, should the races be mixed."

Total enrollment: (3400)
"Negroes low in achievement. Tested this month."

W(2629) N(953)
"Even though we have a number of children in the Negro school who rank favorably with children in white schools because of background and home environment, this would not be true of the average."

W(3330) N(2681)
"In our opinion the average white pupil is a better pupil than the Negro student, by at least a year."

W(8331) N(4023)
"However this might be more easily overcome than other problems."

W(4083) N(2344)
"This is where the real damage would be done to public education in North Carolina."

S

The quotations below are comments made by county and city superintendents of schools in explanation of their an-

swer "Yes" to question number 17 of the questionnaire which reads as follows:

> "Would, in your opinion, white children or their parents elect to attend any school heretofore conducted for Negro children?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(6211) N(1837)
"Very, very few. Some folk here from other sections of the U. S. might let their children do so just to 'make a point'."

T

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 17 of the questionnaire which reads as follows:

> "Would, in your opinion, white children or their parents elect to attend any school heretofore conducted for Negro children?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(2795) N(1111)
"I believe this would be too much of an adjustment to be made immediately."

W(9983) N(4822)
"(a) A few of our preachers, 'do-gooders,' communists, politicians and college professors have indicated that they would do so.
(b) From 90% to 95% of our people would go to any extreme to resist any attempt to do so. ..... has a situation that

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would require just such a student placement if the court edict is carried out."

W(3228) N(2515)
"It is very unlikely that such a choice would be made."

W(696) N(157)
"There is no likelihood whatsoever that they would either elect or be compelled to attend the present Negro school."

W(1130) N(811)
"Definitely no, in the same manner that they do not want Negro children attending schools previously used by white children."

W(2301) N(1702)
"In this area there might be 10 percent of the parents who would allow their children to attend mixed schools."

W(1051) N(441)
"Nor do we think Negro children would elect to attend the white schools."

W(2256) N(1506)
"White children will not attend Negro schools, law or no law."

W(4427) N(26)
"Question 17 implies an option. If such an option exists in the future, there is no question as to what the people will elect—to retain the *status quo*."

W(2262) N(1835)
"School Board members tell me (we have 9) that we cannot possibly assign white children to our present all-Negro schools."

W(6724) N(1827)
"This matter would be bitterly contested."

W(7118) N(5259)
"If this school were still staffed by Negro principal and teachers and the majority of its students Negroes, I do not believe a white parent will send his child there. I believe he will suffer any penalty of the law rather than do it."

W(1132) N(118)
"In my opinion, not a single white student would attend a school which had been used as a Negro school."

W(1878) N(0)
"This would never work here."

W(17,926) N(7984)
"No one has expressed himself in such a vein."

W(1795) N(194)
"These buildings have generally been located in or near the colored or Negro center of population—and in small communities (some at least) these are outlying areas."

W(3256) N(1455)
"They would not go to the colored building."

W(13,032) N(3557)
"Any parent in this area who would do such would be looked upon as a fanatic, and I am quite sure that he would be."

W(3295) N(1900)
"It will be most difficult for the Board of Education to succeed in getting white children to attend schools heretofore known as Negro schools. If there must be integration, it will be much less difficult to have children of both races attend schools heretofore for white children."

W(2812) N(1868)
"Cannot envision such election."

W(5120) N(1683)
"Definitely NO!"

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W(4548) N(916)
"For any white child or parent in our unit to accept this is very doubtful."

W(1006) N(1100) I(1127)
"The consensus of opinion is that the white parents would allow their children to grow up without the benefit of the normal school instructional benefits or send them to private schools if such does come into existence. And many have stated that they would teach their children themselves before they would send them to a Negro school or allow them to attend a white school that has admitted Negroes. The feeling of 95% of our parents would be, whether right or wrong, that it would be an unforgivable disgrace and, thus, will not accept it."

W(1755) N(1030)
"Parents have begun to change their residences."

W(9127) N(257)
"No! Is the answer."

W(2460) N(2597)
"You might have a small minority that could do this but public sentiment would frown on this step by any family in the community."

W(4224) N(66)
"I am certain beyond any doubt of this."

W(2774) N(3036)
"Other observations support the above answer."

W(1937) N(928)
"They are just not going to do it."

W(999) N(1062)
"Customs and habits are not that easily changed."

W(1550) N(107)
"The location of the school in a small all Negro community would negate this problem."

W(8661) N(3624) I(91)
"Most Negro schools have been surrounded by a Negro community."

W(1571) N(2236)
"It would be difficult to keep them in the buildings they are now in if Negro children were allowed to enter."

W(675) N(764)
"Parents object to moving anything from a Negro school to a white school and certainly would react even more to their children attending the Negro school."

W(2272) N(2638)
"It could only be done by extreme force."

W(3250) N(1288)
"The white people refuse to use school books which have been used by the Negroes. They refuse to ride busses which have been used by the Negroes. They cannot stand the scent. Pharoah's army could not make them enter a school building which has been used by the Negroes."

W(3388) N(329)
"Our one Negro school building is average so far as comfort, equipment and all those working tools that go to make up a good school. Practically all of the children that would use the Negro school plant would have to be transported, since it lies a mile and one-fourth outside of the ..... school district, the town of ..... and the ..... white school plant. This building could probably be integrated into the ..... school facilities as a grammar grade unit, since we have enough children in the ..... school to fill all classrooms in the Negro school by simply moving four sixth grades, four seventh grades and four eighth grades to this building. As

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for white parents selecting a school in which there were Negro children, that is entirely out of the question."

W(6468) N(4337)
"They would not attend such schools even if it meant no schools at all for their children."

W(13,996) N(1604)
"Not for the first few years."

W(7175) N(6916)
"Not at this time, though some of our buildings for Negro children are better than for whites in some districts."

W(11,458) N(4441)
"Not now."

W(6631) N(313)
"No matter how adequate and if equal in all respects to the white ones, it would be next to impossible to get them to go."

W(1926) N(533)
"They would go only after a complete renovation of the plant."

W(5347) N(2210)
"I think this is a recognized fact."

W(6314) N(3521) I(250)
"Many schools heretofore used for Negro children will not be used for white people in our area."

W(2409) N(562)
"By no means."

W(3330) N(2681)
"They just wouldn't go!"

W(8331) N(4023)
"There would be some for sake of novelty."

U

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "No" to question number 18 of the questionnaire, which reads as follows:

> "In the event that the Supreme Court should decree that there should be a gradual adjustment brought about from the existing segregated system of public schools to a system not based on color distinction, and provided that sufficient length of time were allowed for such gradual adjustment, would the schools of your unit be better able to cope with the problems presented by such a decision?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(1550) N(107)
"Our action should follow the State pattern. If the action is inevitable I do not believe that prolonging it will help. We are in the process of building and the present uncertainty is complicating our problem."

W(4194) N(3378)
"It is my opinion that it would be better to operate just as we are now with separate schools for white and Negro students. That is the opinion of the principals of our three consolidated Negro schools."

W(5417) N(766)
"I shudder when I think of what may and probably will happen when the Supreme Court hands down its decree implementing its previous decision with reference to segregation in public schools."

W(2571) N(1559)
"We do not think that integration would be for the best interest of either white pupils or Negro. Gradual integration

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merely introduces the element of time and we do not believe that time will correct a basic mistake. The people may finally accept integration on a gradual basis, but it is our opinion that the distaste for and resentment of such action will not disappear."

(Total 3400)
"Perhaps 15 to 20 years from now."

W(2342) N(2685)
"The proportion of Negroes to whites is such that even gradual adjustment would be fraught with serious resistance and resultant interruption of the school program. I have no reason to believe that gradualism would be any more acceptable than immediate integration."

W(8112) N(2177)
"The answer can only be 'perhaps'."

W(2774) N(3036)
"Of course gradual adjustment would be better than a sudden attempt, but any movement toward adjustment will produce tremendous difficulties in our county."

W(3919) N(2223)
"See no way of implementing the decision."

W(3669)
"Gradual adjustment could hardly apply in our case. What would be considered the first step in gradual adjustment elsewhere, would be total in our case."

W(420) N(333)
"We would have serious problems even if a gradual adjustment should be decreed."

W(1795) N(194)
"It is quite obvious, it seems, that this question is the one with the 'Stinger.' I do not think it has a place in this list—

as only one answer is possible and if that is given—and used in your summary—you can quite truthfully say: 'According to our summary, it is agreed that the gradual adjustment is acceptable'—which I think, is misleading and untrue."

W(1006) N(1127) I(1100)
"It depends on the interpretation of the word gradual. If it means that other communities enter into the situation successfully and many years elapse, it might work; however, I honestly, and with all sincerity, doubt if it will ever be workable. I believe it reasonable to state that it will never be workable until there has been a total change in local attitude, and we all know how slowly deep-seated prejudices (whether right or wrong) are modified. Our total picture is that we are facing one of the most destructive decisions ever thrust upon the American people, even greater than were the problems of emancipation."

V

The quotations below are comments made by county and city superintendents of schools in explanation of their answer "Yes" to question number 18 of the questionnaire, which reads as follows:

> "In the event that the Supreme Court should decree that there should be a *gradual* adjustment brought about from the existing segregated system of public schools to a system not based on color distinction, and provided that sufficient length of time were allowed for such gradual adjustment, would the schools of your unit be better able to cope with the problems presented by such a decision?"

The W, N, or I followed by numerals indicate the white, Negro, or Indian school enrollment of the county and city schools of the superintendent answering the questionnaire.

W(9619) N(7122)
"A *gradual* adjustment would certainly help school systems to make the transition from segregated to non-segregated

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schools. It is going to be a difficult job at best. If on top of all the other problems of adjustment which will have to be met, Negro children were thrown in great numbers into the white schools, there would be chaos, as the Negro boys and girls, with very few exceptions, simply cannot do the same quality of work. This would mean that many of these children would fail to pass their work, not because of their color, but for lack of intellectual ability, or background of experience, or both, to do the required classroom work. The Negro parents would then be inclined to accuse the schools of discriminating against them which would not be true in these instances. (The distinguished gentlemen of our Supreme Court, because their experience has had to do with legal matters and not in the area of public education, were naturally not keenly aware of this difference in the general ability and achievement of the two groups.)"

W(3281) N(811)
"This is the only way it will work here."

W(2373) N(4419)
"The 'gradual' would help to adjust the difference in attainments."

W(3534) N(646)
"Provided a separate school to accommodate any colored and white children who might be led to integrate were provided on a trial basis."

W(1523) N(1455)
"We believe only a few Negroes would attempt to enter the schools normally serving the white race. If all schools were open to either white or Negro children, we believe there would be little change in this unit."

W(5074) N(1287)
"Only way out—minimum of 15 years."

W(1164) N(859)
"In my opinion, the Negroes in our school administrative

unit are satisfied with their separate school."

W(1490) N(1784)
"I think it would be many years before any appreciable number of Negro students would actually seek admittance to white schools here."

W(2301) N(1702)
"As I said above, 25 years is the minimum time it would take to carry out the integrated program."

W(2262) N(1835)
"This method is the only possible way that I can see for our schools here. Any other plan of integration will, in my opinion, wreck the public schools in our administrative unit."

W(6724) N(1827)
"There is a tendency toward integration. For example, the ministers of our city only this month combined the work of white and Negro ministers in the association of ministers. Because of the good schools which now exist for Negroes, the educational level of the Negro is rapidly going up. It will be much easier to mix white and colored children 10 or 20 years from now than it will be at the present time."

W(5120) N(1683)
"It all depends upon what is meant by 'sufficient length of time.' In my opinion, 100 years would be too short."

W(2117) N(1172)
"Providing the time allowed is sufficient. A year or two would make little difference. On the other hand, if equal facilities are provided over a ten to twenty year period the progress made by Negro schools will appreciably improve the situation. Many people oppose integration just as bitterly on the basis of the low standards that would come about as they do on the basis of racial differences."

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W(1878)
"I would not be afraid of a *gradual* adjustment at the high school level."

W(2603) N(7753)
"It is my opinion that it would be most difficult to ever make the adjustment to non-segregated schools. I do believe a sufficient length of time would help to alleviate some of the problems."

W(17,926) N(7984)
"We are making progress. Our principals and supervisors meet together. Small groups of both races meet together in professional meetings and in workshops. Even pupils from both races are cooperating in some areas."

W(3256) N(1455)
"What is a gradual adjustment???? (Number of years??)"

W(13,032) N(3557)
"We are not ready for gradual adjustment to begin at once. Most of our white people are of this opinion. I have talked to many Negro leaders of this county, including teachers and principals. Some of them think that they would be ready to begin integration in about 20 years if they continue to make progress. Before the Negroes of this county will demand integration there will have to be a great deal of agitation from the outside. Apparently that is coming at a rapid rate, from far and near. The agitators that are near are few, but get support from a few, some of whom represent large groups and seem to speak for them, without authority."

W(2398) N(875)
"This is my hope! The first ten years will be the hardest!"

W(3295) N(1900)
"If the leaders of both races can agree on a gradual adjustment, and if our people are not disturbed by outside agitators, the problem will be facilitated."

W(5784) N(5991)
"Funds are not in sight now to build all the facilities needed for our present enrollment. If funds were made available by 1960, we will need five years to build the space needed. No kind of integration can be considered before 1965."

W(6253) N(50)
"Time will help."

W(6940) N(1862)
"I think so."

W(7118) N(5259)
"Obviously we would be better able under these circumstances, but I do not know how well we could cope with the pupils that would be aroused by even a gradual attempt at integration."

W(4548) N(916)
" 'Time' will not make integration more acceptable or desirable, but may help in adjustment."

W(2297) N(397)
"The length of time could not be too short. The situation would still be difficult."

W(2460) N(2597)
"If you mean by gradual adjustment another generation something might be done."

W(3494) N(4163)
"I think that if it has got to come that the shock would be less severe if it came gradually. It is my opinion that it would be best to start at the 12th grade. Here you would have a more select group of Negroes. There would be less opportunity, because of the short time that children would be together, for them to mingle and form friendships that might disturb the parents. At this age, too, you would find the children of

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both races when they are most tolerant. My nose tells me that the odor is less nauseating as the Negro children advance in the grades."

W(2774) N(3036)
"Of course, gradual adjustment would be better than a sudden attempt, but any movement toward adjustment will produce tremendous difficulties in our county."

W(1937) N(928)
"If integration should start with the first grade only and the children grew up together, there would be less trouble than otherwise."

W(3885) N(74)
"The general opinion in this community seems to be that gradual adjustment is the only sensible solution."

W(1826) N(1190)
"It will not work otherwise."

W(1987) N(1303)
"If enough time is permitted. We need 25 years."

W(6211) N(1837)
"Naturally, I assume that our schools would fall into line with the general 'State pattern' which might be established. 95 per cent of our people feel that the Supreme Court made a Great Mistake in their May 17 decision."

W(1755) N(1030)
"A doubtful situation."

W(552) N(371)
"Where to begin, is the '64 dollar question.' Our white people in this county will not tolerate at any grade level, manner, or time, integration of white and Negro children."
"Until white and Negro adults can live together, as the white and Negro children would have to under the integration

plan, I see no hope of public schools integrating peacefully."

W(2651) N(344)
"Even with gradual adjustment we have every reason to believe that we will be confronted with serious problems—and as to these problems, I see no reasonable solution at the present time."

W(2905) N(798)
"The gradual transition should be completed 1959-60, beginning with primary grades extending through elementary next two years. First year high school by 1958-59. Complete integration by 1959-60."

W(2577) N(148)
"If left to their own choice, neither race in ..... will want to go to school with the other race for years to come."

W(1139) N(750)
"I honestly think that it will be a long time before the white people of this community will agree to any integration."

W(6487) N(2276)
"This opinion is based on observation of some Negro and white children playing together before their prejudice has had a chance to develop."

W(1408) N(2212) I(230)
"But they would have to have an awfully long time."

W(3901) N(777)
"Gradual adjustment would require a very long time. Forced adjustment will not succeed."

W(2242) N(5125)
"This decision would cause or establish another segregated group. The white financially able to send or establish white or private schools would do so, causing the lower group economically to be forced to integration. This would establish

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three groups which would cause our section of the country to be divided three ways socially and economically. This would cause people with wealth not to be interested in public education and make it difficult to secure funds to operate our schools. Therefore, I believe that the states and counties should operate, support and control their school system."

W(2795) N(1111)
"Prejudices are acquired, I think; not inherited. A change as radical as has been proposed should by all means be a gradual one if made at all. I believe a gradual pupil integration might be made within a reasonable length of time. I am not so certain about teacher integration even then."

W(9983) N(4822)
"As soon as the citizens see that the communist propaganda as to the equality of the races is false, the reaction will be violent. Too many college pink and red professors, imported socialist writers, and 'do-gooders' religious dreamers have brain-washed our citizens to the point that at first a minority would accept the program. When the true situation becomes apparent, there will be a violent reaction. The testing programs for several decades proves the propaganda false."

W(3228) N(2515)
"It would probably require several decades."

W(696) N(157)
"Any approach other than a gradual approach would be fool-hardy and would show that the honorable gentlemen on the Court did not realize the depth of feeling on this matter."

W(1130) N(811)
"Such a period of gradual adjustment should cover not less than 25 years if it is to be gradual enough. This may not be long enough."

W(4164) N(3107)
"If 'gradual' is interpreted to mean 10 to 25 years—Answer—Yes."

W(1787) N(1575)
"Integration will have a better chance to succeed if it is done gradually. It cannot be done peacefully if done in a hurry. It may not be possible to do it peacefully even if done in a gradual manner."

W(3250) N(1288)
"We are getting along fine with the schools as they are in this county. The Negroes do not want to attend the white schools. They seem to want more prestige. If we can get good facilities for all and are allowed to work out a long range plan, we could better get along and live in some degree of peace; otherwise, there will be no peace. We have this situation: Many Negroes now living in the North are sending their children back to the South for school. Three cases or more like this in one of our schools."

W(6468) N(4337)
"This should be at a 'snail's' pace if it has to come at all. Our people are not ready for it and many of them will have no part of it."

W(3388) N(329)
"This is the only way that it might be accomplished in ..... County. A little at a time. One grade this year and another grade next year. I would suggest that not less than 10 years be given to us in order to bring about compete integration."

W(2272) N(2638)
"This type of integration would cause lots of trouble but it would be better than an attempt of immediate integration."

W(675) N(764)
" 'Sufficient length of time' can be a long time. Just as death postponed is better than death now, so integration postponed

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is better than integration now. At the moment it appears that integration will not be welcome in the foreseeable future."

W(1571) N(2236)
"Would probably be less people involved at one time but we will have troube in ..... County with any plan to desegregate schools. Much hatred and bitterness will be generated that never existed previously."

W(8661) N(3624) I(91)
"Any extreme change in a social order must be accomplished over a long period of time."

W(999) N(1062)
"Our schools will follow both by choice and by necessity a State pattern. We are part of a State School System and we have no desire to combat the State's policy. I am confident, after serving as school superintendent in ..... for thirty-one years, that even the State cannot wipe out segregation at one fell swoop without seriously impairing the public school system. If non-segregation every comes in North Carolina it will have to be by degress and it will require a long time."

W(3738) N(None)
"It is my opinion that should such be made the law of the land, people would gradually grow to accept it for most people feel that it is morally right to do so but have strong prejudices to overcome in seeing such put into actuality."

W(1835) N(None) I(393)
"We need a terribly long period and I don't believe our people will go along with the integrated schools for many, many years, willingly."

W(1000) N(675)
"Integration beginning with the first grade will greatly lessen the trouble we are all bound to have with this thing."

W(1270) N(1090)
"This cannot be peacefully and successfully done until the people change. At present the majority of both races are against mixing. I have no idea how long 'gradual' means. It must mean when the people change and are willing to accept integration."

W(2694) N(1492)
"The process would have to be very gradual for it to be accepted at all."

W(1831) N(235)
"We yield to the affirmative as to its comparative implication and not as to, in any measure, conceding to sanction."

W(2409) N(562)
"By all means."

W(2629) N(953)
"If enough time were given sufficient preparation could be made in schools of both races for the change. It is my opinion that with a sufficient amount of careful preparation and training on the part of teachers, children, parents, and the public, integration could be accomplished."

W(3330) N(2681)
"Time makes a difference in solving any problem. I suppose a grade at a time would be best."

W(766) N(891)
"This seems to be the only way out."

W(13,996) N(1604)
"Start in the first grades in a few schools (those from whom we could get an approval of the School Committee and P.T.A. leadership). It will take ten or twelve years to get it started in all the schools in our county."

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W(14,452) N(2475)
"In my opinion, this is the only plan which offers hope of a tolerable solution of the problem."

W(7175) N(6916)
"Fifteen or twenty years ago talk of voting by Negroes was considered, 'political heresy' by whites in this area. It is now accepted by change in public opinion."

W(8669) N(644)
"Our people are becoming more tolerant and if given time will work it out."

W(6631) N(313)
"Even then it will take many years. No law can be enforced when public sentiment is opposed to it."

W(1926) N(533)
"To accomplish any change it is necessary to educate the public to the change. An abrupt change of this type can only cause friction until the whites and Negroes are educated for it."

W(3137) N(2210)
"To what degree, I do not know."

W(6314) N(3521) I(250)
"If the Supreme Court should decree that each county or each community be given the opportunity to choose their own school, I do not believe that any racial problems will arise in our unit. Our Negroes and whites are interested in equal but separate facilities. If this desire is met, I believe generally our system will continue to operate without problems."

W(8331) N(4023)
"Much time is needed for children and parents to prepare for integration (at least 10 years)."

EXHIBIT 8

LETTER OF TRANSMITTAL AND QUESTIONNAIRE TO SHERIFFS AND CHIEFS OF POLICE, WITH TABULATION OF ANSWERS TO QUESTIONS 1 THROUGH 10, INCLUSIVE.

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
RALEIGH

5 October 1954

To the Sheriffs and Chiefs of Police of North Carolina:

In the re-argument of the school segregation cases in the Supreme Court of the United States, which is scheduled to begin December 6, the Court has requested the answers to two questions which they have submitted, the first relating to the immediate mixing of the races in the public schools and the other to a gradual integration of these schools.

There is enclosed to you herewith two copies of the questionnaire which I am sending to the sheriffs throughout the State and chiefs of police in the larger cities. I will appreciate it if you will answer the questions contained in this questionnaire and return it to me by October 12 if possible. You may retain one copy for your file. Your candid answers to these questions will be of great assistance to me in presenting North Carolina's case to the Supreme Court.

No publication will be made of the answer given by the various sheriffs and chiefs of police to these questions. Only the results will be shown in tabulated form in our brief presented to the Supreme Court. I suggest that no publicity be given to this matter.

Yours very truly,
s/ Harry McMullan
HARRY McMULLAN,
Attorney General

Enclosures

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QUESTIONS FOR SHERIFFS AND CHIEFS OF POLICE

1. Name of county or city: .....
2. How long have you been engaged in police work? .....

In all of the following questions, assume all white and Negro children are to be assigned to schools nearest their homes without regard to race.

1. Do you think there would be likelihood of violence among racial groups of students which would seriously interfere with the operations of schools in your city or county? (Answer "Yes" or "No.") Yes—193 No—6 D.K.—1 Make such explanation of your answer as you care to make.
2. Do you think there would be likelihood of such violence involving parents and others who are not students? (Answer "Yes" or "No.") Yes—191 No—6 D.K.—3 Make such explanation of your answer as you care to make.
3. Do you think there would be danger of such violence on school busses or where children wait for busses? (Answer "Yes" or "No.") Yes—195 No—3 D.K.—2 Make such explanation of your answer as you care to make.
4. Do you consider your present police force sufficient to preserve the general peace and order in your jurisdiction if such intermixing of white and Negro children in the public schools were to occur? (Answer "Yes" or "No.") Yes—14 No—182 D.K.—3 Make such explanation of your answer as you care to make.
5. In your opinion, generally, would parents of white children permit them to attend a school in which a substantial number of the students are Negroes? (Answer "Yes" or "No.") Yes—4 No—189 D.K.—7 Make such explanation of your answer as you care to make.
6. In your opinion, would racial conflicts result if white children are disciplined by Negro teachers? (Answer "Yes" or "No.") Yes—197 No—2 D.K.—1

Make such explanation of your answer as you care to make.

7. In your opinion, generally, would parents of Negro children permit them to attend a school in which a substantial number of the students are white?
(Answer "Yes" or "No.") Yes—111 No—71 D.K.—17
Make such explanation of your answer as you care to make.
8. In your opinion, would racial conflicts result if Negro children are disciplined by white teachers?
(Answer "Yes" or "No.") Yes—147 No—41 D.K.—7
Make such explanation of your answer as you care to make.
9. In your opinion, would the mixing of the races in the public schools cause such conflicts as to increase the danger of malicious destruction to school property, such as the burning of school buildings or school busses?
(Answer "Yes" or "No.") Yes—173 No—17 D.K.—8
Make such explanation of your answer as you care to make.
10. If the mixing of the races in public schools were brought about by a gradual process, according to plans of integration considered feasible by local school authorities, in your opinion would the danger of violence in racial clashes be reduced or eliminated?
(Answer "Yes" or "No.") Yes—74 No—108 D.K.—17
11. As the result of your observation and conversations which you have had with citizens of your county or city, do you find the attitude of the majority to be:

	White	*Negro*
For Segregation	.....	.....
For Non-segregation	.....	.....
Indifferent	.....	.....

(Note: The answers to this question were in such form as to prevent tabulation. Every officer replying indicated that the majority of the people in his jurisdiction favor segregation.)

By: .....

October ....., 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NOV 15 1954
HAROLD B. WILLEY, Clerk

Nos. 1, 2, 3, and 5

OLIVER BROWN, ET AL.,
Appellants,

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,
On Appeal from the United States District Court for the District of Kansas

HARRY BRIGGS, JR., ET AL.,
Appellants,

v.

R. W. ELLIOTT, ET AL.
On Appeal from the United States District Court for the Eastern District of South Carolina

DOROTHY E. DAVIS, ET AL.,
Appellants,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.
On Appeal from the United States District Court for the Eastern District of Virginia

FRANCIS B. GEBHART, ET AL.,
Petitioners,

v.

ETHEL LOUISE BELTON, ET AL.
On Writ of Certiorari to the Supreme Court of Delaware

BRIEF OF JOHN BEN SHEPPERD, ATTORNEY GENERAL OF TEXAS, AMICUS CURIAE

JOHN BEN SHEPPERD
Attorney General of Texas
BURNELL WALDREP
BILLY E. LEE
J. A. AMIS, JR.
L. P. LOLLAR
J. FRED JONES
JOHN DAVENPORT
JOHN REEVES
WILL DAVIS
Assistants

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APPENDICES

APPENDIX I
Map showing concentration of Negro population by counties as shown by the 1950 Federal census.

APPENDIX II
Map showing the number and percentage of Negro scholastics in each county as shown by the 1954-1955 scholastic census.

APPENDIX III
Map showing the concentration of Negro scholastics in general areas, as shown by the 1954-1955 scholastic census.

APPENDIX IV
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Nos. 1, 2, 3, and 4

OLIVER BROWN, ET AL.,
Appellants,

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.,
On Appeal from the United States District Court for the District of Kansas

---

HARRY BRIGGS, JR., ET AL.,
Appellants,

v.

R. W. ELLIOTT, ET AL.
On Appeal from the United States District Court for the Eastern District of South Carolina

---

DOROTHY E. DAVIS, ET AL.,
Appellants,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.
On Appeal from the United States District Court for the Eastern District of Virginia

---

FRANCIS B. GEBHART, ET AL.,
Petitioners,

v.

ETHEL LOUISE BELTON, ET AL.
On Writ of Certiorari to the Supreme Court of Delaware

BRIEF OF JOHN BEN SHEPPERD, ATTORNEY GENERAL OF TEXAS, AMICUS CURIAE

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

PRELIMINARY STATEMENT

John Ben Shepperd, Attorney General of Texas, pursuant to request for leave to appear amicus curiae and file a brief, submits this amicus curiae brief to the Court upon the condition that such appearance will not have the effect of making the State of Texas or any of its officers or agencies parties to this litigation.

In compiling data for this brief a sincere effort has been made to obtain a correct cross section of views of educators, legislators and others with knowledge of the subject matter under consideration. Surveys have been made, public opinion has been sampled, and composite views of groups best acquainted with the segregation problem have been obtained. The Texas Education Agency has been most helpful in furnishing pertinent materials which have been used in this brief. We will attempt to present the true Texas picture as reflected from this research.

The public school system in Texas from its inception has been operated and maintained on a segregated basis, and has existed for more than eighty years under the authority of Section 7 of Article VII of the Texas Constitution (1876)[1] and statutes enacted pursuant thereto. This constitutional and statutory authority creating separate but equal facilities

[1] Section 7 of Article VII of the Texas Constitution provides: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

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in the public school system of Texas was the direct and continuing result of the expressed will of the people of Texas. This Honorable Court in many of its decisions has held that the states may provide education at their own expense for the white and Negro students in separate schools so long as equal facilities and advantages are offered both groups. *Plessy v. Ferguson*, 163 U.S. 537 (1896), and related cases. Stability and harmony in the law, particularly in the constitutional law, is a primary requirement in an effective and efficient government. When the courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, they should not be changed, because the law by which men are governed should be fixed, definite and known, particularly when millions of dollars have been spent in reliance thereon. Attending a public free school is a privilege extended by the state. It is not a right of a citizen of the United States. *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 545 (1899). So long as the privileges extended to all groups are equal no one is deprived of the equal protection of the law. The decisions of this Honorable Court have recognized that, where necessity exists, the teaching of white and Negro students in separate classrooms is a reasonable exercise of the state's police power. To preserve the public peace, harmony and the general welfare, the people of Texas in their Constitution, and the Legislature by statutes have declared that such a necessity exists in Texas. There is no *discrimination* on the part of the State of Texas in administering its public school system, only *separation* of the

races. It is the belief of the people of this State that discrimination against the individual can best be eliminated by segregation of the races in the educational system. It is the evil of discrimination and not segregation per se that is condemned by the United States Constitution.

Section 7 of Article VII of the Texas Constitution and related statutes provide that the State shall furnish equal education to its Negro and white students. The State of Texas has been operating under the assumption that the power of states so to classify and the reasonableness of the classification had been settled as a matter of law since 1896 and was not violative of the equal protection clause of the Fourteenth Amendment.

However, if the occasion arises whereby we are compelled to abolish segregation in Texas, it should be by a gradual adjustment in view of the complexities of the problem. Such complexities include the unwillingness of the Texas people immediately to abide by the decision, the varying degrees in which different areas of the State of Texas would be affected, and the result such a decision would have on the State's public school system which has been maintained on a segregated basis for generations.

Legal action which bears upon the folkways of nearly one-fourth of the nation's population cannot be effective unless the affected group is largely willing to abide by it. No individual can be forced against his will to accept, associate, or cohabit with another not of his own choosing. The Fourteenth Amendment to the United States Constitution prohibits only

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"*State action*" which is discriminatory because of race, creed or color, not the prejudices or discrimination evidenced by individuals toward their fellow man. *United States v. Cruikshank*, 92 U.S. 542 (1876). And while it has been determined that equal but separate facilities maintained in the public free school systems of the states involved in this litigation is "State action" in violation of the Fourteenth Amendment, still this Court should consider that such a decision also affects the individual rights, mores and beliefs of the Southern people. To insure that the people of the South accept the decision and make moral decisions of their own commensurate with the end of bettering the Negro race, some way must be found to protect the constitutional rights of the minority without ignoring the will of the majority. The underlying thought implicit in the Court's decision in these cases is that a feeling of inferiority is generated in the Negro child, resulting not from *actual attendance* in a segregated school, but from the *legal requirement* under which the Negro child is forced to attend separate schools. From the standpoint of principle, there is no real difference between compulsory segregation and compulsory integration. Compulsion can only arouse resentment, individual discrimination, and, as experience has demonstrated in other states, violence. The objectives reached by the War between the States left a scar of bitterness and resentment that is visible even now in some parts of the South. Such, we hope, will not be the result of this Court's May 17th decision.

Variance of Degree in Which Different Areas Would Be Affected

In order that this Honorable Court have the full assistance of all parties and amici curiae in formulating decrees, these cases were restored to the docket for the presentation of further argument upon the following questions:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> 5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
>
> (a) should this Court formulate detailed decrees in these cases;
>
> (b) if so, what specific issues should the decrees reach;
>
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
>
> (d) should this Court remand to the courts of first instance with directions to frame de-

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crees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

The following factual information is submitted which we believe to be pertinent insofar as the State of Texas is concerned.

The State of Texas has a total population of seven million, seven hundred eleven thousand, one hundred ninety-four (7,711,194), of whom nine hundred seventy-seven thousand, four hundred fifty-eight (977,458), or 12.7%, are colored.[2] The concentration of the Negro population is shown by counties on the map designated "Appendix I." There are one million, seven hundred eighty-six thousand, nine hundred eighteen (1,786,918) persons of scholastic age enumerated in the scholastic census for the 1954-1955 school year, of whom two hundred thirty thousand, five hundred forty-six (230,546), or 13%, are colored. The concentration of the Negro scholastic population is shown by counties on the map designated "Appendix II." Texas has two hundred fifty-four (254) counties. There are located in the northeastern forty-five counties of this State 50% of the colored scholastics of Texas, and in four of these counties the Negro scholastics comprise a majority of the county's scholastics. In the forty-three counties adjacent to and immediately west of the northeastern block of counties above referred to, another 40% of the colored scholastics reside. Thus, in Texas today ap-

[2] This population is based on the 1950 Federal Census.

proximately 90% of the total Negro scholastics are located in the eighty-eight counties comprising the northeastern quadrant of the State. Forty-one Texas counties do not list a single Negro scholastic. Therefore the remaining 10% of the colored scholastics of Texas are scattered throughout the remaining one hundred and twenty-five counties. A map evidencing this factual information is attached and designated "Appendix III", to which particular reference is made. A study of this map reveals that the segregation problem in Texas is not state-wide, but is of serious import and of vital concern to our local school districts.

Of the two hundred and thirteen Texas counties listing Negro scholastics, one hundred forty-six counties offer a complete Negro high school, twenty-one counties offer some Negro high school, but not twelve grades, and thirty-six counties offer only Negro elementary school. Ten counties operate no school for Negroes; however, these counties have ten or fewer Negro scholastics. Negro scholastics in counties not having a complete twelve grades are transported at State expense to other schools. Texas in 1953-54 had a total of one thousand, nine hundred fifty-three (1,953) active school districts, two hundred ninety-two (292) of which offered a full twelve grade school for both white and Negro. One hundred twenty-five (125) districts maintained a Negro school but did not have a white school. A total of nine hundred fifty-six (956) districts provided Negro schools. The districts that did not maintain a school for Negroes were primarily in areas that did not contain Negro scholastics.

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Texas Public School System

Pursuant to the constitutional authority, the Texas public school system is administered under what is commonly called "The Minimum Foundation School Program."[3] Under this very effective program, education of the Texas school child is provided on an equal but separate basis, with millions of dollars being spent each year. Under the Minimum Foundation Program, as administered by Texas' twenty-one-member elective State Board of Education, all possible control and responsibility are left to local school administrators and local school boards to provide school programs to meet the needs of the children in their communities. As the name implies, the Minimum Foundation Program guarantees to every school-age child in Texas, regardless of race, creed, color, economic status or place of residence, at least a *minimum* of a full nine months of schooling each year, thereby spreading the State's financial resources available for public education as equally as possible among all the people. The Program has been in effect for five years, and during that time the average daily attendance of school-age children actually attending school has risen from 73.77% in 1948-49 to 80.85% during 1953-54. 79.31% of the Negro school-age children were in average daily attendance in 1953-54.

The Minimum Foundation Program provides a system of financing which guarantees to local school districts that State funds will be available to pay the

[3] Art. 2922-11, et seq., Tex. Civ. Stat. (Vernon's, 1948).

cost of a minimum school program when local funds are insufficient.

A number of the Texas school districts do not need a supplemental appropriation from the Legislature. A majority of the Texas schools have surplus money derived from local taxation with which to enrich the local school program beyond the minimum program prescribed by the State. Expenditures from surplus funds provide adult and kindergarten classes for students not included in the scholastic census age brackets, classes for exceptional children, supplemental expenditures on salaries, maintenance and capital costs, and any other authorized school costs. The State funds are provided in proportionate equality to all school districts, for the benefit of all scholastics, irrespective of race, creed or color. If a school program superior to the minimum requirements is desired in any district, it may be paid for by the taxes voted, levied and collected from the taxpayers of the district.

As a result of the Minimum Foundation Program, teachers' and school administrators' salaries have risen from twenty-ninth in the nation to sixteenth. 97.1% of the Texas teachers now have college degrees. Only the State of Arizona exceeds this mark. There are approximately eight thousand, five hundred (8,500) Negro teachers and school administrators in Texas. This number is nearly equal to the total number of Negro educators in the thirty-one Northern and Western States which practice non-segregation. According to the *U. S. News and World Report*, August 27, 1954, only one out of every seventy-three teachers in those thirty-one states

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maintaining an integrated system is a Negro, while in Texas, one out of every five is a Negro. These positions are believed to be the most secure and best paid employment the Negro has today. The effect of this decision upon the teaching profession is speculative, and any decree which would disrupt the stability and security of teachers should be avoided.[4]

Under the Minimum Foundation Program, the public school system of Texas has greatly raised its standards, teachers have been benefited by salary increases and retirement plans, and every school-age child in Texas, without regard to his race, creed or color, has been offered the opportunity of education. The State has not discriminated in its appropriations, such being provided equally to all races and persons, with the privilege and authority in each local district to go further if it is so desired. But the program does provide for separate schools, segregating the races and contemplating an equalization of facilities for all scholastics. Integration would require alteration of the Minimum Foundation Program.

The establishment of an integrated system is not a problem which would apply equally to West or South Texas, where there is only a small percentage of the Negro population, and to Northeast Texas, where the concentration of the Negro population is the heaviest. No equitable general decree could ever be formulated for the entire State of Texas. Specific decrees could be made only after a particular school

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[4] Texas at the present time has no tenure statute for teachers in the public free schools. Employment is through the local school boards.

district was before this Court and the facts relevant to that district were presented. It would be impossible to get enough facts before the Court in one isolated case upon which the Court could enter a general decree which would apply equally to all parts of this State or to all the states practicing segregation. Since we do not know the various fact situations as they exist in these cases, we are in no position to advise the Court as to the type of decree that should be entered.

QUESTION FOUR

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(a) Would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) May this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

Argument

This Court has recognized the complexities involved in the formulation of a decree in these cases because problems of different characteristics are presented. Evidently all states were invited to appear

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because each should have an opportunity to demonstrate the obstacles to adjustment in compliance with any decision that might be rendered in the future affecting the individual states.

It is respectfully submitted that this Court is authorized to permit an effective gradual adjustment toward integration and, unquestionably, if the occasion arises, the administration of this program in Texas must be left to the local school districts. The education system in Texas is predicated upon a number of local, self-governing school districts, with full authority to administer the school system. The basic and historic concept of public free schools is based upon the democratic and salutary principle of local self-government. The schools in Texas are operated, maintained and controlled by local school boards elected by the people of the individual school district.[5] Operational and maintenance costs are provided by local taxation voted by the taxpayers of the district[6] and supplemented by the Legislature under the Minimum Foundation Program.[7] Capital expenditures are made through bond issues voted by the taxpayers of the district.[8] All personnel of the school, with the exception of the elected officials, are employed by local

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[5] *Southwestern Broadcasting Company v. Oil Center Broadcasting Company*, 210 S.W. 2d 230 (Tex. Civ. App., 1947, error ref. N.R.E.); *University Interscholastic League v. Midwestern University*, ... Tex. ....., 255 S.W. 2d 177 (1953); Arts. 2745, 2749, 2775 et seq., and 2780, Tex. Civ. Stat. (Vernon's, 1948).

[6] Art. 2784e, Tex. Civ. Stat. (Vernon's, 1948).

[7] See discussion of the Texas Public School System in this brief.

[8] Art. 2784e and Art. 2786, Tex. Civ. Stat. (Vernon's, 1948).

officials and work under such officials' supervision.[9] It is thus seen that the schools in Texas constitute almost a complete local autonomy controlled by the taxpayers of the individual school districts and their locally elected school board. In fact, the courts of Texas have repeatedly held that these school districts are local public corporations of the same general character as municipal corporations.[10] Any decree of the Court that might affect Texas must leave this administration in the local school districts unhampered. The problems with which we are confronted can best be resolved at the local level in this manner.

As a basic premise for showing the need for a transition period, the following is typical of the feeling of Texas citizens and school administrators on the vital subject now before this Court.

In an article appearing in *The Dallas Morning News* on June 9, 1954, Dr. J. W. Edgar, Texas Commissioner of Education, stated:

> "Texas has 2,000 problems as a result of the Supreme Court's decision. We have 2,000 school districts, and they vary from totally white to totally Negro.
>
> "The final decree by the Court ought to permit continued management of local districts by local boards. Schools must be run on a community basis. They can't be run successfully from Washington or even from Austin (Texas).
>
> "Experience in separating children on a language basis has proved to us that where the re-

[9] Art. 2750a and Art. 2781, Tex. Civ. Stat. (Vernon's, 1948).

[10] *Hatcher v. State*, 125 Tex. 84, 81 S.W. 2d 499 (1935); *Love v. City of Dallas*, 120 Tex. 351, 40 S.W. 2d 20 (1931).

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sponsibility is put upon the local community, they work honestly to resolve differences.

"Anything which schools do effectively must be done with local support. We don't care to tell others how to run their schools, but we certainly believe that our 2,000 problems can be resolved best if the Supreme Court leaves control in local districts."

In a statement made to the Texas Commission on Higher Education, Dr. R. O'Hara Lanier, Negro president of Texas Southern University, stated:

"In spite of the U. S. Supreme Court's anti-segregation ruling, Negro schools will be needed more than ever in the future. It would be a narrow position for the state to get rid of Negro schools for if the Negroes are given equal facilities there is nothing to worry about from segregation.

"For many years to come there will be shown a great desire and preference on the part of the Negro student to attend an institution equal in every respect, where there will exist many opportunities for development for qualities of leadership and where full participation in every phase of college life will be assured.

"Because of human behavior and social backgrounds and patterns long existent, the large majority of such students will come to us (the Negro schools) because they prefer to do so.

"Such students very likely will prefer to continue to study with homogeneous groups and will feel strongly that more sympathetic attention will be given to them in our institutions than in some other schools."

Dr. E. B. Evans, Negro president of Prairie View A. & M. College, expressed similar views to the Commission.

The latest state-wide survey of the Texas Poll[11] on September 12, 1954, indicates:

> "1. 71% of the Texas people are definitely opposed to the Supreme Court's decision. The breakdown on the decision is like this:

	Approve	Disapprove	Undecided
Negroes	60%	33%	7%
Latins	49%	37%	14%
Other Whites	15%	80%	5%
Entire Public	23%	71%	6%

> "2. What should be done about the problem? 7% favor putting the Court's ruling into effect immediately, and another 23% believe plans should be made to bring the races together in the schools within the next few years. A majority of 65% goes on record in favor of continued segregation notwithstanding the Court's decision. The breakdown on this problem is:

	Go Now	Few Years	Keep Apart	Undecided
Negroes	27%	40%	26%	7%
Latins	20%	37%	33%	10%
Other Whites	3%	19%	74%	4%
Entire Public	7%	23%	65%	5%

> In the entire public, Negroes account for about 12% of the population; Latins, about 11%; and other whites, about 77%."

In a recent questionnaire forwarded by the Attorney General of Texas to approximately one hun-

[11] A long-established Texas organization operated by Joe Belden who periodically and systematically conducts a scientific sampling, or polling, and reporting thereon, of public opinion in Texas on current events.

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dred fifty-two Texas school administrative officials, seventy-seven reported that 85% or more students would continue attending the same school if they had free choice. Of this number, fourteen answers were from Negro administrators. Only three answered that students in their districts would prefer attending integrated schools, and all three reports were from Negro administrators. The questions propounded and the answers received by the Attorney General are compiled in a report which is attached as "Appendix IV."

Many plans have been advanced to alter the public school system of Texas as a result of the May 17th decision. Some go so far as to suggest the complete abolition of the free public school system, while others advocate turning the State schools into private schools. The decision of the United States Supreme Court is to the effect that segregation in public schools maintained by compulsion of law is unconstitutional as being in violation of the Fourteenth Amendment. Many suggest that it does not necessarily follow that integration of the white race with the colored race in the field of education is compelled by the Constitution. If, under the Fourteenth Amendment, all citizens are entitled to equal protection of the law, which was the premise for the Supreme Court's decision, then integration can no more be compelled than can segregation. Provision for domestic tranquility in the exercise of the police powers of the State premised the original laws requiring segregation. To maintain public peace, good order and the domestic tranquility, these same police pow-

ers of the State could be exercised, calling for another and different provision relating to public education.

Realizing this, and that the need for compulsion no longer exists, another plan suggests that the section of the law which provides for compulsory education should be repealed and the laws providing that the State furnish free education to all should be left undisturbed. Then the present laws should be amended to allow the parent or guardian of the child desiring to take advantage of free education to express his own desires and preferences as to the type of school the child should attend. The parent or guardian could select a school in which the majority of the other pupils are of the same race as the child, or he could select a school in which the other pupils are of both races, thereby providing equality of opportunity and freedom of individual choice.

This change would remove the unconstitutional "compulsion" of segregation, and at the same time the State would be in a position of honoring the individual preferences of its people.

Another plan advanced is that of allowing voluntary transfers between school districts, and it is based upon the same principle as the foregoing.

In complying with the mandatory duties placed upon the Legislature of the State of Texas by the Constitution of the State of Texas, the Legislature has by general law established, supported and maintained a segregated public free school system. These laws of the State of Texas are not before the Court in these causes, and the State Board of Education has ruled that the schools of Texas should continue to be operated in the same manner until otherwise di-

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rected.[12] Since the end of World War II, Texas, together with many of our states, has been confronted with the enormous task of providing adequate school housing for a shifting and rapidly increasing population. In areas predominantly populated by white students schools have been built to house these students. In areas predominantly populated by colored students schools have also been built to house them. Utilization of all present school housing to the fullest extent in this State will be an absolute necessity. Texas is also confronted with the difficult problem of providing adequate facilities for the anticipated increase in its scholastics in the interim between now and 1960. Statistics reveal that at the close of the 1958-1959 school year, eight hundred forty-nine million, three hundred forty-four thousand, nine hundred twenty-two dollars ($849,344,922) will be needed over and above the present needs to care for the increase in population and replacement costs on existing facilities. Of this amount, only three hundred ninety-four million, eight hundred fifty-eight thousand, fifty-two dollars ($394,858,052) can be anticipated from local funds, leaving a balance of four hundred fifty million, four hundred eighty-six

[12] On July 5, 1954, the State Board of Education passed the following resolution: "Since the recent United States Supreme Court's decisions on segregation in public schools are not final, the State Board of Education of Texas is of the unanimous opinion that it is obligated to adhere to and comply with all of our present state laws and policies providing for segregation in our public school system and to continue to follow these present laws and policies until such time as they may be changed by a duly constituted authority of this State. If in the future, the Texas laws should be changed then each local district should have sufficient time to work the problem out. . . ."

thousand, eight hundred seventy dollars ($450,486,-870) which must be derived from another source to care for the needs of the school children for the school year of 1960. The school system is presently overcrowded with certain school-age groups being separated into morning and afternoon classes to offset this condition. It can readily be seen that if Texas attempted an immediate integration, the perplexities confronted in accomplishing the same would be overwhelmingly multiplied. Additional facilities are needed and will have to be supplied by local bond issues. It is highly speculative as to whether such bond issues would be voted to house an integrated school system which an overwhelming majority of the people oppose. The election calls for freedom of choice and no mandamus action could be maintained to force an affirmative vote. At this time it would be highly impracticable to eliminate any of the present school housing, and great consideration must be given to the natural and presently existing boundary lines which, of course, is the prime consideration for the Legislature or the local school board.

A gradual transition to an integrated public school system is not a denial of relief or of the constitutional rights enunciated by the Court. The Court has previously permitted a transition period in analogous situations, particularly in the antitrust and nuisance cases. In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the Supreme Court determined that the defendant had violated the Sherman Anti-Trust Act. Recognizing the need for adjustment to its decree, the Court, in order to avoid and mitigate any possible injury to the interest of the general public,

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remanded the case to the lower court to hear the parties and to ascertain and determine a plan for dissolution of the combination. To accomplish this end, the Court allowed sufficient time (eight months) to carry out its decree. In *Georgia v. Tennessee Copper Co.*, 240 U.S. 650 (1916), the Court entered a final decree in a case in which the State of Georgia had sued the Tennessee Copper Company to restrain the discharge of irritating gases into Georgia. The case had involved three lawsuits and covered a span of nine years in which the Court allowed considerable time and discretion to devise ways and means of subduing and preventing the escape of the noxious fumes. In *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), the Pullman Company brought suit in the Federal Court against the Railroad Commission of Texas attacking a regulation of the Commission as being in violation of the Federal Constitution and unauthorized by the Texas statutes. The Court remanded the case to the lower court, with directions to retain the bill pending a determination of proceedings, to be brought within a reasonable time in the state court to determine a definite construction of the state statute.[13]

The use of administrative discretion and its limits has been spelled out often by the Court in the areas of administrative agencies. The Court has emphasized consistently that supervision and discretion should lie with the administrative agencies in conducting their functions as economic and political gov-

[13] See also: *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Northern Securities Company v. United States*, 193 U.S. 197 (1904).

erning boards.[14] Such emphasis is closely related also to the administrative discretion which exists in school boards. In *United States v. Paramount Pictures*, 334 U.S. 131 (1948), Mr. Justice Douglas reviewed a decree in an injunction suit by the United States under the Sherman Act to eliminate or qualify certain business practices in the motion picture industry. A provision in the decree that films be licensed on a competitive bidding basis was eliminated by the Supreme Court *as not likely to bring about the desired end and as involving too much judicial supervision to make it effective.* This elimination was held to require reconsideration by the district court of its prohibition of the expansion of theatre holdings by distributors and provisions for divesting existing holdings.

The Court at page 163 stated:

> "It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and

[14] See *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and *Far Eastern Conference, United States Lines Co., States Marine Corporation, et al. v. United States and Federal Maritime Board*, 342 U.S. 570 (1952).

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> clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective."

The implications in the Court's opposition to judicial administration of intricate and detailed rules in the economic field apply with greater force to the social relationship and problems created by these cases in the field of public education. Furthermore, the amount of capital involved in the *Paramount* case is minute when compared with the wealth invested in the public school systems of the South.

The Court, in *Barbier v. Connolly*, 113 U.S. 27 (1885), speaking of the Fourteenth Amendment, stated at page 31:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, *education and good order* of the people. . . ." (Emphasis supplied.)

A tremendous portion of the wealth of these states has been invested in capital expenditures for their public schools. The only practical method of establishing an integrated system calls for a period of implementation in our present dual system. This Court in the exercise of its equity powers has ample authority to permit the parties to adjust gradually from their existing segregated systems to an integrated one. The instant cases affect millions of individuals and the entire public in some seventeen states. By reason of the great number of people affected by

the decree and by reason of the vast amount of money invested in capital expenditures, and because of the necessity to make use of all present buildings in the operation of an efficient system of public education, this Court should permit the states to adjust their dual systems gradually into an integrated system. It is, therefore, respectfully submitted that this Honorable Court has sufficient authority to permit a gradual adjustment to an integrated school system with sufficient time given for local school officials to accomplish this purpose by the exercise of their administrative authority.

QUESTION FIVE

5. On the assumption on which Questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in Question 4 (b),

(a) Should this Court formulate detailed decrees in these cases;

(b) If so, what specific issues should the decrees reach;

(c) Should this Court appoint a special Master to hear evidence with a view to recommending specific terms for such decrees;

(d) Should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this

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Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

Argument

The information contained in the introductory statements and in Appendix III clearly demonstrates that the problem of establishing a public school system not based on race is a localized problem in Texas, not a state-wide problem. This is further evidenced in Appendix V, which is a compilation of scholastic population by counties. It is not a problem in which the remedy voluntarily adopted in West Texas or South Texas would be equally applicable and effective in Northeast Texas. For that reason no equitable general decree could be formulated which would be appropriate for every part of the State of Texas. Specific decrees would have to be provided for each case, based on the facts and conditions then presented to the Court which are shown to exist in the locality involved in a proper case.

Section 1 of Article VII of the Constitution of Texas imposes the duty on the Legislature to establish, support and maintain our system of public free schools.[15] This Court announced on May 17, 1954, that segregation in public education is a denial of the

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[15] Section 1 of Article VII of the Constitution of Texas provides: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

equal protection of the laws. Since that time the Texas Legislature has not met in session, and it is not known at this time what action the Legislature will take, if any.

In *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), this Court stated that it did not want to become the school board for the entire country. At page 598 the Court stated:

> "But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in social origins and religious alliances. *So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.*" (Emphasis supplied.)

Keeping the control of public education close to the local people is perhaps the strongest tradition in American education. One of the predominant characteristics of American education is the variation in local policies and procedures in terms of unique local conditions. The Texas Legislature has the right and duty to maintain public safety and good order. This Court, in the *Gobitis* case,[16] supra, recognized its

[16] That portion of the *Gobitis* case dealing with the validity of a statute requiring a compulsory flag salute was overruled in *Board of Education v. Barnette*, 319 U.S. 624 (1942).

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limitations and the authority of the state legislatures when it said at page 597:

> "The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma *in a field where courts possess no marked and certainly no controlling competence.*" (Emphasis supplied.)

Other decrees have been held in abeyance until an appropriate action could be taken by the proper agency. See *Addison v. Holly Hill Co.*, 322 U.S. 607 (1944), and *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1940).

This Court has the authority to remand these cases to the courts of first instance, instructing them to enter decrees implementing the principles enunciated in the Court's opinion of May 17, 1954. See *International Salt Company v. United States*, 332 U.S. 392 (1947). If this decision stands, then on remand the courts of first instance would be familiar with local conditions and could provide a continuing supervision over the program of non-discrimination.

They could recognize and adjust the equities between the parties, bringing individual rights into equality without unduly hindering the public school program.

CONCLUSION

Since our position before the Court is that of amicus curiae only and not that of a party, ordinarily we would not assume to state specifically the scope of the decrees to be entered by the Court in these cases. If the Court attempted to formulate a general decree applicable to all school districts and States, it would be prejudging a multitude of cases not before the Court. However, in entering appropriate decrees the Court should consider the following suggestions which are respectfully submitted at the request of the Court:

(1) In formulating a decree or decrees, the Court should recognize the long established traditions and usages which have prevailed in those States maintaining a segregated school system, such as Texas, under the separate but equal doctrine as predicated upon the principles announced in *Plessy v. Ferguson*, supra. These traditions and usages should not be suddenly and abruptly destroyed. A period of orderly transition will insure that a decree will meet with no more than passive resistance by the public.

(2) In formulating a decree or decrees, this Court must preserve the democratic and salutary principle of local self government inherent in our public school systems. Any decree or decrees entered by the Court should protect this principle. In this manner the decrees could appropriately be implemented by the local

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school authorities as a legislative and administrative matter.

(3) The Court, in formulating a decree or decrees, should preserve the right of free selection and choice by the patrons of public schools in selecting the school which will be patronized.

Respectfully submitted,

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APPENDIX IV

Educators' Views on Integration

On July 30, 1954, the Attorney General of Texas directed a questionnaire to one hundred and fifty-two Texas school administrative officials. One hundred two questionnaires were mailed to white administrators and fifty questionnaires were mailed to Negro administrators. Twelve of the questionnaires were directed to county superintendents, fifty were directed to school principals and ninety were directed to district superintendents. Responses were received in eighty-two instances, eighteen of which were from Negro educators.

The questionnaire and evaluated responses are:

"We are in the process of compiling data to determine the feasibility of filing an amicus curiae brief in the United States Supreme Court relative to the recent segregation decisions which affects our public school system. Our school system operates under legislative authorization, and the Legislature will not convene in Regular Session until January to consider the problem arising by reason of the Supreme Court decision. Consequently, if any brief is filed, it should contain a cross-section of the views of educators and the public generally in Texas in an effort to see what impact the decision has made on our public school system and customs.

"By reason of your long familiarity with the field of education throughout the State we would like to have an expression of your views on the following questions:

"1. In the event of legislative or Supreme Court direction, what, in your opinion, would be a reasonable minimum period of time for working out an integrated system in your district?"

In evaluating responses, a period of five years was arbitrarily set as a division. Thirty-six replied that a period of five years or less would be sufficient. Forty-two replied that a longer time than five years was necessary. Nineteen answers volunteered replies favoring a twelve year plan of integration (beginning with the first grade and adding a new grade each year). Ten of the Negro replies favored a five year or less program, while five thought a longer program was necessary. Two Negroes volunteered that they favored the twelve year plan.

"2. Do you consider the local problem more acute than the problem on a state-wide basis?"

Thirty-nine answered that the local problem was not more acute, as compared to forty-one replies that the local problem was more acute. The Negro replies were eleven affirmative, seven negative.

"3. Do you think that the established precedent of separate schools would seriously handicap the operation of integrated schools in your area?"

Sixteen responses did not believe the operation of integrated schools would be handicapped by the precedent of separate schools, but sixty-four did believe a handicap would exist. Eleven Negroes replied there would be no handicap, and seven replied there would be difficulty with an integrated system.

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"4. (a) In the event of an integrated system, could all school buildings be utilized?"

Forty-eight responses believed all present school buildings could be used in an integrated program. Thirty-three thought that there would be a loss of use in an integrated system. Ten Negroes replied that all buildings could be used and seven thought that all buildings could not be used in an integrated system.

"4. (b) To what extent are present school buildings situated so that natural zones could be established that would continue to serve substantially the same student body in attendance at the same schools as under present operations?"

Forty replies stated that natural boundaries separated the two races and the schools for each race. Thirty-eight responded that no natural boundaries existed in their locality. Of the Negro educators, eleven replied that natural boundaries existed, while five answered that natural boundaries did not exist in their locality.

"4. (c) If any existing buildings would be unusable in an integrated program, estimate the present value of such buildings."

Forty answered that there would be no loss of buildings in operating an integrated school system. Thirty-eight answered that there would be some loss within their district. Of the Negro educators nine replied there would be no loss, while six answered that there would be some loss.

"5. How will an integrated public school system affect the school teachers in your area?"

Fifteen responded that there would be no affect on school teachers in their districts. Fifty-six answers believed the Negro teachers would be adversely affected by an integrated school program. Some replies thought white teachers in their districts would refuse to teach in an integrated school. The Negro replies seeing no affect within their districts numbered seven, while three feared an adverse affect.

"6. If the patrons of your district, both negro and white, were given free choice, what per cent would send their children to the same school now attended?"

Seventy-seven replied that 85% or more would continue attending the same school if they had free choice. Of this number fourteen answers were from Negro administrators. Only three answered that students in their districts would prefer attending integrated schools, and all three replies were by Negro administrators.

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APPENDIX V

County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
1. Anderson	4,127	2,473	34.5
2. Andrews	1,885	30	1.6
3. Angelina	6,645	1,398	17.4
4. Aransas	1,154	14	1.2
5. Archer	1,541	0	------
6. Armstrong	381	0	------
7. Atascosa	5,266	66	1.2
8. Austin	1,977	789	28.5
9. Bailey	1,994	60	2.9
10. Bandera	725	0	------
11. Bastrop	2551	1,477	36.7
12. Baylor	1,297	60	4.4
13. Bee	4,831	134	2.7
14. Bell	11,788	1,760	13.0
15. Bexar	109,453	5,997	5.2
16. Blanco	806	22	2.7
17. Borden	176	0	------
18. Bosque	2,263	103	4.3
19. Bowie	10,895	3,805	25.9
20. Brazoria	13,514	1,523	10.1
21. Brazos	5,437	2,132	28.17
22. Brewster	1,460	9	.6
23. Briscoe	688	64	8.5
24. Brooks	2,336	3	.1
25. Brown	4,994	140	2.7
26. Burleson	1,791	1,063	37.6
27. Burnet	1,794	34	1.9
28. Caldwell	3,743	686	15.5
29. Calhoun	2,933	151	4.9

County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
30. Callahan	1,690	0	.....
31. Cameron	34,957	117	.3
32. Camp	1,153	822	41.6
33. Carson	1,613	0	.....
34. Cass	4,018	2,400	37.4
35. Castro	1,458	11	.7
36. Chambers	1,649	447	21.3
37. Cherokee	4,905	1,980	28.8
38. Childress	1,649	113	6.1
39. Clay	1,861	14	.7
40. Cochran	1,503	69	4.4
41. Coke	826	0	.....
42. Coleman	2,761	94	3.3
43. Collin	7,950	1,062	11.8
44. Collingsworth	1,692	172	9.2
45. Colorado	2,827	1,134	28.6
46. Comal	3,916	83	2.1
47. Comanche	2,408	0	.....
48. Concho	940	2	.2
49. Cooke	4,783	186	3.7
50. Coryell	3,518	179	4.8
51. Cottle	919	36	3.8
52. Crane	994	66	6.2
53. Crockett	893	12	1.3
54. Crosby	2,168	236	9.8
55. Culberson	606	0	.....
56. Dallam	1,638	12	.7
57. Dallas	119,280	18,943	13.7
58. Dawson	3,695	224	5.7
59. Deaf Smith	2,456	7	.3
60. Delta	1,416	219	13.4

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County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
61. Denton	7,220	567	7.3
62. De Witt	4,901	798	14.0
63. Dickens	1,380	64	4.4
64. Dimmit	3,505	13	.4
65. Donley	1,087	75	6.4
66. Duval	4,533	0	----
67. Eastland	4,110	64	1.5
68. Ector	12,923	562	4.2
69. Edwards	541	1	.2
70. Ellis	6,570	2,875	30.4
71. El Paso	45,775	719	1.6
72. Erath	2,927	20	.7
73. Falls	3,191	1,978	38.3
74. Fannin	4,900	708	12.6
75. Fayette	3,492	982	21.9
76. Fisher	1,777	113	6.0
77. Floyd	2,291	166	6.8
78. Foard	742	90	10.8
79. Fort Bend	6,304	1,803	22.2
80. Franklin	783	126	13.9
81. Freestone	1,675	1,749	51.1
82. Frio	2,785	23	.8
83. Gaines	2,796	46	1.6
84. Galveston	21,504	5,036	19.0
85. Garza	1,397	45	3.1
86. Gillespie	2,137	0	----
87. Glasscock	255	5	1.9
88. Goliad	1,302	151	10.4
89. Gonzales	3,357	960	22.2
90. Gray	5,727	159	2.7
91. Grayson	12,366	1,303	9.5

County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
92. Gregg	10,895	3,739	25.5
83. Grimes	1,911	1,563	45.0
94. Guadalupe	5,228	814	13.5
95. Hale	7,618	456	5.7
96. Hall	1,770	228	11.4
97. Hamilton	1,790	0	------
98. Hansford	989	0	------
99. Hardeman	1,769	181	9.3
100. Hardin	4,268	791	15.6
101. Harris	156,638	32,559	17.2
102. Harrison	5,059	6,042	54.4
103. Hartley	233	0	------
104. Haskell	2,892	161	5.3
105. Hays	4,332	234	5.12
106. Hemphill	803	0	------
107. Henderson	3,657	1,280	25.9
108. Hidalgo	4,511	84	.2
109. Hill	4,792	1,308	21.4
110. Hockley	5,391	281	5.0
111. Hood	1,054	18	1.2
112. Hopkins	3,595	666	15.6
113. Houston	2,511	2,110	45.7
114. Howard	6,423	285	4.2
115. Hudspeth	868	0	------
116. Hunt	6,188	1,436	18.8
117. Hutchinson	7,511	116	1.5
118. Irion	355	0	------
119. Jack	1,534	23	1.5
120. Jackson	3,221	418	11.5
121. Jasper	3,834	1,540	28.7
122. Jeff Davis	415	0	------

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	County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
123.	Jefferson	34,353	11,297	24.7
124.	Jim Hogg	1,340	0	.....
125.	Jim Wells	7,757	55	.7
126.	Johnson	6,595	397	5.7
127.	Jones	4,137	325	7.3
128.	Karnes	3,724	143	3.7
129.	Kaufman	4,288	2,222	34.1
130.	Kendall	1,311	11	.8
131.	Kenedy	142	0	.....
132.	Kent	236	6	2.5
133.	Kerr	2,602	104	3.8
134.	Kimble	868	0	.....
135.	King	169	12	6.6
136.	Kinney	471	60	11.3
137.	Kleberg	5,443	172	3.1
138.	Knox	2,069	157	7.0
139.	Lamar	6,644	1,692	20.3
140.	Lamb	4,855	403	7.7
141.	Lampasas	1,852	30	1.6
142.	La Salle	2,800	0	.....
143.	Lavaca	3,484	561	13.9
144.	Lee	1,582	776	32.9
145.	Leon	1,517	1,310	46.3
146.	Liberty	5,368	1,591	22.9
147.	Limestone	2,822	1,654	36.9
148.	Lipscomb	725	0	.....
149.	Liveoak	2,334	4	.8
150.	Llano	904	2	.2
151.	Loving	20	0	.....
152.	Lubbock	22,164	2,001	8.3
153.	Lynn	2,240	104	4.4

	County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
154.	Madison	978	622	38.9
155.	Marion	896	1,314	59.5
156.	Martin	1,160	78	6.3
157.	Mason	893	10	1.1
158.	Matagorda	4,537	1,149	20.2
159.	Maverick	3,430	0	-----
160.	McCulloch	2,184	84	3.7
161.	McLennan	21,888	5,260	19.4
162.	McMullen	200	0	-----
163.	Medina	4,730	31	.6
164.	Menard	685	12	1.7
165.	Midland	9,143	897	8.9
166.	Milam	4,249	1,199	22.0
167.	Mills	1,024	0	-----
168.	Mitchell	2,570	192	6.9
169.	Montague	3,515	0	-----
170.	Montgomery	4,680	1,541	24.8
171.	Moore	3,562	0	-----
172.	Morris	1,816	1,018	35.9
173.	Motley	633	66	9.4
174.	Nacogdoches	4,218	3,278	36.0
175.	Navarro	6,076	2,475	28.9
176.	Newton	1,604	996	38.3
177.	Nolan	4,083	170	4.0
178.	Nueces	45,914	1,748	3.7
179.	Ochiltree	1,114	0	-----
180.	Oldham	653	0	-----
181.	Orange	10,179	1,209	10.6
182.	Palo Pinto	3,694	125	3.3
183.	Panola	2,542	1,809	41.6
184.	Parker	4,768	89	1.8

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County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
185. Parmer	1,867	27	1.4
186. Pecos	2,699	35	1.3
187. Polk	2,568	1,112	30.2
188. Potter	19,370	1,010	4.9
189. Presidio	1,536	0	------
190. Rains	729	114	13.5
191. Randall	1,316	0	------
192. Reagan	780	41	5.0
193. Real	480	0	------
194. Red River	3,155	1,173	27.1
195. Reeves	3,842	133	3.3
196. Refugio	2,522	275	9.8
197. Roberts	197	0	------
198. Robertson	2,439	2,141	46.7
199. Rockwall	938	539	36.5
200. Runnels	3,437	106	3.0
201. Rusk	5,439	3,154	36.7
202. Sabine	1,336	518	27.9
203. San Augustine	1,222	844	40.8
204. San Jacinto	666	967	59.2
205. San Patricio	12,143	190	1.5
206. San Saba	1,599	9	.6
207. Schleicher	654	40	5.8
208. Scurry	4,236	93	2.1
209. Shackelford	840	16	1.9
210. Shelby	3,623	1,622	30.9
211. Sherman	574	0	------
212. Smith	11,385	5,558	32.8
213. Somervell	493	0	------
214. Starr	5,053	0	------
215. Stephens	1,646	60	3.5

	County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
216.	Sterling	308	2	.6
217.	Stonewall	681	36	5.0
218.	Sutton	895	15	1.6
219.	Swisher	2,318	47	2.0
220.	Tarrant	74,977	8,904	10.6
221.	Taylor	13,248	594	4.3
222.	Terrell	656	0	-----
223.	Terry	3,122	81	2.5
224.	Throckmorton	634	0	-----
225.	Titus	3,207	733	18.6
226.	Tom Green	11,538	621	5.1
227.	Travis	27,111	4,761	14.9
228.	Trinity	1,524	658	30.1
229.	Tyler	2,121	705	24.9
230.	Upshur	2,965	1,533	34.1
231.	Upton	1,598	74	4.4
232.	Uvalde	4,307	44	1.0
233.	Val Verde	4,440	80	1.8
234.	Van Zandt	4,086	451	9.9
235.	Victoria	8,502	733	7.9
236.	Walker	1,786	1,865	51.1
237.	Waller	1,367	1,178	46.29
238.	Ward	2,870	39	1.3
239.	Washington	2,333	1,778	45.2
240.	Webb	16,089	5	.1
241.	Wharton	7,504	2,087	21.8
242.	Wheeler	2,104	66	3.0
243.	Wichita	17,203	1,219	6.6
244.	Wilbarger	3,490	382	9.9
245.	Willacy	5,490	21	.4
246.	Williamson	6,851	1,357	16.5

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	County	Whites on 1954-1955 Scholastic Census	Negroes on 1954-1955 Scholastic Census	% of Negroes
247.	Wilson	3,634	95	2.5
248.	Winkler	2,415	49	2.0
249.	Wise	3,096	34	1.1
250.	Wood	3,932	744	15.9
251.	Yoakum	1,465	1	.1
252.	Young	3,405	24	.7
253.	Zapata	1,035	0	----
254.	Zavala	3,293	26	.8
	TOTALS	1,556,372	230,546	12.9

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 8*

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Because of the national importance of the constitutional questions presented in these cases, the United States considers it appropriate to submit this brief as *amicus curiae*. We shall not undertake, however, to deal with every aspect of the issues involved. Comprehensive briefs have been submitted by the parties and other *amici curiae;* and, so far as possible, this brief will avoid repetition of arguments and materials contained in those briefs. We shall try to confine ourselves to those aspects of the cases which are of particular concern to the Government or within its special competence to discuss.

*Together with No. 101, *Briggs, et al.* v. *Elliott;* No. 191, *Davis, et al.* v. *County School Board, et al.;* No. 413, *Bolling, et al.* v. *Sharpe, et al.;* and No. 448, *Gebhart, et al.* v. *Belton, et al.*

I

The interest of the United States

In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guaranties of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."[1]

Recognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy, even though differences of opinion may exist as to the need for particular legislative or executive action. Few Americans believe that government should pursue a *laissez-faire* policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties. Instead, there is general acceptance of an affirmative government obligation to insure respect for fundamental human rights.

[1] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2.

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The constitutional right invoked in these cases is the basic right, secured to all Americans, to equal treatment before the law. The cases at bar do not involve isolated acts of racial discrimination by private individuals or groups. On the contrary, it is contended in these cases that public school systems established in the states of Kansas, South Carolina, Virginia, and Delaware, and in the District of Columbia, unconstitutionally discriminate against Negroes solely because of their color.

This contention raises questions of the first importance in our society. For racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American,* and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man's skin—like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States—does not

diminish or alter his legal status or constitutional rights. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[2]

The problem of racial discrimination is particularly acute in the District of Columbia, the nation's capital. This city is the window through which the world looks into our house. The embassies, legations, and representatives of all nations are here, at the seat of the Federal Government. Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude toward minorities generally. The President has stated that "The District of Columbia should be a true symbol of American freedom and democracy for our own people, and for the people of the world."[3] Instead, as the President's Committee on Civil Rights found, the District of Columbia "is a graphic illustration of a failure of democracy."[4] The Committee summarized its findings as follows:

> For Negro Americans, Washington is not just the nation's capital. It is the

[2] Mr. Justice Harlan in *Plessy* v. *Ferguson*, 163 U. S. 537, 559. Regrettably, he was speaking only for himself, in dissent.

[3] Message to the Congress, note 1, *supra*, p. 5.

[4] *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 89.

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point at which all public transportation into the South becomes "Jim Crow." If he stops in Washington, a Negro may dine like other men in the Union Station, but as soon as he steps out into the capital, he leaves such democratic practices behind. With very few exceptions, he is refused service at downtown restaurants, he may not attend a downtown movie or play, and he has to go into the poorer section of the city to find a night's lodging. The Negro who decides to settle in the District must often find a home in an overcrowded, substandard area. He must often take a job below the level of his ability. He must send his children to the inferior public schools set aside for Negroes and entrust his family's health to medical agencies which give inferior service. In addition, he must endure the countless daily humiliations that the system of segregation imposes upon the one-third of Washington that is Negro.

* * * * *

The shamefulness and absurdity of Washington's treatment of Negro Americans is highlighted by the presence of many dark-skinned foreign visitors. Capital custom not only humiliates colored citizens, but is a source of considerable embarrassment to these visitors. * * * Foreign officials are often mistaken for American Negroes and refused food, lodging and entertainment. However, once it

> is established that they are not Americans, they are accommodated.[5]

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith. In response to the request of the Attorney General for an authoritative statement of the effects of racial discrimination in the United States upon the conduct of foreign relations, the Secretary of State has written as follows:

> * * * I wrote the Chairman of the Fair Employment Practices Committee on May 8, 1946, that the existence of discrimination against minority groups was having an adverse effect upon our relations with other countries. At that time I pointed out that

[5] *Id.*, pp. 89, 95.

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discrimination against such groups in the United States created suspicion and resentment in other countries, and that we would have better international relations were these reasons for suspicion and resentment to be removed.

During the past six years, the damage to our foreign relations attributable to this source has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United Nations and through radio broadcasts and the press, which reaches all corners of the world. Some of these attacks against us are based on falsehood or distortion; but the undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare. The hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions. In such countries the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country.

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> The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words.
>
> Although progress is being made, the continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.[6]

II

The Court may not find it necessary to reach the question whether the "separate but equal" doctrine should be reaffirmed or overruled

The briefs in these cases are largely concerned with the question, specifically reserved in *Sweatt* v. *Painter,* 339 U. S. 629, 635–636, whether the "separate but equal" doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537, "should be reexamined in the light of contemporary knowledge respecting

[6] Letter to the Attorney General, dated December 2, 1952. The earlier letter of May 8, 1946, referred to by the Secretary, is quoted in *To Secure These Rights*, note 4, *supra*, pp. 146–147.

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the purposes of the Fourteenth Amendment and the effects of racial segregation."

In the *Sweatt* case (p. 631) the opinion stated: "We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible." The essential requisites for constitutional adjudication "may be lacking though there be entire disinterestedness on both sides in their desire to secure at the earliest possible moment an adjudication on constitutional power."[7] The Court has emphasized that "it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool Steamship Company* v. *Emigration Commissioners,* 113 U. S. 33, 39. Additional authorities are collected in the concurring opinion of Brandeis, J., in *Ashwander* v. *T. V. A.,* 297 U. S. 288, 346–348.

Because of its "traditional reluctance to extend constitutional interpretations to situations or facts" not actually presented to it, the Court

[7] *United States* v. *CIO,* 335 U. S. 106, 126 (concurring opinion).

has declined to pass on the abstract constitutionality of racial segregation *per se* in cases where such an issue was raised but where other or additional grounds for finding inequality were present. *Sweatt* v. *Painter, supra; Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Fisher* v. *Hurst,* 333 U. S. 147, 150; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; cf. *Henderson* v. *United States,* 339 U. S. 816, 826. The Court may find, upon examination of the records in the cases at bar, that none of them presents inescapably the question whether separate but otherwise equal public schools for white and colored children are, solely because they are separate, constitutionally unequal.

That question would not arise unless and until it were found as a fact, upon the basis of supporting evidence, that the separate schools are equal in the educational benefits and opportunities afforded children of both races. Such a finding, if made by a district court and sustained by the evidence, would make it necessary to decide whether the establishment of such "separate but equal" schools satisfies the requirements of the Constitution. In none of the cases before the Court, however, is there such a finding.

In the Virginia, South Carolina, and Delaware cases, physical inequality, apart from segregation, was expressly found, and these findings of fact are not here challenged. (No. 101, R. 210, 307; No. 191, R. 622, 624; No. 448, R. 48–66.) The spe-

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cific findings of inequality in those cases make it unnecessary to go further in order to establish that plaintiffs' constitutional rights have been violated. Failure of a state to provide "equal" educational facilities to some of its citizens, solely because of their race or color, is without more a violation of the Fourteenth Amendment. "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349. The constitutional right to equality of educational opportunity is "personal and present" (*Sweatt* v. *Painter,* 339 U. S. 629, 635), and it is no answer to the particular plaintiffs' claim to say that, at some time in the future, colored persons as a group will be treated "equally." A state can discharge its obligation to persons discriminated against only by furnishing them equal educational benefits "as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. We agree with the Supreme Court of Delaware in No. 448 that, in cases where separate schools are found physically unequal, the particular plaintiffs should not be required to attend inferior schools until such time as the state may complete an "equalization" program. Accordingly, the district courts, upon making such findings in the Virginia and South Carolina cases, erred in withholding from the plaintiffs the relief to which they were then imme-

diately entitled. If and when it should be found as a fact, and not merely prophesied, that "equalization" has been accomplished, there would arise the question which on the present records in the Virginia and South Carolina cases may be deemed hypothetical, namely, whether "equalization" is the same as equality. Cf. *Wilshire Oil Co.* v. *United States,* 295 U. S. 100, 102.

In the Kansas case, the district court found equality of physical facilities, curricula, qualifications of teachers, transportation service, etc., and held that the plaintiffs were "denied no constitutional rights or privileges by reason of any of these matters." (R. 245–246.) But it also made the following finding of fact (*ibid.*):

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain [retard?] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.[8]

[8] A substantially identical finding of fact was made by the Chancellor in the Delaware case. The state Supreme Court, although it held that this finding was "immaterial" to the constitutional issue, did not reject it as unsupported by the evidence.

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This is not a finding of "separate but equal." On the contrary, it is a finding of "separate but unequal," or more precisely, "separate and hence unequal." Despite this finding, the district court held that the plaintiffs' constitutional right to equality of treatment had not been violated. This holding was based solely on the court's understanding of the "separate but equal" doctrine of *Plessy* v. *Ferguson*. The district court thought that that case required it to hold as a matter of law that separate schools are legally equal even though it finds that, because of segregation, they are in fact unequal. This, we submit, was plain error even if it be assumed that *Plessy* is still controlling.

Plessy v. *Ferguson* did not purport to lay down an inexorable rule of law, which could not be challenged at any time in the future no matter how different the circumstances, that segregation could *never* create inequality. In the *Plessy* case the Court said only that, as a general matter, laws requiring the separation of white and colored persons "do not *necessarily* imply the inferiority of either race to the other." (P. 544; italics added.) This was asserted as if it were axiomatic and too obvious to admit of dissent. We do not pause here to demonstrate the errors of fact and law contained in the Court's generalization.[9] It suffices to note that the *Plessy* case plainly does not

[9] See Brief for the United States, pp. 27–35, 49–60, in *Henderson* v. *United States*, No. 25, Oct. Term 1949, 339 U. S. 816.

preclude a district court from finding, as the district court found in the Kansas case, that segregation can, and in the particular instance does, produce unequal and inferior treatment. In *Plessy* the Court indulged in an abstract speculation as to the effects of racial segregation in general; in No. 8 there is a contrary finding of fact, based on evidence and not on unproved assumptions, as to the particular effects of racial segregation in public schools on the education of colored children. Hence, we believe, the Kansas district court erred in construing *Plessy* v. *Ferguson* as compelling a holding of constitutional equality where there is a specific finding of fact that the particular type of enforced racial segregation creates inequality.

The District of Columbia case arises on the pleadings, the precise issue being whether the district court erred in granting the motion to dismiss the complaint. No evidence was taken, and no findings of fact were made. To the extent that determination of the constitutional questions raised may depend on facts, the case may not be in an appropriate posture for deciding such questions. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–575, and cases cited.

In any event, it is contended that the action of respondents in establishing segregated schools in the District of Columbia infringes petitioners' rights under the Fifth Amendment. Respondents assert that such segregation is compelled by cer-

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tain Acts of Congress, and their interpretation of these Acts was upheld by the district court in dismissing the complaint, apparently on the authority of *Carr* v. *Corning,* 182 F. 2d 14 (C. A. D. C.). There is, therefore, an initial question of statutory construction.

The Court may find this an appropriate case for application of the well-settled rule of construction that doubts as to the meaning of a statute should be resolved so as to avoid serious constitutional questions. The Court has in countless cases affirmed its duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *United States* v. *CIO,* 335 U. S 106, 120–121, and cases cited. There is room for reasonable argument that in the pertinent statutes Congress *assumed* the existence of a system of segregated schools in the District of Columbia, but did not make it mandatory upon the responsible District authorities to maintain and continue such segregation.

The language of these Acts of Congress may be regarded as significantly different from the constitutional and statutory provisions involved in the state cases. Typical of the latter in their explicitness are those of Virginia.[10] Its Constitution (1902, Article IX, section 140) provides:

[10] The texts of the constitutional and statutory provisions in states having school segregation are quoted in appellees' brief in No. 101, pp. 38–46.

"White and colored children shall not be taught in the same school." Its statutes (Code 1950, section 22–221) provide: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

No similarly explicit and mandatory language, manifesting an unmistakable intention to make racial segregation compulsory in the public schools of the District of Columbia, is to be found in the pertinent Acts of Congress.[11] If Congress had expressly required such segregation, a grave and difficult question under the Fifth Amendment would arise. This question could be avoided if these Acts were construed as meaning only that in them Congress assumed, but neither approved nor disapproved, the fact of a segregated school system in the District. Such a construction, we suggest, is not precluded by the terms of the legislation. Cf. *Ex parte Endo,* 323 U. S. 283, 303, note 24, and cases cited. If the Court should adopt this construction, it would be appropriate to remand the case to the district court with instructions to enter a declaratory judgment to that effect. The respondent Board of Education would then be free to abandon the present segregated school system in the District of Columbia. If it should thereafter continue to maintain such a segregated school system, its action

[11] These provisions are set out in petitioners' brief in No. 413, pp. 23–26.

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could not be based upon any asserted mandate from Congress but would arise solely from its own independent ~~action~~ choice. In such event the legal questions which might arise would not be the same as those now sought to be raised.

III

If the Court should reach the question, the "separate but equal" doctrine should be reexamined and overruled

In the briefs submitted by the United States in *Henderson* v. *United States,* 339 U. S. 816, and in *Sweatt* v. *Painter,* 339 U. S. 629, and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, the Government argued that racial segregation imposed or supported by law is *per se* unconstitutional. We renew that argument here. Without repeating in detail the grounds, stated at length in those briefs, for the conclusion that the doctrine of "separate but equal" is wrong as a matter of constitutional law, history, and policy, the United States again urges the Court, if it should reach the question, to reexamine and overrule that doctrine.

The Government submits that compulsory racial segregation is itself, without more, an unconstitutional discrimination. "Separate but equal" is a contradiction in terms. Schools or other public facilities where persons are segregated by law, solely on the basis of race or color, cannot in any circumstances be regarded as equal. The con-

stitutional requirement is that of equality, not merely in one sense of the word but in every sense. Nothing in the language or history of the Fourteenth Amendment supports the notion that facilities need be equal only in a physical sense.

People who are compelled by law to live in a ghetto do not enjoy equality, even though their houses are as good as, or better than, those on the outside. Cf. *Buchanan* v. *Warley,* 245 U. S. 60. The same is true of children who know that because of their color the law sets them apart from others, and requires them to attend separate schools specially established for members of their race. The facts of every-day life confirm the finding of the district court in the Kansas case that segregation has a "detrimental effect" on colored children; that it affects their motivation to learn; and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. (*Supra,* p. 12.) Similar considerations are reflected in the opinions of this Court in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633–635 and 641–642.

The broad principle underlying the decisions of this Court from *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, to the *Sweatt* and *McLaurin* cases is that the Fourteenth Amendment forbids the classification of students on the basis of race or color so as to deny one group educational advantages and opportunities afforded to another. To

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be sure, those cases involved university graduate and professional schools, but nothing in the language or history of the Fourteenth Amendment could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other. Strict insistence upon the constitutional requirement of equality is no less necessary as applied to public schools which, as has been said, are "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." [12]

Similarly, nothing in the language or history of the Fourteenth Amendment could support an interpretation which permits segregation of Negroes but not of other groups in the community. Indeed, as the Court has pointed out in many cases, that Amendment was primarily designed to assure to colored persons the right to be treated under the law exactly like white persons, and to protect them against being singled out for special or discriminatory treatment.

Strauder v. *West Virginia,* 100 U. S. 303, decided in 1880, was the first case in which the Court was called upon to deal with the application of the Fourteenth Amendment to a state law making

[12] *McCollum* v. *Board of Education*, 333 U. S. 203, at 216, 231 (concurring opinion).

a classification based on race or color. The interpretation placed on the Amendment in that case (pp. 306–308) is especially significant, not merely because of its comprehensive nature, but because it was made by a Court whose members had lived during the period when the Amendment was adopted:

> This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate * * * that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It is well known that in some States laws making such discriminations then existed, and others might well be expected. * * * It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the

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> enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *
>
> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?
>
> * * * The very fact that colored people are singled out * * * is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, the Court in *Virginia* v. *Rives,* 100 U. S. 313, 318, stated: "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same." See also the *Slaughter-*

House Cases, 16 Wall. 36, 70–72, 81, and *Buchanan* v. *Warley,* 245 U. S. 60, 76.

In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 420, the Court said: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Cf. *Hurd* v. *Hodge,* 334 U. S. 24, 30–34. And in *Shelley* v. *Kraemer,* 334 U. S. 1, 23, the Chief Justice stated for the Court:

> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.

"Separate but equal" is sometimes described as an "ancient" doctrine of constitutional law. But its antiquity dates not from the adoption of the Fourteenth Amendment in 1868 but from a judicial expression which did not make its appearance in the reports of this Court until 1896. Almost three decades after ratification of the post-bellum Amendments, when "the history of the times when they were adopted, and the gen-

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eral objects they plainly sought to accomplish" may have become blurred by the passage of time, the opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, read into the Fourteenth Amendment a qualification that enforced separation of white and colored persons in the use of public facilities does not violate the Amendment so long as the separate accommodations are "equal." This judicial contraction of the constitutional rights secured by the Amendment is irreconcilable with the body of decisions which preceded and followed *Plessy* v. *Ferguson,* and is not justified by the considerations adduced to support it.

In the *Plessy* case the view was expressed (p. 551) that the alternative to racial segregation compelled by law is "an enforced commingling" of white and colored persons. This observation, apart from its irrelevance to the constitutional issue, is a plain *non sequitur.* Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. "Commingling" between white and colored persons can then result as the product of voluntary choice, not of legal coercion. Cf. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 641–642.

In the *Plessy* case the Court also said (p. 551) that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon

physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." This observation also was irrelevant to the constitutional issue before the Court. It might properly have been made before a legislative body considering a bill to penalize acts manifesting racial prejudice. But the Court was not called upon to make a judgment of policy as to the wisdom of legislation designed to eradicate racial prejudice; the only question before it was whether a particular statute violated a constitutionally-protected right.

In any event, this observation in the *Plessy* opinion is, at best, a half-truth. Although legislation may not be able to "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual elimination of racial prejudice; or it can, on the other hand, strengthen and enhance it. As the Supreme Court of California has said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension."[13] Even if statutes cannot in themselves remove racial antagonisms, they cannot constitutionally exacerbate such antagonisms by giving the sanction of law to what would otherwise be private acts of discrimination.

The above-quoted statements in the *Plessy* opinion illustrate the extent to which the "sepa-

[13] *Perez* v. *Sharp*, 32 Calif. 2d 711, 725.

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rate but equal" doctrine represented the views of the members of the Court as the best solution for "the difficulties of the present situation" then existing. But the Justices were being called upon to make, not a judgment as to desirable legislative policy, but a judicial judgment as to the interpretation of the Fourteenth Amendment which would be most faithful to its terms, history, and purposes.

Whatever the merits in 1896 of a judgment as to the wisdom or reasonableness of the rule of "separate but equal", it should now be discarded as a negation of rights secured by the Constitution. The Court has said that "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." *Wolf* v. *Colorado,* 338 U. S. 25, 27. "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610.

In sum, the doctrine of "separate but equal" is an unwarranted departure, based upon dubious

assumptions of fact combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law. The rule of *stare decisis* does not give it immunity from reexamination and rejection. In *Smith* v. *Allwright*, 321 U. S. 649, 665–666, the Court said:

> * * * we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.[14]

[14] "* * * the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 491–492 (concurring opinion). In *Passenger Cases*, 7 How. 283, 470, Mr. Chief Justice Taney agreed that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

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IV

If in any of these cases the Court should hold that a system of "separate but equal" public schools is unconstitutional, it should remand the case to the district court with directions to devise and execute such program for relief as appears most likely to achieve orderly and expeditious transition to a non-segregated system

It is fundamental that a court of equity has full power to fashion a remedy to meet the needs of the particular situation before it. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 622; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 132; *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431; *Alexander* v. *Hillman*, 296 U. S. 222, 239; *Union Pacific Railway Co.* v. *Chicago, M. & St. P. Railway Co.*, 163 U. S. 564, 600–601. The fact that a system or practice is determined to be unlawful does not of itself require the court to order that it be abandoned forthwith. Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would be impracticable. For example, dissolution of the illegal combinations involved in the *Standard Oil* and *Motion Picture* [15] cases was deliberately

[15] *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures*, 70 F. Supp. 53 (S. D. N. Y.), 334 U. S. 131, 85 F. Supp. 881, 339 U. S. 974. See also *United States* v. *National Lead Co.*, 332 U. S. 319, 329–335; *United States* v. *Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (S. D. N. Y.), 171 F. 2d 285, 91 F. Supp. 333, 419.

required to take place over a period of years.[16]

If, in any of the present cases, the Court should hold that to compel colored children to attend "separate but equal" public schools is unconstitutional, the Government would suggest that in shaping the relief the Court should take into account the need, not only for prompt vindication of the constitutional rights violated, but also for orderly and reasonable solution of the vexing problems which may arise in eliminating such segregation. The public interest plainly would be served by avoidance of needless dislocation and confusion in the administration of the school systems affected. It must be recognized that racial segregation in public schools has been in effect in many states for a long time. Its roots go deep in the history and traditions of these states. The practical difficulties which may be met in making progressive adjustment to a non-segregated system cannot be ignored or minimized.[17]

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[16] As another example, when Congress determined that certain holding company arrangements were illegal, it delayed elimination of such arrangements in particular cases until a satisfactory plan for their dissolution should be proposed by the parties and approved by the Securities and Exchange Commission. Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k.

[17] These anticipated difficulties relate, of course, only to the question of relief; they cannot affect the merits of the constitutionality of compulsory racial segregation. Moreover, the discussion in this section of the brief assumes that the separate schools for colored children are in other respects "equal." It would be manifestly unfair and unjust,

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A decision that the Constitution forbids the maintenance of "separate but equal" public schools will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states—provisions which were adopted in good faith upon the assumption, supported by previous declarations of this Court, that they were consistent with the requirements of the Fourteenth Amendment. A reasonable period of time will obviously be required to permit formulation of new provisions of law governing the administration of schools in areas affected by the Court's decision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Teachers may have to be transferred, and teaching schedules rearranged. It is possible, of course, that abolition of segregation would in many areas produce no serious dislocations, and no wholesale transfers of teachers or pupils would be required. This could result from purely geographical factors, for it would still be likely that the pupils of a school would be representative of the area in which it is situated.

These are indicative of the kinds of problems which may arise in giving effect to a holding that "separate but equal" school systems are unconstitutional. We suggest that any relief which

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and contrary to the Court's decisions, to withhold immediate relief where the separate schools are also physically unequal and inferior. See pp. 10–12, *supra*.

this Court may direct should contemplate the possibility of such problems and afford opportunity for their expeditious settlement within a specified period. Moreover, to the extent that there may exist popular opposition in some sections to abolition of racially-segregated school systems, we believe that a program for orderly and progressive transition would tend to lessen such antagonism. An appropriate tribunal to devise and supervise execution of such a program is a district court, which could fashion particular orders to meet particular needs. On remand, that court could direct the parties to submit proposals for such a program. And if the district court so desires, it could appoint an advisory committee of lawyers and other citizens to assist it in this task. After the district court adopts a program, either side could seek review, by appeal or otherwise, if it believes the program does not conform to this Court's decision. At reasonable intervals after the program is put into effect, the parties should submit progress reports to the district court, which should have the power, if circumstances so require, to enter any further orders found to be necessary.

Such a procedure should afford opportunity to responsible school authorities to develop a program most suited to their own conditions and needs. Thus, subject to the court's approval, a school board might propose integration on a grade basis, *i. e.*, to integrate the first grades immediately, and to con-

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tinue such integration until completed as to all grades in the elementary schools. Cf. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358. Another board might deem it more feasible to integrate on a school-by-school basis. In some states where there is segregation only in some grades of the elementary schools, as a result of the discretionary action of the authorities, it may be feasible to put a non-segregated system into effect immediately.[18]

CONCLUSION

The subordinate position occupied by Negroes in this country as a result of governmental discriminations ("second-class citizenship," as it is sometimes called) presents an unsolved problem for American democracy, an inescapable challenge to the sincerity of our espousal of the democratic faith.

In these days, when the free world must conserve and fortify the moral as well as the material sources of its strength, it is especially important to affirm that the Constitution of the United States places no limitation, express or implied,

[18] It is assumed that the district courts are, because of their familiarity with local conditions, the appropriate tribunals to deal with issues of relief. It may be, however, that the Court will wish to formulate more precise standards and provisions for the guidance of the district courts. In that event we suggest that several procedures are available. One would be for the Court to issue no decree at this time, but to set the matter down for argument at a later date on the question of relief. Another would be to appoint a special master to hold hearings and make recommendations to the Court on that question.

on the principle of the equality of all men before the law. Mr. Justice Harlan said in his dissent in the *Plessy* case (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.

The Government and people of the United States must prove by their actions that the ideals expressed in the Bill of Rights are living realities, not literary abstractions. As the President has stated:

> If we wish to inspire the people of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.
>
> We know the way. We need only the will.[19]

Respectfully submitted.

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DECEMBER 1952.

[19] Message to the Congress, note 1, *supra*, p. 7.

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RIDER - Supplemental Brief for the United States

(Nos. 1, 2, 4, 8, and 10)

The following should be inserted in the Supplemental Brief for the United States, immediately after the paragraph ending on the top of page 71:

> Both bills passed the Senate on May 21, 1866. On that day the Senate considered 18 measures, and passed 10. Of those considered 10 were District bills, 7 of which were passed. There was practically no debate or comment on any of these measures, and no discussion of any of the District bills passed. (Globe, pp. 2706-2723.)
>
> S. 246 (dealing with the school funds) passed the House on July 18, 1866. On that day the House considered 23 measures, passed 9 bills, and concurred in Senate amendments to 11 more. This included consideration of 5 District measures, 4 of which were passed. There was no discussion of any of the District bills passed. (Globe, pp. 3905-3913.)
>
> S. 247 (dealing with the school lots) passed the House on July 27, 1866, the next to last day of the session. On that day the House held a day and evening session. In the evening session, lasting from 7:30 p.m. to 7:50 a.m., it considered 38 measures, and passed 23. There was brief debate on only 8 of the 23 measures passed. The entire "debate" on S. 247 consisted of a question and answer as to the size of the lots. (Globe, pp. 4262-4288.)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 1[1]

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

On June 8, 1953, the Court ordered these cases restored to the docket for reargument, and requested counsel in their briefs and on oral argument to discuss certain questions. The order also invited the Attorney General of the United States to take part in the oral argument and to file an additional brief if he so desires.[2]

[1] Together with No. 2, *Briggs, et al.* v. *Elliott, et al.*; No. 4, *Dorothy E. Davis, et al.* v. *County School Board of Prince Edward County, Virginia, et al.*; No. 8, *Spottswood Thomas Bolling, et al.* v. *C. Melvin Sharpe, et al.*; and No. 10, *Francis B. Gebhart, et al.* v. *Ethel Louise Belton, et al.*

[2] The full text of the Court's order is as follows (345 U. S. 972–973):

"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In

Since the United States is not a party to any of these cases and is participating herein solely as an *amicus curiae,* it submits this brief as an objective non-adversary discussion of the questions stated in the Court's order of reargument. No attempt has been made to reexamine other questions briefed and argued at the last term.

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their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

"1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

"2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about

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I and II

THE CONTEMPORARY UNDERSTANDING OF THE FOURTEENTH AMENDMENT WITH RESPECT TO ITS EFFECT ON RACIAL SEGREGATION IN PUBLIC SCHOOLS

The first two questions asked by the Court are as follows:

> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance

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from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

"The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

Since the historical materials examined are relevant to both questions, they are here treated together.[3]

A. INTRODUCTORY

1. The reconstruction period

Abolition of slavery by national action began while the Civil War was in progress, with Congressional abolition in the District of Columbia (12 Stat. 376) and the territories (12 Stat. 432) in 1862, and President Lincoln's Emancipation Proclamation in 1863. The Thirteenth Amendment, abolishing slavery everywhere within the United States, was proposed by Congress on February 1, 1865, and declared adopted on December 18, 1865.

After the termination of hostilities, new governments were established in the Southern states under Presidential authority. Negroes were not

[3] The Appendix, which is contained in a separate volume, consists of detailed factual summaries of the materials on the various aspects of the historical questions which are dealt with in this brief.

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allowed, however, to participate in the elections held in these states, and in December 1865 Congress refused to seat members chosen in such elections. At the same session Congress created a Joint Committee on Reconstruction, to which all matters concerning the South were referred and which originated the various measures which formed the program of Congressional reconstruction.

During 1866 Congress, over the opposition of President Johnson, extended the functions of the Freedmen's Bureau, which had been created in 1865 to promote the welfare of the freed Negroes and to protect their civil rights. In April of the same year it enacted over a veto the Civil Rights Act (14 Stat. 27), which was designed to enforce by Federal authority the civil rights of Negroes, including their right to "full and equal benefit of all laws and proceedings for the security of person and property * * *."

Two months later, on June 16, 1866, Congress proposed the Fourteenth Amendment. By March 1867 most of the Northern states had ratified the Amendment. Three border states had rejected it, however, and of the Southern states only Tennessee had ratified it, making a total of less than the required three-fourths. The elections of 1866 had returned to Congress a clear majority in favor of the program of Congressional reconstruction. Accordingly, in March 1867 Congress enacted the Reconstruction Act (14 Stat. 428)

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under which the Southern states (except for Tennessee) were divided into five military districts and the existing state governments were declared to be provisional only. The Act provided that military supervision would be withdrawn, and a state's representatives readmitted to Congress, after it had (a) framed a new constitution "in conformity with the Constitution of the United States in all respects," (b) adopted universal male suffrage, and (c) ratified the Fourteenth Amendment. By June 1868 seven states had met all of these conditions and were restored to representation. On July 21, 1868, the Amendment, having been ratified by the legislatures of thirty of the thirty-seven states to which it was submitted, was declared adopted. Subsequently, the other three Southern states ratified the Amendment, and their representatives were readmitted to Congress.

The impeachment of President Johnson in 1868, arising out of his differences with Congress on reconstruction policy, was unsuccessful, but the election of Grant that year brought into office a President who was in agreement with the Congressional program. To assure the Negroes the right to vote, protected by the national government, a third constitutional amendment, the Fifteenth, was proposed by Congress in February 1869 and came into effect in March 1870. In the latter year the Enforcement Act (16 Stat. 140)

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reenacted the Civil Rights Act of 1866 and imposed civil and criminal sanctions for violation of rights secured by the Fourteenth and Fifteenth Amendments.

Congress in 1875 enacted a new Civil Rights Act (18 Stat. 335)[4] declaring that all persons within the jurisdiction of the United States shall be entitled to the "full and equal enjoyment" of the accommodations of inns, public conveyances, theatres, and other places of public amusement, and providing civil and criminal penalties for violations. That Act marked the end of attempts during the reconstruction period to enforce by federal legislation equality of treatment for the emancipated Negroes.

After the determination in 1877 that Hayes had been elected President, the use of Federal authority to support the reconstruction governments in the Southern states ceased.[5]

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[4] This Act was held unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3.

[5] An historian has described the settlement of the Hayes-Tilden election dispute as follows: "Generalized, this famous bargain meant: Let the reforming Republicans direct the national government and the southern whites may rule the Negroes. Such were the terms on which the new administration took up its task. They precisely and consciously reversed the principles of reconstruction as followed under Grant, and hence they ended an era." Dunning, *Reconstruction, Political and Economic*, 1865–1877 (1907), p. 41; see also Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951); Buck, *The Road to Reunion*, 1865–1900 (1937).

2. Public education in the United States in 1866

The quarter-century before the Civil War witnessed the initial efforts to establish free, tax-supported public schools throughout the United States.[6] By 1861 the principle of free public education had become accepted in almost all of the Northern states. Common schools open to all, and supported by general taxation, existed in most of the cities and towns, and in a large number of rural areas.[7]

In the South, however, different conditions prevailed. The essentially rural and sparsely settled character of the region made communication slow and community cooperation difficult. The institution of slavery and the acceptance of class and social distinctions were formidable barriers to the growth of public education. In addition, religious influences tended to encourage the view that education was a parental obligation and not one which the state should assume. Consequently, education in the South prior to the Civil War was left largely to private groups.[8]

Outside of some of the larger cities, such public schools as existed in the South were generally

[6] Cubberley, *Public Education in the United States* (1919), p. 119 *et seq.;* Knight, *Public Education in the South* (1922), pp. 196–198.

[7] Cubberley, *supra*, p. 211. A survey of the public school systems in many cities and towns during this period may be found in Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871), pp. 77–130.

[8] Knight, *supra*, pp. 264–265.

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maintained for the benefit of only the children of the poor.[9] Even these were disrupted by the war. Teachers and students were called away to other tasks, and the state school funds were diverted to other purposes. At the close of the war the Southern states were faced with the task of completely rebuilding their educational systems.[10] The development of the present-day system of public education did not really begin in the South until the post-war period.[11]

Although public education was far more advanced in the North than in the South, the conditions in the former region hardly approximated those existing today. The schools were often small one-room affairs where, in rural areas at least, not much more than the three R's was taught. In many states the school term was only three months of a year. Compulsory school attendance was scarcely known. Ungraded schools were common in rural areas, and public high schools were rare. The quality of instruction was generally low, judged by modern standards.[12]

B. THE HISTORICAL ORIGINS AND BACKGROUND OF THE FOURTEENTH AMENDMENT

1. The anti-slavery origins of the reconstruction amendments

The constitutional changes of the Reconstruction period, and the civil rights legislation which

[9] *Ibid.*

[10] *Id.*, pp. 306, 313–317.

[11] Cubberley, *supra*, p. 251.

[12] Cubberley, *supra*, ch. VIII, Knight, *supra*, p. 294 *et seq.*

accompanied them, were the culmination of more than thirty years of controversy engendered by the anti-slavery movement. The growth of that movement and the formation of its constitutional philosophy, particularly in relation to the Fourteenth Amendment, have been the subject of several recent historical and legal studies.[13] These studies show that the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War.

The abolitionists propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the "natural and fundamental" rights of all persons, white and black alike.[14] "Just as the great objection to slavery was its lack of legal protection for slaves, as well as the concomitant, invidious, and discriminatory treatment of free Negroes

[13] Nye, *Fettered Freedom* (1949); ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Dumond, *Antislavery Origins of the Civil War in the United States* (1939); Jenkins, *Pro-Slavery Thought in the Old South* (1935); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, (1950) Wis. L. Rev. 479, 610; Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830–1860*, 40 Calif. L. Rev. 483 (1953).

[14] ten Broek, *supra*, pp. 7, 96; Nye, *supra*, p. 177 *et seq.*; Dumond, *supra*, pp. 71–73.

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and the wholesale public and private invasion of the rights of abolitionists, so the first object of the abolitionists was to gain legal protection for the basic rights of members of all three classes."[15] To gain that legal protection from the governments of the states where slavery existed was a practical impossibility; so the full impetus of the movement was directed towards securing national protection.[16]

Against the philosophy of absolute equality before the law, pro-slavery advocates posed the concept of "classified equality among equals."[17] To them, slavery was not a necessary evil but a "positive good," for by relegating a class in society naturally incapable of self-direction to a position legally subordinate to that of a class which was naturally superior and dominant, true equality was possible within each class.[18]

The agitation of the anti-slavery forces for absolute equality stimulated numerous efforts to eradicate from the laws of Northern states distinctions based on color; these were regarded as badges of servitude irreconcilable with the equality which was the natural right of all men.[19] An example was the campaign to open the Massachusetts common schools to all, without regard to color. Those schools were tax supported and free,

[15] ten Broek, *supra*, p. 97; see Dumond, *supra*, p. 43.
[16] ten Broek, *supra*, ch. III, IV, *passim*.
[17] Jenkins, *supra*, ch. III *passim;* Nye, *supra*, pp. 185–189.
[18] *Ibid.*
[19] Nye, *supra*, pp. 81–84; ten Broek, *supra*, pp. 42, 54, note 17.

and governed by local boards.[20] Some boards yielded to local pressure to abolish segregation; others did not, and efforts were made after 1844 to obtain remedial legislation.[21] In 1849, after failure of these efforts, an attempt was made to secure judicial invalidation of school segregation. In that year, in *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, Charles Sumner argued before the Supreme Judicial Court that segregation in the Boston common schools was a violation of the state constitutional guarantee of equality, because segregation was in itself a denial of equality.[22] He lost the case, but in 1855 the Massachusetts legislature forbade school segregation.

In *Van Camp* v. *Board of Education of Logan,* 9 Ohio 406 (1859), it was held that mulatto children were not entitled to enter the white common schools. The basic philosophy of the anti-slavery movement was expressed in the dissenting opinion, which declared that "caste-legislation" was inconsistent with the theory of a free and popular government "that asserted in its bill of rights the equality of all men" (p. 415). Twelve years later, Senator Wilson, a leader in the Congressional program of reconstruction, referred to these struggles for Negro access to common schools as an integral

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[20] Cubberly, *Public Education in the United States* (1919), p. 163 *et seq.*

[21] Wilson, *Rise and Fall of the Slave Power in America* (1872), vol. I, pp. 495–498.

[22] ten Broek, *supra*, p. 54, note 17.

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part of the "contest of forty years between liberty and equality on the one side and slavery and privilege on the other" for securing "perfect and absolute equality in rights and privileges" for the Negro.[23]

This application of the philosophy of absolute legal equality to invalidate distinctions based on race or color in the Northern states was, however, a side issue. The main objective was complete abolition of slavery, and to accomplish that purpose it was necessary to secure political control of the national government.[24] These efforts produced a new national political organization—the Republican Party—established in 1854, and formed specifically to promote anti-slavery objectives.[25] Control of the national government by that party after the election of 1860 was the occasion for assertion by the South of the right of sovereign states to secede from the Union to protect their domestic institutions;[26] and control of the national government by that party after the Civil War was the occasion for amendment of the Constitution to embody the principle of "perfect and absolute" equality before the law for which the anti-slavery advocates had so long agitated.

[23] Congressional Globe, 41st Cong., 3d Sess., p. 1061.

[24] ten Broek, *supra*, ch. VI.

[25] Wilson, *supra*, vol. II, p. 406 *et seq.*; Curtis, *The Republican Party* (1904), vol. I, ch. VI.

[26] Dumond, *supra*, pp. 123–126.

2. The status of Negroes (legal, economic, and educational) at the close of the Civil War

By 1865 slavery had been ended in fact. In that year it was constitutionally abolished. Emancipation did not, however, make the former slave a free man in all respects. Abolition of slavery did not wipe out at a stroke the "badges of servitude" which had existed for so many generations. The Negro "freedmen" were still commonly regarded as an inferior race. Legally, economically, and educationally, the free colored population was still subject to disabilities not imposed on white citizens, both in the Southern states and, to a lesser extent, in some of the Northern states.

Before the Civil War the states had varied in their treatment of free colored people. Some slave states had required freed Negroes to emigrate; where permitted to remain, they were limited in their rights to contract, hold property, sue, appear as witnesses, and to vote or serve on juries. In some Northern states immigration of free Negroes was prohibited; in many more, the right of suffrage was denied.[27]

[27] Hurd, *Law of Freedom and Bondage in the United States* (1862), vol. 2, pp. 1–218, contains a complete compilation and digest of these laws; and see Barnard, *Special Report of the Commissioner of Education*, H. Ex. Doc. No. 315, 41st Cong., 2d Sess., Appendix, Legal Status of the Colored Population etc., pp. 301–400; Wilson, *Rise and Fall of the Slave Power in America* (1874), vol. II, p. 181 *et seq.;* Stephenson, *Race Distinctions in American Law* (1910), ch. IV. Only in the states of Maine, New Hamp-

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At the close of the war, so-called "Black Codes" designed to restrict the freedom of the newly freed colored people were enacted in the Southern states. These Codes contained provisions discriminating against Negroes with regard to such matters as employment and the right to engage in business.[28] They were regarded by the majority in Congress as "an attempt on the part of Johnson's reorganized governments to reestablish virtual slavery and thus reverse the result of the war."[29]

Despite emancipation, the Negroes remained on the lowest economic level. Cut adrift without money or property, they generally remained dependent upon their former owners for employment. The Black Codes only reinforced that dependence.

In the field of education the opportunities of the Southern Negro were far inferior to those of his brother in the North. Long before the war, most of the Southern states had enacted legislation prohibiting the education of all Negroes, free or slave, because of the widespread belief that such education was conducive to rebelliousness.[30]

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shire, Vermont, Massachusetts, and Rhode Island had Negroes received the full right of suffrage.

[28] Stephenson, *supra*, ch. IV.

[29] Randall, *The Civil War and Reconstruction* (1937), p. 724.

[30] Nye, *Fettered Freedom* (1949), pp. 70–71. See the speech of Senator Wilson (Mass.) on April 12, 1860, reviewing these laws, Congressional Globe, 36th Cong., 1st Sess., p. 1685.

The few Negro schools were operated clandestinely. It has been estimated that ninety-five per cent of the colored population of the South was illiterate at the time of the Civil War.[31]

After the war ended, the provisional legislatures in the Southern states began to show great interest in the establishment of systems of public school education; yet, with few exceptions, they showed no disposition to extend its benefits to Negroes.[32] This reflected the hostility of many people in the South towards the principle of Negro education. The establishment of schools for Negroes was left largely to northern charitable societies, in cooperation with the Freedmen's Bureau. However, the effectiveness of these schools was impaired by the opposition of a considerable portion of the local white population—an opposition which frequently expressed itself in violence, with Negro schools being burned and their teachers, white and colored alike, beaten and expelled from the community.[33]

In the North the situation was far different. Nowhere were there prohibitions against Negro education,[34] although in five states Negroes were

[31] Bond, *The Education of the Negro in the American Social Order* (1934), p. 21.

[32] *Id.*, p. 41.

[33] *Id.*, pp. 28–32.

[34] The only border state which had had such prohibitions was Missouri. By 1865, this prohibition was not only abolished, but Negroes were admitted to public schools. Barnard, *supra*, pp. 359–360. All the following references to

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excluded from public schools.[35] In some Northern states they were admitted to the same public schools as white children; in others, they were either provided with separate schools, or admitted to the white schools, depending principally upon the number of children involved;[36] in still others, they were provided only with separate schools.[37] In individual communities in many of the states the practice varied from the state-wide pattern, either by legislative permission or common practice, without legal sanction.[38]

C. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND IMPLEMENTING LEGISLATION

1. The Thirteenth Amendment

The legislative history of the Fourteenth Amendment in Congress must begin with a brief account of the Thirteenth Amendment. Both amendments had a common origin and purpose, and were con-

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the educational status of the Negro are taken from Appendix, Legal Status of the Colored Population, etc., pp. 301–400, of the Barnard report.

[35] Delaware, Maryland, Kentucky, Indiana and Illinois.

[36] Pennsylvania and California are examples.

[37] See p. 90, footnote 93, *infra*.

[38] For example, the Ohio state statutes provided only for separate schools; in the greater part of the state, however, with the exception of Cincinnati, colored children were admitted to the same schools as white children. In Illinois, where there was no provision for Negro public education, the city of Chicago, after an unsuccessful experiment with separate schools during 1864–1865, maintained under its own ordinances a fully integrated system of public schools. On the other hand, New York City and some towns in New Jersey maintained separate schools for colored children. See Barnard, *supra*, pp. 96, 104.

sidered in Congress as related components of an integral plan of reconstruction.

The Thirteenth Amendment originated in the 38th Congress in the form of a joint resolution introduced by Senator Henderson in January 1864. (Congressional Globe, 38th Cong., 1st Sess., p. 145.) The resolution proposed that the Constitution be amended to provide that "Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."[39] The proposal was made only after Congressional and executive action had been taken which effectively emancipated the slaves in the Southern states.[40] In reporting the resolution, Senator Trumbull, chairman of the Senate Judiciary Committee, noted that fact. He stated that the amendment would not only end the institution of slavery but would remove from the Constitution the inconsistency of the founding fathers, who, while proclaiming the equality of all men, nevertheless denied all rights to an entire race (Globe, 38th Cong., 1st Sess., p. 1313). The resolution passed the Sen-

[39] Globe, 38th Cong., 1st Sess., p. 1313. The Thirteenth Amendment, as adopted, provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[40] The Confiscation Act of 1861, 12 Stat. 319; the Captured and Abandoned Property Act of 1863, 12 Stat. 820; Proclamation (No. 16) of September 22, 1862, 12 Stat. 1267.

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ate, but failed of passage in the House (Globe, 38th Cong., 1st Sess., pp. 1490, 2995); and it became one of the principal issues in the 1864 national election.[41]

The overwhelming Republican victory that year led President Lincoln in December 1864 to recommend to the lame-duck session of the 38th Congress that the House reconsider its vote (Globe, 38th Cong., 2d Sess., Appendix, p. 3). In January 1865 the resolution was passed by the House by slightly more than the required two-thirds vote (Globe, 38th Cong., 2d Sess., p. 531). It was submitted to the states for ratification in February 1865, and by December of that year a sufficient number of states had ratified. (13 Stat. 567, 774.)

The Congressional debates on the Thirteenth Amendment indicate that its purpose was to make the Negro, so far as law could do so, an indistinguishable element of the general population.[42] It was the belief of its proponents that by abolishing the institution of slavery they were establishing the constitutional principle of full equality before the law. (Globe, 38th Cong., 2d Sess., pp. 154, 177.) To these men, freedom and equality were coextensive; the one necessarily implied the other. (Globe, 38th Cong., 1st Sess., pp. 1482, 2957; Globe, 38th Cong., 2d Sess., p. 154.) Simi-

[41] McPherson, *Political History of the United States, 1860–65* (1865), pp. 406, 419, 422.

[42] See, for example, the remarks of Rep. Orth (Globe, 38th Cong., 2d Sess., p. 143).

larly, those who opposed the Amendment did not doubt that the freedom conferred upon the Negro slave included more than "mere exemption from servitude." (Globe, 38th Cong., 1st Sess., p. 2962.) To them, that freedom was a reversal of the "natural and divine" order under which the colored race was inferior and unequal. (Globe, 38th Cong., 2d Sess., p. 150.) This argument proceeded on the basis of their understanding that the Amendment would merge the Negro into the general mass of people on a basis of full legal equality. Those who favored the Amendment did not deny that such was its purpose. (Globe, 38th Cong., 1st Sess., pp. 2957, 2960, 2989; Globe, 38th Cong., 2d Sess., pp. 154, 202, 237.)

2. Implementing legislation: The Freedmen's Bureau bills and the Civil Rights Act of 1866

In the period between the adjournment of the 38th Congress in March 1865 and the convening of the 39th Congress in December of that year, the provisional governments in the Southern states, which had been set up by President Johnson under his "restoration" policy, enacted a series of laws discriminating against Negroes in various ways, the so-called Black Codes discussed *supra,* p. 15. The first session of the 39th Congress, over the veto of President Johnson, enacted two bills to nullify the discriminations created by the Black Codes: (1) the Civil Rights Act of 1866, 14 Stat. 27, and (2) the law which extended the life of the Freedmen's Bureau and enlarged its powers,

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14 Stat. 173. It also passed another bill dealing with the Freedmen's Bureau which failed of enactment after it had been vetoed by President Johnson. (S. 60, 39th Cong., 1st Sess.; Globe, p. 943)[43] These three bills were expressly intended to give content to the freedom conferred upon the Negro by the Thirteenth Amendment by guaranteeing to him all of the civil rights to which free men were entitled.

These measures were related to the Fourteenth Amendment by more than mere coincidence of time [44] and subject matter. As will appear *infra*, pp. 40–45, the latter was proposed after members of the Congress stated that the civil rights guaranteed by statute were vulnerable to future political changes or might possibly be stricken down as unconstitutional. Because the rights intended to be secured to Negroes by these measures were the same as those subsequently embodied in the Four-

[43] All references to the Globe in this section are to the Congressional Globe, 39th Cong., 1st Session.

[44] The Supplementary Freedmen's Bureau bill (S. 60) was debated in Congress from January 11, 1866, through February 20, 1866; the Civil Rights bill, from January 29, 1866, through April 9, 1866; and the second Supplementary Freedmen's Bureau bill (H. R. 613), from May 22, 1866, through July 2, 1866. Meanwhile, the two precursors to the Fourteenth Amendment, the Stevens "apportionment" amendment and the Bingham "equal rights" amendment, *infra*, pp. 33–41, were debated from January 23, 1866, through March 9, 1866, and February 26 through 28, 1866, respectively. Debate on H. J. Res. 127, containing the Fourteenth Amendment as finally proposed, extended from May 8, 1866, to June 13, 1866.

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teenth Amendment, it is appropriate to include their legislative history as a relevant part of the background of the Fourteenth Amendment.

(a) Immediately following President Johnson's message of December 5, 1865, stating that existing state law furnished adequate protection for civil rights, the 39th Congress established a Joint Reconstruction Committee to serve as the principal agency for developing the program of "Congressional reconstruction." (Globe, pp. 6, 30, 47.) Senator Wilson immediately brought up for consideration a bill (S. 9)[45] to nullify the Black Codes. (Globe, p. 39.) He urged Congress to strike down these Codes without delay, so that the Negro freedman

> can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111.)

The chief opposition to Wilson's bill came from those Senators who considered all civil rights proposals as an unwarranted effort "to confer on former slaves all the civil or political rights that white people have." (Globe, p. 113.) The

[45] All bill numbers hereafter cited in this section refer to bills in the 39th Cong., 1st Session.

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bill was, however, withdrawn by Wilson because of the evident view of the majority that measures of such a nature required more careful formulation. Senator Trumbull undertook this task. He subsequently introduced two bills which, he stated, would effectively protect all men in those basic rights without which they would not be free. (Globe, p. 43.)

(b) One of the Trumbull bills (S. 60) proposed to extend the life of the Freedmen's Bureau and to enlarge its authority; the second (S. 61) was intended to protect all persons in the exercise of their civil rights and to furnish a means by which those rights might effectively be vindicated. (Globe, p. 129.)

The purpose of S. 60, as stated by Senator Trumbull, was to restrain by military measures any attempt to enforce the Black Codes. (Globe, pp. 319–323.) The bill passed the Senate by a wide majority. (Globe, p. 421.) The opposition centered their attack on the basic concept of equality underlying the bill, and on its military enforcement provisions. (*E. g.*, Globe, pp. 318, 319, 342.) The debate in the House emphasized much the same issues, with the additional matter of education for the freedmen. (*E. g.*, Globe, pp. 513, 585.)

There was little difference in the majority and minority views concerning the bill's scope. Its proponents expressed their understanding that the equality to be enforced did not mean "that all

men shall be six feet high," but rather that they were to have "equal rights before the law," so that it "operates alike on both races" and without "discrimination against either in this respect that does not apply to both." (Globe, pp. 322, 343.) Nor did the opposition indicate any disagreement on that score. They objected, rather, to the general philosophy of the bill. Representative Dawson of Pennsylvania observed that the bill constituted only a part of a broad policy to enforce absolute equality for Negroes so that they

> should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. (Globe, p. 541.)

Several Congressmen objected to entrusting the Freedmen's Bureau with the responsibility of educating the freedmen because it appeared that the Bureau had taken over certain white schools in the South for the use of Negro children. The charge was made that "unless they mix up white children with black, the white children can have no chance in these schools for instruction."

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(Globe, App. pp. 71, 82.) There is no other evidence that any particular thought was given to the question of racial segregation in the existing schools. The bill was passed by the House, but was vetoed by President Johnson in February 1866. (Globe, pp. 688, 915.) The Senate sustained his veto. (Globe, p. 943.)

(c) After the Senate passed S. 60, it turned immediately to consideration of the second of Senator Trumbull's bills, S. 61, the so-called "Civil Rights" bill. (Globe, p. 421.) S. 61 provided (1) that there was to be no discrimination in "civil rights or immunities" among the inhabitants of the United States on account of color, race, or previous servitude, and (2) that all persons, regardless of race or color, were to have the "same" rights to make and enforce contracts, to sue and be sued, to inherit and own property, and to have the full and equal benefit of all laws for the security of person and property. (Globe, p. 474.) Violation of any of these rights "under color of law" was to carry both civil and criminal penalties. (Globe, p. 475.)

The purpose of the bill was stated to be the nullification of all state laws which, on grounds of color or race, deprived "any citizen of civil rights which are secured to other citizens." (Globe, p. 474.) The Senate proponents of the bill explained that the freedom conferred upon Negroes by the Thirteenth Amendment was of little value, unless they were given "some means

of availing themselves of their benefits." (Globe, p. 474.) So long as there were state laws discriminating against the colored people, they remained in part slave. Any statute

> which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. (*Ibid.*)

To the objection that the bill's purpose was "revolutionary", its supporters answered that the country was "in the midst of revolution." (Globe, p. 570.)

The opposition, recognizing that the bill was intended to accomplish "the abolition of all laws in the States which create distinctions between black men and white ones" (Globe, p. 603), objected to this attempt to "place all men upon an equality before the law." (Globe, p. 601.) They claimed that the Thirteenth Amendment did not confer the power on Congress to erase distinctions between Negroes and whites created by state law. (Globe, p. 476.) For them, the Amendment had merely abolished the "status or condition of slavery", and there was no justification for attempting to use it "to confer civil rights which are wholly distinct and unconnected" with such a status. Senator Cowan of Pennsylvania, opposing the bill, referred to the system of racially-segregated schools provided for by Pennsylvania

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law as an example of the kind of legal distinction which would be eradicated by the bill:

> In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. (Globe, p. 500.)

No member of the Senate rose to differ with Senator Cowan's view of this objective of the bill. The attacks on the bill failed, however, and it was passed by the Senate in February 1866. (Globe, p. 606.)

In the House the bill was reported favorably by the Judiciary Committee, of which Congressman Wilson of Iowa was chairman. (Globe, p. 1115.) The debate in the House followed the same general pattern as in the Senate.

Mr. Wilson took a more limited view of the objectives and scope of the bill than had his colleagues in the Senate. To him, the general language of the bill did not mean that "all citizens shall sit on the juries, or that their children shall attend the same schools." These, to him, were not such "civil rights or immunities" as were intended to be protected by the bill.[46] (Globe, p. 1117.)

Those in the House who opposed the bill on its merits vigorously disagreed with Wilson's view that the bill had a limited application, particularly with respect to state laws concerning racial segregation in the schools. (Globe, pp. 1120, 1121, 1270). Congressman Kerr of Indiana argued that the bill would invalidate the school laws of his state:

> Again, the constitution of Indiana has dedicated a munificent fund to the support of common schools for the education of the children of the State. But negro and mulatto children are by law excluded from

[46] Mr. Wilson later pointed out that this view depended not on any general definition of "civil rights or immunities" but upon the form of the bill itself, which, under general rules of construction, would in his opinion have limited the general declaration to the specific and limited rights actually enumerated. (Globe, pp. 1291, 1294.) He thought that the bill could only be construed as relating to matters within the control of Congress, and he had doubt that Congress could constitutionally provide such general protection of civil rights. (Globe, p. 1294.)

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> those schools. Negroes and mulattoes are exempt by law from school tax. They are denied a civil right, on account of race and color, and are granted an immunity, (from school taxation,) but are taxed for all other purposes. Now, a negro or mulatto takes his child to the common schoolhouse and demands of the teacher that it be admitted to the school and taught as the white children are, which is refused. The teacher then becomes a wrong-doer and is liable to the same punishments, to be administered in the same way; because all the persons referred to would be acting under *color* of some law, statute, ordinance, regulation, or custom. (Globe, p. 1271.)

Congressman Rogers of New Jersey, of the minority, argued similarly with reference to the Pennsylvania schools:

> In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes and the local regulations of a State, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise to the same ex-

> tent that it is accorded to the white men in that State, * * *. (Globe, p. 1121.)

To Rogers, there was no authority under the Thirteenth Amendment for Congress to interfere in such "domestic" matters; but he plainly understood that the bill under consideration would prohibit segregated schools in the states.

There were some members of the majority who, although supporting the merits of the bill, agreed with the minority that there was doubt that the Thirteenth Amendment empowered Congress to enact such legislation. (Globe, pp. 1290, 1293, 1266.) Led by Congressman Bingham of Ohio, later a principal draftsman of the Fourteenth Amendment, they clearly expressed their understanding that the general language of the bill would "strike down by congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen." (Globe, p. 1291.) Congressman Delano of Ohio, a member of this group, pointed out that the bill would clearly apply to state school laws; he cited his own state as an example:

> we once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the funds raised for the support of those schools. That law did not, of course, place the black population upon an equal footing with the white, and would, therefore, under

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> the terms of this bill be void, and those attempting to execute it would be subjected to punishment by fine or imprisonment. (Globe, App. 158.)

Mr. Bingham stated that all laws making distinctions on the basis of color should be eliminated, for the law "should be just"; but he saw the proper remedy for those abuses, "not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future." (Globe, p. 1291.) He agreed that without such amendment the "protection in time of peace within the States of all the rights of person and citizen was of the powers reserved to the States." (Globe, p. 1293.)

The bill was recommitted against Wilson's wishes, largely because of the defection of Bingham and his followers. (Globe, p. 1296.) It was amended in committee to strike out the general language guaranteeing "civil rights or immunities." (Globe, p. 1366.) As Wilson said, that language had been taken by some as warranting a "latitudinarian construction not intended." (*Ibid.*) In this form the bill passed the House, and was concurred in by the Senate. (Globe, pp. 1367, 1416.)

The President vetoed the measure on March 27, 1866. (Globe, p. 1679.) The Senate, after two days' discussion, passed the bill over the veto; the House held no debate, and the veto was immediately overridden. (Globe, pp. 1809, 1861.)

In sum, the Thirteenth Amendment had been proposed as a means of attaining the equality of all men before the law, not as conferring mere exemption from servitude. To its proponents, and to most of its opponents, it would establish the principle that all men should be treated equally. The Civil Rights and the Freedmen's Bureau bills were considered necessary to enforce the equality of freedom guaranteed by that Amendment by forbidding differences in legal treatment on account of race or color. These bills were aimed at striking down state laws which were viewed as restricting the freedom of Negroes by creating or continuing legal distinctions based on race or color. The debates on these bills show that some legislators, on both the majority and minority sides, expressed the view that this principle of equality under law would, if enforced, destroy racial segregation in state schools.

D. THE FOURTEENTH AMENDMENT IN CONGRESS

During the same period that the Civil Rights Act and the first Freedmen's Bureau extension bill were occupying the attention of the 39th Congress, the Joint Committee on Reconstruction was engaged in the study of plans to "reconstruct" the Union on principles that would prevent a recurrence of the recent war.[47] In the course of that study the Committee originated two

[47] Journal of the Joint Committee on Reconstruction, Senate Doc. 711, 63rd Cong., 3rd Sess. (hereinafter "Committee Journal").

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separate proposals for constitutional amendments which it reported to the floor of Congress. These proposals were: (1) a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment)[48]; and (2) a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment).[49] Both proposals failed. However, after some modification, and with the addition of other proposals, they were included in the "plan of reconstruction" reported by the Joint Committee in April 1866. That plan included the Fourteenth Amendment. (Globe, pp. 2265, 2286.) The discussions of these preliminary proposals in the Congress illumine the scope and purpose of that Amendment and constitute an integral part of its legislative history.

(1) *The Stevens "apportionment" amendment.* The first proposal to be reported was the apportionment amendment. A brief report to the House was delivered by Congressman Thaddeus Stevens on January 22, 1866. (Globe, p. 351.) The amendment had a direct political purpose. It proposed to reduce the congressional representation of a state which excluded any group of citizens from the elective franchise on account of race or color.

[48] Committee Journal, p. 13; Globe, p. 351.

[49] Committee Journal, p. 17; Globe, pp. 813, 1033.

The opponents of reconstruction united to condemn this proposal (e. g., Globe, pp. 353, 381, 387). However, the usual supporters of reconstruction were divided. To many of the latter, a constitutional provision for apportionment where suffrage was denied on the basis of color might imply that the Constitution permitted legal distinctions to be made on such a basis. (Globe, pp. 405, 408.)

Congressman Bingham argued that while the measure was necessary, it was not sufficient standing alone. (Globe, p. 429.) It should be accompanied, he said, by

> another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guaranteed to him from the beginning * * *.

Bingham urged that the American people should adopt both of these proposals in order

> to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws. (Globe, p. 431.)

The split among the majority led to recommittal of the apportionment proposal. (Globe, p. 508.) However, the following day it was again reported with an amendment concerning apportionment of

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direct taxes, and in this form it passed the House with little discussion. (Globe, p. 538.)

Senator Sumner opened the Senate debate on February 6 with an attack on the proposal. (Globe, p. 673). He said that the freedmen must be fully protected, not by indirection, but by directly "maintaining him in the equal rights of citizenship," including suffrage; and this was impossible "so long as you deny him the shield of *impartial laws.*" (Globe, p. 675.) Sumner proposed, instead, a joint resolution to declare, by statute and not by constitutional amendment, the abolition of all distinctions based on color, including those relating to the franchise. (Globe, p. 684.) This was proposed as an exercise by Congress of the authority which he thought it had under the Thirteenth Amendment. Senator Fessenden, Chairman of the Joint Committee on Reconstruction, opposed Sumner and argued the necessity of the apportionment amendment, although admitting his own preference for

> a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe, p. 704.)

But he thought that a direct suffrage amendment would probably be too extreme to secure ratification by the states. Senator Yates of Illinois stated that the equality of freedom guaranteed by

the Thirteenth Amendment included both civil and political rights. (Globe, App., pp. 100–101.) By that Amendment, he said, the Negro "became a part of the people" and as such "entitled to the same rights and privileges with all the other citizens of the United States."

Although the proposal received a majority vote in the Senate, it lacked the necessary two-thirds. (Globe, p. 1289.)

(2) *The Bingham "equal rights" amendment.* The second precursor of the Fourteenth Amendment is more directly related to section 1 of that Amendment. It had its origin in two proposals of a similar nature which were placed before the Joint Committee on Reconstruction at its third meeting in January 1866.[50]

The first of these proposals, by Congressman Bingham, provided:

> The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.[51]

The second, by Congressman Stevens, chairman of the House group of the Committee, was a simpler declaration that

> All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.[52]

[50] Committee Journal, p. 9.
[51] *Ibid.*
[52] *Ibid.*

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Both were referred to the subcommittee on the apportionment of representatives in Congress, which included Bingham and Stevens.

The following week the subcommittee approved a new draft combining the Bingham and Stevens proposals:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.[53]

The Committee kept it under consideration until after the apportionment amendment had passed the House. The matter was then referred to a special subcommittee, consisting of Bingham, Boutwell of Massachusetts, and Rogers of New Jersey. The subcommittee reported back a draft very similar to Bingham's original proposal:

> Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges.[54]

The Committee by a tie vote failed to approve this draft, and Bingham proposed a modification which the Committee adopted:

[53] Committee Journal, p. 12.

[54] Committee Journal, p. 14.

> The Congress shall have power to make all laws necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property.[55]

Bingham reported the proposed amendment to the House on February 26. (Globe, p. 813.)

The proposal was debated for three days and was then postponed. In his report, Bingham stated that the amendment "stands in the very words of the Constitution"; it had theretofore been "the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State * * * to enforce obedience to these requirements of the Constitution." (Globe, pp. 1033, 1034.)

Rogers of New Jersey, a member of the Joint Committee, expressed the view of the minority that the "protection, security, advancement, and improvement, physically and intellectually, of all classes" should be left to the states:

> Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property. * * * (Globe, App., p. 134.)

[55] Committee Journal, p. 17. It may be observed that each of the proposals, except that of Stevens, provided for exclusive Congressional enforcement.

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They should be permitted by the states to do everything white men could do, except to vote and hold office. However, according to Rogers, the amendment would take from the states the power to regulate such personal rights as education:

> In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States. (Globe, App., p. 134.)

Bingham took the floor again for his proposal, stating:

> that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is

> the perfection of human reason, and which is impartial, equal, exact justice * * *. (Globe, p. 1094.)

Congressman Hotchkiss of New York, however, said that the provision which authorized Congress to legislate guarantees of equal protection would mean that the degree of protection given could vary as the Congress changed. (Globe, p. 1095.) Equal protection should instead be made a

> constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress * * *. [T]he very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override.

Following this three-day debate, further consideration of the proposal was postponed. (Globe, p. 1095.) This postponement was apparently attributable to the reluctance of the moderate Republican group to give Congress the power to determine the measure of equal protection. The objection that the proposal placed upon Congress the direct responsibility not merely of enforcement but of declaring what rights were to be protected was also voiced by members of the majority in the debates on the Civil Rights bill: what a Republican Congress could give, they feared, a Democratic Congress could take away. The guarantees

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of legal equality, to be permanent, therefore had to be made an explicit part of the Constitution.

The majority were determined that the Constitution should not permit any distinctions of law based on race or color, and that it should include express guarantees of equal protection which could not be repealed by any future Congress. The debates on both Stevens' "apportionment" proposal and Bingham's "equal rights" proposal echo the same determination to abolish legal differences based on color or race which had been manifested throughout the debates on the Thirteenth Amendment and its implementing legislation. In the debates on the "equal rights" proposal, the minority repeated their previous argument that to protect equally the civil rights of all persons would destroy racial segregation in state schools. The majority, as before, did not deny that charge but instead continued to discuss equal protection in general terms, without any attempt to enumerate its specific applications.

(3) *H. J. Res. 127: the Fourteenth Amendment.* After the failure of these two proposals, Stevens laid before the Joint Committee in April 1866 a "plan of reconstruction," the core of which was a proposed amendment to the Constitution, containing five sections. Section 1 read as follows:

> No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.[56]

[56] Committee Journal, pp. 28, 29.

Bingham immediately moved to amend this by adding:

> Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.

The committee rejected Bingham's amendment and retained the original form.[57] Subsequently, Bingham secured committee agreement to a new section in these words:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[58]

This section, which contains the wording of the Fourteenth Amendment as eventually adopted, was substituted for the original section 1, and in that form was reported to both Houses on April 30. (Globe, pp. 2265, 2286.) In the House, as H. J. Res. 127, the proposed amendment was made a special order of business. (Globe, p. 2286.)

(a) *The House debate.* There were but three days of discussion in the House under a rule limiting debate, and much of that time was devoted to Reconstruction generalities and to portions of the

[57] *Ibid.*
[58] Committee Journal, p. 39.

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proposal other than section 1. (Globe, p. 2433.) From the opening statement by Stevens on May 8, 1866, until he closed May 10, 1866, with the declaration that the Southern states should not return except "as supplicants in sackcloth and ashes," nearly all the radical Republicans in the House echoed his disappointment that suffrage for the Negro was not directly included in the proposed amendment. (Globe, pp. 2459, 2544.) However, Stevens remarked that what was proposed "is all that can be obtained in the present state of public opinion." (Globe, p. 2459.)

The discussion of Section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He affirmed the justice of its provisions:

> They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies the defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court

> shall allow the man of color to do the same. (Globe, p. 2459.)

Stevens referred to discriminatory state laws which disqualified Negroes from testifying in courts, and provided different methods of trial or different punishments for them. He did not wish, however, to "enumerate these partial and oppressive laws" at length. But, he said,

> Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. (Globe, p. 2459.)

He anticipated that it would be contended that the "civil rights bill secures the same things." That was only "partly true." Moreover,

> a law is repealable by a majority. * * * This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get. (*Ibid.*)

The arguments which Stevens made for this section of the Amendment do not indicate that, apart from the suffrage provision, he considered there was any difference in substance between the new proposal and his own earlier one (*supra,* p. 36) that "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color."

Congressman Finck of Ohio was opposed to the amendment, but all he said about section 1 was that—

> if it is necessary to adopt it, in order to confer upon Congress power over the mat-

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> ters contained in it, then the civil rights bill * * * is clearly unconstitutional. (Globe, p. 2461.)

Congressman Garfield of Ohio, later President, rose to support the proposal:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arises when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. (Globe, p. 2462.)

The first section, he said, would hold "over every American citizen, without regard to color, the protecting shield of law."

Congressman Raymond of New York, publisher of the New York Times and a conservative Republican who had voted against the Civil Rights bill, undertook to explore the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

> It was first embodied in a proposition introduced by the distinguished gentleman from Ohio, [Mr. Bingham,] in the form of an amendment to the Constitution, giving to Congress power to secure an absolute

> equality of civil rights in every State of the Union. It was discussed somewhat in that form, but, encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though Raymond had voted twice against the civil rights bill, the principle of which was embodied in the proposed amendment, he stated that he was supporting the latter because he was "heartily in favor of the main object which that bill was intended to secure." All that he wanted was to have this accomplished by constitutional means. (*Ibid.*)

Congressmen Randall of Pennsylvania and Rogers of New Jersey were among the few opponents of the amendment who registered specific objections to section 1. (Globe, pp. 2530, 2538.) Although most of the others objected to reconstruction generally, or to other sections of the proposal, Randall objected because:

> The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They

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> relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States. (Globe, p. 2530.)

Rogers insisted that "the first section of this programme of disunion" was "most dangerous to liberty." (Globe, p. 2538.) It was, he said,

> no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which * * * was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation. (Globe, p. 2538.)

The speeches of Congressmen Bingham and Stevens closed the debate. To Bingham, the need for the first section was "one of the lessons that have been taught * * * by the history of the past four years of terrific conflict." (Globe, p. 2542.) It was to supply the absence in the Constitution of a

> power in the people, the whole people of the United States, * * * to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

This amendment would not take rights properly reserved to the states, for

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (Globe, p. 2542.)

Section 1 would carry out the great objectives of the Constitution in protecting persons "by national law from unconstitutional State enactments." (Globe, p. 2543.)

After Stevens' speech, which candidly outlined the partisan political aims of the entire amendment, a vote was taken, and on May 10, 1866, it passed by more than the necessary two-thirds. (Globe, p. 2545.)

(b) *The Senate debate.* In the Senate, the amendment received more extended consideration. It was first brought up May 23, nearly two weeks after it passed the House. (Globe, p. 2763.) Senator Howard of Michigan made the report for the Joint Committee in place of the chairman, Senator Fessenden, who was ill.

Howard explained section 1 in great detail. He said:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. * * * It estab-

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> lishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining. (Globe, p. 2766.)

The fifth section of the proposal, he stated, would enable the Congress,

> in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment. (Globe, p. 2768.)

Senator Stewart of Nevada spoke generally on the amendment as a plan of reconstruction. (Globe, p. 2798.) He discussed the purposes of section 1 in terms of the conflict between the Congress and the President. Mere restoration of the Southern states on their pre-war footing would, he said, permit them to continue "to apply the theories of slavery to a condition of freedom":

> They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished

> at the inconsistencies of the world and its tendency to recognize the rights of man. (Globe, p. 2799.)

However, he did not believe the amendment sufficed in its present form, for to him Negro suffrage was the only definite answer to "slavery and inequality of human rights." (*Ibid.*)

Up to this point, on May 24, the debate had produced a number of proposed revisions, for the most part concerned with other sections of the amendment. (Globe, pp. 2768, 2770, 2804.) With Stewart's speech, it was plain that the majority party was not united on all the aspects of the amendment. Further consideration was postponed for five days, until Tuesday, May 29. Friday, Monday, and Tuesday morning were devoted to a caucus of the Republican members of the Senate.[39] What was discussed in the caucus, or who proposed the changes agreed to by the caucus, cannot be determined; it is clear, however, that there was great unity thereafter. In fact, opponents found it "hard work to speak" when they knew in "advance that no argument, however just and forcible, and no appeal, however patriotic, can influence a single vote." (Globe, p. 2938.)

Senator Howard, as floor leader, took up the amendment Tuesday, and offered the changes which had been agreed to in caucus. (Globe, p. 2868.)

[39] James, *The Framing of the Fourteenth Amendment* (1939), pp. 171–172 (an unpublished thesis in the library of the University of Illinois).

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The only section 1 change was the addition of a declaration of citizenship as its first sentence:

> All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (Globe, p. 2869.)

The purpose of this change was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States." (Globe, p. 2890.)

All of the caucus changes were adopted. (Globe, pp. 2897, 2921.) The renewal of the debates showed marked unity not only in the majority party but also in the opposition. Most of the Senators in that group undertook active opposition—Hendricks of Indiana, Davis of Kentucky, McDougall of California, Reverdy Johnson of Maryland, Democrats; and Cowan of Pennsylvania and Doolittle of Wisconsin, dissident Republicans.

The pattern of opposition was set by Hendricks. (Globe, p. 2938.) To him, the amendment was a matter of partisan politics, a mere "party programme." The whole proposal would centralize "absolute and despotic power" in the Federal government. (Globe, p. 2940.) Senator Davis likewise accused the majority of a "bold and desperate political game." (Globe, App., p. 238.) As to the first section, he said, its

> real and only object * * * is to make negroes citizens, to prop the civil rights bill,

> and give them a more plausible, if not a valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, App., p. 240.)

None of the opposition Senators devoted any discussion to specific illustrations of "equality"; they, along with the majority, were more concerned with its general and political implications.

After the caucus, only four of the proponents of the amendment found it necessary to make major speeches, Poland of Vermont, Howe of Wisconsin, Henderson of Missouri, and Yates of Illinois. (Globe, pp. 2961, 3031, 3037, App., p. 217.) Senator Poland was first, and he argued the necessity and justice of reconstruction generally. (Globe, p. 2961.) As to section 1, he declared that its provisions were largely a restatement of those in the original Constitution. Nevertheless,

> we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the

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> power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States * * *. (Globe, p. 2961.)

Senator Howe, arguing the necessity of radical reconstruction policies, directed attention to section 1. (Globe, App., p. 217.) His is an important speech, because it went beyond generalities and dealt expressly with the amendment's application to public schools. Howe attacked Senator Hendricks' argument that state rights were invaded by the amendment, for no state had a right to have an "appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (Globe, App., p. 219.) But for Federal intervention, the Southern states would have continued to deny "to a large portion of their respective populations the plainest and most necessary rights of citizenship." As a result of such intervention, he acknowledged that most of those states had granted some basic rights, such as contract, ownership, suit, and the like; but

> these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (Globe, App., p. 219.)

The single instance of continuing inequality which Senator Howe cited to illustrate the need for section 1 was "a statute enacted by the Legislature

of Florida for the education of her colored people." He analyzed for the Senate the details of the inequality of that statute: First, there was unequal taxation, for

> They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. (Globe, App., p. 219.)

Moreover under the statute there was an insufficient sum provided for Negro education, only about twelve thousand dollars, of which all but $2,200 was to pay the superintendent of colored schools and the assistant superintendents. Finally, the Negro schools in Florida, he said, could not be satisfactory, since their administration would be subject to the uncontrolled discretion of the superintendents:

> Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, * * * and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent see fit to allow * * *. (Globe, App., p. 219.)

Since legislation of this degree of inequality, touching "one of the great interests not only of

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this colored population but of the State itself," had been already enacted, Senator Howe asked if there could possibly be hesitation in amending the Constitution to place a "positive inhibition upon exercising this power of local government to sanction such a crime * * *." His speech thus clearly reflects an understanding that school legislation which discriminated against Negroes would be invalidated by the amendment.

Following Howe, Senator Henderson, draftsman of the Thirteenth Amendment, defended the new proposal. (Globe, p. 3031.) He said that the South, after the adoption of the Thirteenth Amendment,

> saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave. (Globe, p. 3034.)

He referred explicitly to the anti-slavery origins of the new amendment; to him, the Southern position that the Negro was "inferior to the white man" had caused the war because it came into irreconcilable conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges." After the war, it

had become necessary "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." The amendment, he said, was the only way to remove the cause of disease.

Senator Yates likewise expressed the belief that as a result of the Thirteenth Amendment the freed Negro had in law become "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (Globe, p. 3037.)

Following some unsuccessful attempts by the opposition to have the sections of the amendment submitted as separate propositions, and to strike out the privileges and immunities clause because it was too vague, the final vote was taken on June 8. (Globe, p. 3042.) The amendment was adopted by a vote of 33–11, more than the necessary two-thirds. (*Ibid.*)

In the House, the amendment was called up by Stevens on June 13, with the statement that the Senate amendments were so slight that there was no purpose in having lengthy discussion. (Globe, p. 3144.) There was a brief debate of a general nature not directed at any specific provisions of the amendment. (Globe, pp. 3144–3148.) That same day, the amendment, in the form in which it had passed the Senate, was approved by the House by a vote of 120 to 32.[60]

[60] (Globe, p. 3149.) The Fourteenth Amendment, as thus submitted, reads as follows:

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E. RATIFICATION OF THE FOURTEENTH AMENDMENT BY THE STATES

In contrast to the abundance of materials relating to the legislative history of the Fourteenth Amendment in Congress, the available records concerning its ratification by the state legislatures

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

are scanty and incomplete.[61] State legislative debates for the period were not reported, except in Pennsylvania and, in digest form, in Indiana. Official records of state action are limited to the messages of the Governors transmitting the proposed Amendment to the legislatures, often as merely a minor item in the annual message, occasional committee reports, and items entered in the legislative journals.

The Fourteenth Amendment was proposed by Congress on June 16, 1866. It was declared adopted on July 28, 1868, after thirty states had ratified it. During the years 1866 and 1867 it was ratified by twenty-two states, including only Tennessee of the eleven former Confederate states.[62]

"SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[61] Our research in the state materials has necessarily been limited to those available in the Library of Congress, including its Microfilm Collection of Early State Records prepared under the supervision of Professor W. S. Jenkins, of the University of North Carolina. Detailed accounts of the ratification proceedings in all of the states appear in the Appendix to this brief.

[62] In three of these states—Ohio, New Jersey and Oregon—resolutions were passed by the state legislature in 1868 to withdraw the prior consent to the Amendment. In each in-

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It was rejected by three border states and the other Southern states. In 1868, as a condition of restoration under the Reconstruction Act, seven Southern states ratified the Amendment, along with Iowa, and it came into effect. Subsequently, in compliance with the Reconstruction Act, the other three Southern states ratified.

Ratification by the Northern states in 1866 and 1867 was on the basis of party lines, with the Republican legislatures approving the Republican plan of reconstruction for the South. Rejection by the Southern and the border states was based on opposition to that plan of reconstruction. In both cases the emphasis was upon the political clauses.[63]

The Fourteenth Amendment as "a plan for reconstruction for the South" was a highly controversial party issue in the elections of 1866. Interest centered on its political clauses: the redistribution of representation under section 2 and the related question of Negro suffrage; the disqualification of Southern leaders under section 3; and the war debt provisions of section 4. References to the first section during the election campaigns were, as a rule, brief and general in nature, such as, for instance, that this section made the Civil Rights Act of 1866 a part of the Constitution, that

stance the attempted "rescission" came after a change in the party control of the legislature. See Flack, *The Adoption of the Fourteenth Amendment* (1909), pp. 165–168, 170.

[63]A more detailed review is in Flack, *supra*, chs. III, IV.

it meant Negro equality, or that it centralized power in Congress.[64]

With emphasis during the campaign of 1866 on the political clauses and with little need after the election to do more than carry out the decision of the voters, there was little occasion to analyze the Amendment in detail, and still less occasion to discuss the specific applications of the first section. The Governors' messages to the state legislatures were in general terms, as were the committee reports recommending ratification.[65]

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[64] See Flack, *supra*, pp. 140–160.

[65] Governor Morton of Indiana, for example, said little more than that

"No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no arguments in its behalf before this General Assembly. Every member understands it. * * *" (Indiana Senate Journal 1867, p. 42.)

Governor Crawford of Kansas submitted the Amendment with this comment:

"Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood." (Kansas Senate Journal 1867, p. 45.)

Governor Fenton of New York, in recommending adoption of "a proposition so moderate and so just" stated that

"I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved. * * *

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There were sufficient references to the first section to show an understanding that it guaranteed to the Negroes full rights as citizens, but the exact content of those rights was not spelled out. It was to provide "civil equality before the law,"[66] "equal protection of all citizens in the enjoyment of life, liberty and property,"[67] "all the political and civil rights citizenship confers,"[68] and "to destroy all legal caste within our borders."[69]

The first section was intended

> to destroy every distinction founded upon a difference in the caste, nationality, race or color * * * which has found its way into the laws of the Federal and State Governments which regulate the civil relations or rights of the people. * * * In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to everyone here declared a citizen.[70]

In the debates in Pennsylvania, where school segregation existed, Senator Landon expressed this idea more forcefully:

"There is no other plan before the people, and the verdict of the ballot-box implies that no other plan is desired. * * " (New York Assembly Journal 1867, vol. 1, pp. 13–14.)

[66] Governor Bullock, Massachusetts Acts and Resolves 1867, p. 820.

[67] Governor Brownlow, Tennessee Senate Journal, Called Session, 1866, p. 4.

[68] Governor Oglesby, Illinois Senate Journal, 1867, p. 40.

[69] Taylor in the Pennsylvania debates. Pennsylvania Legislative Record, 1867, App., p. XXII.

[70] Jenks, opposing ratification, in the Pennsylvania debates, *id.* p. XLI.

> * * * You ask me: what do you want for the colored man? I reply, do you let the white rebel go to school? I claim that the colored man shall go to school; do you protect the white man before the law, you shall protect the colored man before the same law; do you punish a crime in a colored man, you shall punish the same in a white man in the same way; and a virtue that will reward a white man shall be rewarded in the colored man. Do you let the white rebels of Carolina or Florida vote, then in the name of Heaven command that the colored man in the same State shall vote."[71]

Opposition to the amendment, in so far as it referred to the first section, was based on its transfer of power to the Federal Government."[72]

In the South, where the Amendment was at first rejected, emphasis was given to the political clauses, particularly those dealing with representation and with disqualification of the former

[71] *Id.*, p. IX.

[72] Thus, the minority report of the Wisconsin Senate Committee on Federal Relations commented that

"The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizens in the state and to subordinate state governments to federal power." (Wisconsin Senate Journal 1867, p. 98.)

The minority report in New Hampshire characterized the Amendment as

"* * * a dangerous infringement upon the rights and independence of all the States, North as well as South, assuming, as it does, to control their legislation in matters purely local in their character." (New Hampshire House Journal 1866, pp. 176–177.)

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leaders of the South.[73] The validity of the procedure by which the Amendment was submitted was also attacked, the argument being that a Congress from which representatives of the Southern states were excluded could not properly propose an amendment.[74]

The first section was attacked, not so much on the ground that it extended rights to the Negroes, but that it, together with the fifth section, enlarged the powers of the Federal Government to such an extent as to destroy the rights of the states.[75]

[73] See Flack, *supra*, p. 159.

[74] See, for example, the report of the Georgia Joint Committee on the State of the Republic, Georgia Senate Journal, 1866, pp. 65–71.

[75] For example, Governor Patton of Alabama, in recommending rejection of the Amendment, stated as an objection to the first section that:

"It would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important, or however trivial, which could arise under the State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress." (Alabama Senate Journal 1866, p. 33.)

Governor Walker of Florida, referring to the first and fifth sections, stated that:

"These two Sections taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely

The later messages of the Southern Governors recommending ratification of the Amendment because such ratification was a condition precedent to readmission into Congress contained no analysis of the Amendment. The ratification of the Amendment by the Southern states was perfunctory, without any discussion of its meaning or effect.[76]

In our review of the records of the ratification proceedings, the specific references to the possible effect of the Amendment on education consist of three brief statements: that of Senator Landon of Pensylvania, quoted *supra,* p. 62; a statement by Representative Ross in the Indiana debates that under the Amendment "The blacks would sit with us in the jury-box, and with our children in the common schools";[77] and a report

changing the form of government." (Florida Senate Journal 1866, p. 8.)

[76] A typical example was Governor Murphy's message to the Arkansas legislature in which he remarked that:

"As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention to the importance of early attention to the ratification of the same." (Arkansas House Journal 1868, p. 19.)

The record of House action is equally typical.

"On motion of Mr. SIMS, the rules were suspended by a two-thirds vote, and the joint resolution was placed on its second reading; after which it was engrossed, and read a third time and put upon its final passage by calling of ayes and nays." (*Id.*, p. 22.)

[77] Brevier Legislative Reports, 1867, p. 80.

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from a Kentucky contributor to a newspaper that the Democrats in Kentucky say "That amendment admits * * * their children to the public schools. * * *"[78]

The paucity of the available materials on the ratification of the Fourteenth Amendment by the states is such as to preclude any definite conclusion as to the existence of any general understanding of the effect which the Amendment would have on racial segregation in public schools. Apart from the few scattered references given above, we have found no manifestations of an awareness in the state legislatures that the Amendment would affect public education, as this Court later held in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, and related cases (see pp. 143–149, *infra*), by imposing on a state the duty of furnishing such education to all its citizens, if furnished to some, on a basis of equality of right. The available materials do show that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates (pp. 20–56, *supra*), namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color.

[78] McPherson's *Scrap Book*, *Fourteenth Amendment*, p. 84 (name of paper not given).

F. CONTEMPORANEOUS ACTIONS, FEDERAL AND STATE, BEARING ON SCHOOL SEGREGATION

The Reconstruction period, during which the Fourteenth Amendment was adopted, also witnessed other actions, both in Congress and the states, which are relevant to an inquiry into the contemporaneous understanding of the Amendment's effect on school segregation. The 39th Congress in 1866 also passed laws concerning (a) the schools maintained by the Freedmen's Bureau, and (b) the public schools in the District of Columbia. In the proceedings in Congress in 1868 and 1870 on the readmission of the Southern states there were some references to the matter of public school education for Negroes. In later Congresses, repeated efforts were made, particularly under the leadership of Senator Sumner, to provide specific enforcement of the rights secured by the Fourteenth Amendment. These efforts culminated in the Civil Rights Act of 1875. At one stage in its legislative history that Act contained a provision forbidding racial segregation in public schools. In the states, various actions were taken to provide public education for Negroes. In some states, particularly in the North, existing laws for segregated schools were continued; in other states, particularly in the South, school segregation laws were enacted shortly after the Fourteenth Amendment was adopted; in still other states, provisions for mixed schools were enacted. In this section of the brief

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we shall summarize these actions, both federal and state, and attempt to evaluate them as evidence of a contemporary understanding as to the Fourteenth Amendment's effect on racial segregation in public schools.

1. Federal legislation in the 39th Congress

(a) *The Freedmen's Bureau Extension Act.* In May 1866 there was again raised in the House the question of extending the life of the Freedmen's Bureau and providing it with the authority to safeguard the welfare and civil rights of the freedmen. (Congressional Globe, 39th Cong., 1st Sess., p. 2743.) Representative Eliot reported from his Select Committee on Freedmen a bill (H. R. 613) similar to the one vetoed by President Johnson in February 1866 (*supra*, pp. 23–25), and it passed the House without any particularly significant discussion. (Globe, p. 2878). In the Senate, it was referred to the Military Affairs Committee, of which Senator Wilson was chairman, and was favorably reported with substantial amendments. (Globe, p. 3409). It passed the Senate in June, but was vetoed by the President. (Globe, pp. 3413, 3838.) With no discussion, the veto was overridden in both House and Senate, and the bill became law July 16, 1866. (Globe, pp. 3842, 3850; 14 Stat. 173.)

The House version of the bill had made provision for the maintenance of schools for the freedmen, with equipment and teachers to be supplied

by private societies.[79] The Senate kept that provision, and added a provision for financing the schools from the property of the Confederate States. (Globe, pp. 3409, 3410.) After the termination of the Freedmen's Bureau, the remaining proceeds of such property were to be distributed proportionately to those southern states "which have made provision for the education of their citizens without distinction of color." There was also resolved a long-standing dispute as to the disposition of certain islands off Georgia and South Carolina, which General Sherman had devoted to the freedmen's use. (Globe, p. 2809.) One provision in resolution of that dispute distributed the proceeds of a certain portion of those lands to "the support of schools, without distinction of color or race, on the islands in the parishes of St. Helena and St. Luke." (Globe, p. 3409.)

These two provisions are the only instances in which the 39th Congress legislated directly to establish schools that were financed in whole or in part from Federal funds, and it is noteworthy that in these provisions it expressed a policy

[79] The educational societies concerned were the successors of the former abolitionist groups and adhered to their concepts of equality in civil rights. Thus, the American Freedmen's Union Aid Commission, a central organization of these societies, had in its constitution a provision that "no schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color." *American Freedman* (1866), p. 18.

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favoring schools making no distinctions on grounds of race or color.

(b) *School Legislation for the District of Columbia.* A month after the 39th Congress submitted the Fourteenth Amendment to the states, it provided that an earlier school act for the District of Columbia (the Act of June 25, 1864, 13 Stat. 187) should be construed to require the authorities of Washington and Georgetown to pay over certain moneys for the support of the separate colored schools in those cities (Act of July 23, 1866, 14 Stat. 216). A week later, on the final day of the session, Congress passed a bill authorizing a grant of three lots in Washington for colored schools (Act of July 28, 1866, 14 Stat. 343).

Separate schools for colored children had been established for Washington County by the Act of May 20, 1862, 12 Stat. 394, and for the cities of Washington and Georgetown by the Act of May 21, 1862, 12 Stat. 407. When Congress in the Act of June 25, 1864, *supra,* provided a reallocation of taxes for the support of the various District school systems, it left unchanged the existing provisions for separate colored schools. It is to be noted that none of the foregoing measures received much attention in Congress. There were no written committee reports. All were considered perfunctorily as part of routine District business, and were passed with scarcely any debate or division in vote. (Globe, 37th Cong., 2d Sess. pp.

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1544, 2037, 2157; Globe, 38th Cong., 1st Sess., pp. 2814, 3126.)[80]

It is contended that the 1866 school legislation for the District of Columbia evidences an understanding by the 39th Congress, which proposed the Fourteenth Amendment, that the Amendment did not prohibit racially-segregated schools. We believe that no persuasive inference can be drawn of any connection between these acts and the Amendment. In the first place, separate schools in the District for colored children had been established by Congress four years before the Fourteenth Amendment was proposed. The 1866 Acts were only implementations of the existing legislation. The legislative history of those measures contains no indications that they were regarded as having any relation to the Fourteenth Amendment. The latter was the product of the Joint Committee on Reconstruction; the District schools bills were reported by the Senate and House District Committees, none of whose members was on the Joint Committee. (Globe, 39th Cong., 1st Sess., pp. 11, 21, 57, 106.) The Amendment was passed by Congress only after prolonged and searching debate, while the school measures were considered perfunctorily, amid a welter of routine District business. There were no committee

[80] Cf. *Metropolitan Rd.* v. *District of Columbia*, 132 U. S. 1, 5, on the limited extent of interest and interference by Congress in the internal affairs of the District prior to the Organic Act of 1871, 16 Stat. 419.

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reports, no debate or noteworthy comment. There was no roll call vote in either House or Senate on these bills. (Globe, 39th Cong., 1st Sess., pp. 2719, 3906, 4278.)

The Act of July 23, 1866, dealt with a question raised in a local controversy regarding the allocation of school funds. It merely provided that there would be made available for the Negro schools, newly-created under the legislation of 1862, the funds which the Congress had previously committed for their support, but which had been locally withheld. Similarly, in the Act of July 28, 1866, the question was merely one of easing the financial burden of supporting the Negro schools by the donation of building sites. In the debates on these bills, characterized by their sponsor, Senator Morrill of Maine,[81] as "very small measures * * * which will take no great time anyway" (Globe, 39th Cong., 1st Sess., p. 2716), there is no evidence that any member of Congress thought that its action on these measures would constitute a legislative interpretation of the Fourteenth Amendment, or indeed that the Amendment was in any way relevant. Congress was exercising its exclusive jurisdiction over the District, to which the Fourteenth Amendment in terms did not apply. Moreover, the conditions prevailing in the District during this period

[81] Senator Morrill, in the debates during this same session on the Civil Rights Act, expressed the conviction that the Constitution forbade distinctions based on race or color. (Globe, 39th Cong., 1st Sess., pp. 570–571.)

were such as to make the question of mixed or separate schools relatively unimportant. Throughout the entire period the overriding problem was to make a beginning in providing some schools for Negroes. Prior to the war, the problem of Negro education had been completely disregarded by the Congress; and at each step taken after 1860, attention was focussed on the need of creating educational facilities for a race that theretofore had received no public educational benefits. Details of school organization were subordinated to that need, and were not considered and discussed in Congress.

2. Legislation in Congress after 1866

(a) *Readmission of the Southern States.* Under the Reconstruction Act of March 2, 1867 (14 Stat. 428) the Southern states, as a condition of representation in Congress, were required to form "a constitution of government in conformity with the Constitution of the United States in all respects" which was to be submitted to Congress "for examination and approval." In 1868, the new constitutions were submitted to Congress by Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina, and those states were readmitted (15 Stat. 72, 73). None of these state constitutions provided for separate schools for colored children; in at least three of them (Louisiana, South Carolina, and Florida) a provision for mixed schools was expressed or implied. (See *infra,* pp. 97–98.)

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In the House debates, opponents of the reconstruction program unsuccessfully objected to provisions in the constitutions of Alabama (Congressional Globe, 40th Cong., 2d Sess., pp. 1937, 2197), Arkansas (Globe, p. 2395), Louisiana (Globe, p. 2449), and South Carolina (Globe, p. 2447), which they thought required mixed schools.

In the Senate debates on the readmission of Arkansas, Senator Drake of Missouri proposed the following condition:

> That there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed. (Globe, p. 2748.)

Senator Henderson of Missouri offered as a substitute:

> * * * the further condition that no person on account of race or color shall be excluded from the benefits of education, or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State.

In the ensuing colloquy it appeared that Senator Henderson feared that the term "or of any other right" in Senator Drake's proposal might be construed as requiring mixed schools. Accordingly, his substitute was intended explicitly to permit separate schools. (Globe, p. 2748.)

In answer to a question from Senator Henderson, Senator Frelinghuysen of New Jersey (not a member of Congress when the Fourteenth Amendment was proposed) stated his view that neither the Drake proposal nor the Amendment "touches that question, as to what school they shall be educated in * * *." (Globe, p. 2748.) Senator Henderson explained that:

> I desire that the negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites. * * * But I would not provide here by a condition that the States should extend the same rights to the negroes in regard to office-holding, marrying, or anything else, that they do to the whites * * *

His amendment was defeated, however, by a vote of 30 to 5 (*ibid*). The Drake amendment was agreed to,[82] but subsequently the Senate accepted the House version of the bill not containing that amendment.

In 1870 Virginia (16 Stat. 62), Mississippi (16 Stat. 67) and Texas (16 Stat. 80) were read-

[82] The omnibus bill for the admission of other Southern states, reported from the Judiciary Committee the next day (Globe, p. 2759), contained the Drake amendment with the words "or any other right" omitted. Senator Trumbull explained that their insertion "might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend; and as the committee thought there was no importance in the words they are left out of the amendment." (Globe, p. 2858.)

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mitted. Each act of admission contained a condition:

> That the constitution * * * shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

The bill for the admission of Virginia as reported by the Committee on Reconstruction (H. R. 783, 41st Cong., 2d Sess., Globe, p. 362) contained an express prohibition on amending the state constitution:

> * * * to prevent any person on account of race, color, or previous condition of servitude from * * * participating equally in the school fund or school privileges provided for in said constitution * * *

Its inclusion was explained as required by the bitter hostility to the common-school system expressed by the newly elected Governor of Virginia. (Globe, pp. 402, 442, 546.) It was justified as essential to a republican form of government. (Globe, pp. 485, 500.) Similarly, the provision concerning school rights in the bill for the admission of Mississippi was justified as a means of preserving a republican form of government. (Globe, pp. 1253, 1255.) The view was also expressed that under the Fourteenth Amendment the colored man was entitled to "the same rights and privileges of schools that the white man has * * *." (Globe, p. 1329.) The debates are concerned, however, with the guarantee of education to

the Negroes rather than with the question of separate schools.

Georgia was "reconstructed" a second time (16 Stat. 59, December 22, 1869) and readmitted in July 1870 (16 Stat. 363). The bill for admission of Georgia (H. R. 1335, 41st Cong., 2d Sess.; Globe, p. 1702) contained a condition on school rights similar to that in the Virginia, Mississippi, and Texas acts, but the final act contained no conditions. The debates indicate the same view that opportunity of education for the Negroes was an element of a republican form of government (Globe, p. 1704).

In sum, therefore, the debates on the readmission of the Southern states into the Union fail to disclose any definite understanding as to the effect of the Fourteenth Amendment on school segregation, but it is of some significance that none of the state constitutions submitted to and approved by Congress as being "in conformity with the Constitution of the United States in all respects" provided for segregated schools (see *nfra,* pp. 97–98).

(b) *Legislative Attempts to Abolish School Segregation in the District of Columbia.* In 1871 the issue of public schools of the District of Columbia came squarely before the 41st Congress. On January 23, 1871, a bill was introduced in the Senate, S. 1244, to regulate the organization and conduct of the public schools in the District of Columbia. (Globe, 41st Cong., 3d Sess., p. 663.) The bill was reported by the District Committee

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with an amendment which would abolish racial segregation in the District schools. (Globe, p. 1054.[83]) The amendment was vigorously supported on the floor of the Senate by Senator Sumner, a member of the District Committee, and several other Senators on the ground that it was required by the principle of equality underlying the Fourteenth Amendment. (Globe, pp. 1055, 1056, 1058.) Sumner stated that "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on his color". (Globe, p. 1055.) Senator Carpenter of Wisconsin agreed:

> Mr. President, we have said by our Constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case. (Globe, p. 1056.)

None of the opponents of the bill explicitly controverted the view that the Amendment's broad

[83] This and succeeding references to the Congressional Globe are, until otherwise noted, to the 41st Cong., 3d Sess.

principle applied to racial segregation in the schools. (See Globe, pp. 1054, 1056, 1057, 1059, 1060.) The bill, however, was dropped without any vote, in favor of more pressing business, and was not taken up again. (Globe, p. 1061.)

Another bill was introduced by Senator Sumner in the next Congress on December 12, 1871. (S. 365, Globe, 42d Cong., 2d Sess., p. 68.) This bill, "to secure equal rights in the public schools of Washington and Georgetown," would also have abolished racial segregation in those schools. Like its predecessor, it was put aside, after a brief debate containing nothing of significance here, without any vote, in favor of other business. (Globe, 42d Cong., 2d Sess., pp. 2539, 2542, 3057, 3058, 3099–3100, 3122–3125.)

(c) *Civil Rights Act of 1875.* The issue of racial segregation in public schools came before the Congress for extended but indecisive consideration between 1870 and 1875 in connection with the efforts of Senator Sumner and others for further civil rights legislation.

Sumner, advocate of the 1871 proposals to abolish racial segregation in the District public schools, had in 1870 introduced a bill to secure the right of all citizens throughout the United States to "full and equal enjoyment" in respect of theaters, conveyances, inns, and public schools. (S. 916, 41st Cong., 2d Sess., Globe, p. 3434.) In substantially its original form, it was reintroduced

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in each subsequent Congress until 1873, but without success. In 1872, it was twice attached to amnesty bills in the Senate. (H. R. 380, H. R. 1050, 42d Cong., 2d Sess., Globe, pp. 919, 3268.) Both of these amnesty bills (with the civil rights rider) failed because they did not receive in the Senate the two-thirds vote required under section 3 of the Fourteenth Amendment, although they did receive majority approval. Similarly, efforts during the same session to suspend the House rules to bring up the House counterpart of Sumner's bill failed of the two-thirds vote necessary, despite clear majorities. (Globe, 42d Cong., 2d Sess., pp. 1956, 3383, 3932, 4321–4322.) The debates in Congress on these bills proceeded on the understanding that they would require non-segregated schools throughout the country, and this was one of the most controversial points in issue. (Globe, 42d Cong., 1st Sess., App., p. 216; Globe, 42d Cong., 2d Sess., pp. 241–243, 384; 2 Cong. Rec. 4088.)

In 1873, in the first session of the 43d Congress, Sumner again introduced a bill prohibiting segregation generally, including segregation in the schools. Civil and criminal penalties were provided for violation. (S. 1; 2 Cong. Rec. 10.) In March 1874, a month after Sumner's death, the bill was reported favorably by the Senate Judiciary Committee. (2 Cong. Rec. 3053.) An attempt on the floor to amend the bill by adding a provision permitting "separate but equal" schools

failed (2 Cong. Rec. 4167), and in May the bill passed the Senate (2 Cong. Rec. 4176). However, several efforts to bring the bill up for consideration in the House failed because of dilatory tactics on the part of the minority. (2 Cong. Rec. 4242, 4439, 4691, 5162.)

In 1874, in the second session of the 43d Congress, the House Judiciary Committee reported a civil rights bill similar to Sumner's, but containing a provision expressly permitting "separate but equal" schools. (H. R. 796; 3 Cong. Rec. 116.) Consideration on the floor was again impeded by the tactics of the minority, which forced one continuous three-day session. (3 Cong. Rec. 786–829.) A compromise was finally reached (see *infra*, pp. 82–84), and the bill passed the House on February 4, 1875, after deletion not only of the provision for segregated schools, but also of any reference whatever to schools. (3 Cong. Rec. 1010, 1011.) Senate approval of the bill, in the compromise form, followed shortly thereafter. (3 Cong. Rec. 1870.) The bill, which has come to be known as the Civil Rights Act of 1875, became law on March 1, 1875, 18 Stat. 335.[84]

The members of Congress who throughout this period persisted in their advocacy of unsegregated schools included many who had been prominent

[84] This Act was declared unconstitutional in 1883 in the *Civil Rights Cases*, 109 U. S. 3, the Court holding that the Fourteenth Amendment's prohibitions extended only to state and not to individual actions.

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in the passage of the Fourteenth Amendment in 1866.[85] Sumner was their leader until his death. His view, frequently expressed, was that the Reconstruction Amendments had established the sweeping principle that

> all persons without distinction of color shall be equal before the law. Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute provisions and regulations; notoriously, public conveyances are in the nature of common carriers subject to a law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color. (Cong. Globe, 42d Cong., 2d ~~8d~~ Sess., p. 242; see also, *supra,* p. 77.)

To Sumner, public schools[86] established by law could not be maintained on a segregated basis:

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[85] For example, in 1874 when the Senate passed Sumner's bill (S. 1) prohibiting racial segregation in the public schools, by a vote of 29 to 16, the majority included nine former members of the 39th Congress—Allison, Boutwell, Conkling, Edmunds, Howe, Morrill of Vermont, Stewart, Washburn and Windom. No Senator who had participated in the framing of the Fourteenth Amendment voted with the minority. 2 Cong. Rec. 4176.

[86] Sumner agreed to provisions permitting segregation in private schools, as proposed by Frelinghuysen. (Globe, 42nd Cong., 2d Sess., 435, 487, 3267.)

> The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. (Globe, p. 384.)

Senators Conkling, Boutwell and Justin Morrill, all members of the Joint Committee on Reconstruction in 1866, apparently shared Sumner's views. (See, e. g., 2 Cong. Rec. 4151, the vote rejecting the "separate but equal" amendment.) Others of the majority likewise rejected the contention that separate school facilities were permissible under the Fourteenth Amendment. To Morton of Indiana, the Senate majority leader, segregation was a violation of the principle of equality embodied in the Fourteenth Amendment, which had taken "from the States the power to make class legislation." (Cong. Globe, 42d Cong., 2d Sess., p. 847.) Senator Pease of Mississippi agreed that there could be no real equality in "equal advantages in separate schools." (2 Cong. Rec. 4154.) See also footnote 40, *infra,* p. 103.

The opposition in the Senate was led by Senator Thurman of Ohio, of the minority party, who argued that equal protection of the laws, with

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regard to public schools, required only that school funds should be applied so that "each citizen shall have an equal advantage from its application." (Globe, 42d Cong., 2d Sess., App. p, 26; see 2 Cong. Rec. 4083–4089.) Other members of the minority expressed the view that the requirement of equality was satisfied if the separate facilities were equivalent. (See, e. g., Globe, 42d Cong., 2d Sess., p. 241.)

As discussed *supra,* p. 79, the Sumner bill was not reached in the House, which took up instead a similar bill that contained a provision permitting schools to be "separate but equal". (H. R. 796, *supra.*) The school issue proved a stumbling block, and a compromise was reached on the bill, striking all reference to schools, only a short time before its passage. Congressman Cain of South Carolina, a Negro, indicated that for the sake of unity within the majority party, the Negroes would accede to the elimination of all reference to schools. (3 Cong. Rec. 957, 981–982.) As Congressman Monroe of Ohio stated, the Negroes thought that "their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this [the "separate but equal" provision]." (3 Cong. Rec. 998.) Moreover, the fear was expressed that if the provision requiring mixed schools was insisted upon "then in certain States of the South schools will be abandoned altogther." (3 Cong. Rec. 981.)

The controversy in the House and the reasons for the compromise effected were fully summarized by Congressman Butler of Massachusetts, Chairman of the Judiciary Committee, who himself had also been a member of the 39th Congress:

> There are two kinds of opinion in the republican party on this question. I myself would legislate equal privileges to white and black in the schools, if I had the power, first, to legislate, and secondly, to enforce the legislation. But the difficulty I find in that is, that there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up if we put that provision into the bill. Then comes the provision of the committee that there shall be separate schools wherever schools are supported by taxation. There are some difficulties with an unwilling people in carrying out that provision, and there is an objection to it on the part of the colored people, because they say they desire no legislation which shall establish any class distinction.
>
> Then comes the proposition * * * to strike out all relating to schools. I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools. (3 Cong. Rec. 1005–1006.)

It would appear, therefore, that the compromise form of the bill as enacted represented mutual concessions by the opposing groups, not as to the

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substantive issue of the power of Congress to prohibit school segregation, but solely in recognition of the impossibility of securing from the Congress at that time any decision between the conflicting views on this question.

The Congressional actions subsequent to 1866, which have been summarized above, have relevance as early interpretations of the scope of the Fourteenth Amendment. However, as evidence of contemporaneous understanding, their value is doubtful. Although only a few years had elapsed since the adoption of the Amendment, there had occurred a substantial change not only in the membership of the Congress, but in the intensity of the movement, which had reached its high point in 1866 with the proposal of the Fourteenth Amendment, for securing through national action full protection of the Negro's right to equal treatment.

Throughout this period there were consistent legislative attempts to implement the principles of equality embodied in the Fourteenth Amendment. One such attempt, remarkable for its persistence, was the attempt to end segregation in the public schools. While it ended in failure, the consideration and the support it received in Congress indicate that a substantial group in the Congress, at times a majority, regarded it as necessary and appropriate in carrying out the broad principles established in the Fourteenth Amendment. The failure of this effort resulted in part from the use

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of dilatory parliamentary tactics by the opposition. Another contributory factor was the belief of a substantial number of Congressmen that legislation to prohibit school segregation would destroy the public school system in the South, then in its infancy, and would thus completely deprive Negroes in that section of the benefit of public education.

The failure to include a provision in the Civil Rights Act of 1875 specifically forbidding public school segregation does not appear to represent a legislative judgment that the Fourteenth Amendment permitted such segregation, or that it could not be judicially construed, in the light of future conditions, to require invalidation of state segregation laws. As has been shown, some members of Congress may have accepted the compromise form of the bill because it would preserve the question of equal educational treatment of Negroes for later judicial determination. No conclusive inferences can be drawn, therefore, from the legislative history of the 1875 Act to show an understanding either that the Amendment precluded or permitted state laws providing for segregation in public schools.

3. State legislation and decisions

At the time when the Fourteenth Amendment was before the states for ratification and during the period immediately after ratification, there was widespread interest and concern in the extension of public education. Prominent in the

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discussions was the question of education for the Negroes not merely in the South, where four million freedmen had to be educated to meet their new responsibilities as citizens, but also in the North, where the events of the preceding years had called attention to the status of the Negroes in those states as well.

The movement for general public education, which had begun in the 1830's, took on new impetus in both the North and South after the Civil War. Nearly every Governor's message in the postwar period dealt with the problem of public education in the state, making suggestions for improvement and justifying larger expenditures in the interest of general enlightenment. In the South the Reconstruction constitutional conventions were all concerned with public education. Each of the Constitutions specified that it was the duty of the legislature to make provision for education of all the children of the state, and the first legislatures elected under them passed comprehensive common school laws.

Although the governors, both in the Northern and Southern states, in urging education for the Negroes made their recommendations contemporaneously with submission of the Fourteenth Amendment for ratification, and frequently in the same message, there was no reference to the Amendment as relevant to the question. Education of the Negroes was said to be required

by state constitutional provisions, by natural justice, and by the desirability of educating the citizens of a republic. The question was dealt with not in the framework of federal constitutional requirements, but as a matter of determining state policy.

Congress also regarded education as important for the protection of the Negroes in their new status. As has been noted *supra,* pp. 74–75, in the acts restoring Mississippi (16 Stat. 67), Texas (16 Stat. 80) and Virginia (16 Stat. 62) to representation, Congress specified that the state constitutions should never be amended to deprive any citizen of "the school rights and privileges secured by" those constitutions. Similar provisions were considered and rejected in consideration of the readmission of Arkansas (Congressional Globe, 40th Cong., 2d Sess., p. 2748) and Georgia (Congressional Globe, 41st Cong., 2d Sess., p. 4796). These debates are inconclusive, however, on the relevance of the Fourteenth Amendment to this question, with greater attention being given to education as an element in a republican form of government.

Furthermore, there was no apparent awareness in the states that the Fourteenth Amendment required that education for colored children be furnished on a basis of equality. Thus, the laws

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of California,[87] Indiana,[88] and Ohio[89] at the time did not provide schools for colored children in areas where they were insufficient in number to warrant a separate school. Those of Delaware and Maryland allotted to Negro education only taxes raised among the colored population.[90] In New York in 1869 the Supreme Court in *Dallas* v. *Fosdick*[91] sustained the validity of segregated schools in Buffalo, saying that

> The right to be educated in the common schools of the state, is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment.

As is more fully discussed *infra*, pp. 104–110, this failure to appreciate the applicability of the Fourteenth Amendment to the subject of public education appears to have been widely shared at the time, and conceivably may explain the ratification of the Amendment by legislatures in states where school segregation then existed or was established shortly thereafter.

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[87] Cal. Laws 1866, c. 342, sec. 57.

[88] Ind. Laws 1869 (Special Session), p. 41, sec. 3.

[89] 51 Ohio Laws, p. 429, sec. 31 (1853), as amended, 61 Ohio Laws 31, sec. 4 (1864).

[90] Del. Laws 1875, c. 48; Md. Laws 1868, c. 407, c. ix.

[91] How. Prac. Rep. 249, 251 (Sup. Ct. 1869).

a. *Negro education in the North.* At the time of the adoption of the Fourteenth Amendment, Negroes had been given some share in the public school systems established in the great majority of the Northern and border states.[92] The form and extent of their participation varied greatly, from complete absence of segregation in the New England states to strict segregation in others. Some states made segregation mandatory; others left it to the discretion of the local school boards either by specific authority in the state legislation or under the general powers of the local boards; others prohibited the exclusion of colored children from public schools of their choice.[93] Historically, the usual sequence was the establishment of a public school system for white children, followed either by the admission of colored children or by the creation of separate schools for Negroes.

[92] There were five states outside of the South (Indiana, Illinois, Kentucky, Maryland, and Delaware, the last three being slavery states), which in their laws, either directly or by implication, excluded colored children entirely from the public schools.

[93] The laws of eight states provided generally for separate schools for colored children: California, Kansas, Missouri, Nevada, New York, Ohio, Pennsylvania, and West Virginia. Thirteen states had either no segregation law or expressly prohibited segregation: Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and Wisconsin. The state laws are discussed in detail in the Appendix to this brief. A brief survey is contained in Barnard, *Special Report of the Commissioner of Education*, 41st Cong., 2d Sess., H. Ex. Doc. No. 315 (1871), p. 323 *et seq.*

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Although in the North the emphasis was on improved public education for all, the emancipation of the Negroes focussed interest on their education. Governor Morton of Indiana, for example, in his message to the legislature in 1865,[94] urged that, as a matter of "natural justice" as well as "sound political economy" and as an example to the Southern states, the Negroes should be given educational opportunities in the public school system. He said:

> An ignorant and degraded element is a burden and injury to society, whatever may be its color. It therefore becomes a matter of sound political economy, as well as absolute justice, that whatever colored population we may have should be educated, and enabled to become intelligent, industrious and useful members of the community.[95]

Along with the question whether education for the Negroes should be provided, was the question of how they were to be educated, whether in mixed schools or in separate schools. This, too, was discussed without reference to the Fourteenth Amend-

[94] Brevier Legislative Reports 1865, pp. 31–32.

[95] Similarly, in 1869 the Superintendent of Public Instruction in Illinois pleaded with the legislature to extend public education to the 7,000 colored children who were excluded from "all the blessings of public education." (Ill. Doc. 1869, vol. 2, p. 557.) Compare the report of the School Superintendent of Indiana to the state legislature in 1867, in which he concluded that "the welfare of the government, i. e., the State requires the education of all the community, hence of the colored man. * * *" (Ind. Doc. 44th Reg. Sess. (1867), Part I, p. 338.)

ment, at least prior to 1872, when the decision of the Supreme Court of Ohio in *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, directed public attention to the issue. (See *infra,* pp. 102–103). In 1870, Governor Bowie, in recommending modification of the Maryland school law to provide education for colored freedmen, made no reference to the Fourteenth Amendment:

> * * * If at a period, immediate or remote, they are to become citizens, possessed of the elective franchise, would not sound policy, then, dictate such education of the colored population as would prepare them intelligently to exercise the elective franchise, and as citizens to judge for themselves of the proper workings of our political system, and not be misled by the crafts and clamors of designing and unscrupulous politicians? Education among the colored people of the State would have a beneficial effect in rendering them more valuable in any position they may be destined to fill. It would doubtless render them, as a class, more virtuous and provident, and better members of the community in which they live.[96]

In the decade immediately following the ratification of the Fourteenth Amendment the established basic patterns of non-segregation or segregation in the Northern states continued with only slight changes. The changes in the school laws were, as a rule, directed not toward abolition

[96] Md. Docs. 1870, H. Doc. A, pp. 14–15.

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of segregation but rather toward strengthening and equalizing the school rights of the colored children. Some states, such as Michigan (in 1867),[97] and Connecticut (in 1868),[98] declared by statute the right of all children to attend any public school in the district where they resided; others enacted penalties for school boards refusing admission of colored children into the common schools (*e. g.*, Kansas, 1867).[99]

Among the states which had, prior to the ratification of the Amendment, excluded Negroes from the public schools, Indiana admitted them on a segregated basis in 1869,[1] with an amendment enacted in 1877[2] which gave them access to "white" schools where no separate schools were provided or where the colored school did not offer the higher grades available at "white" schools. Illinois, while not expressly providing for segregation in its school law of 1872,[3] considered segregation an administrative matter in the discretion of the county and local school authorities,[4] but insisted that colored children be admitted to some school.[5] In Chicago, as early as 1867 more satis-

[97] Mich. Laws 1867, Act No. 34.

[98] Conn. P. L. 1868, p. 206. Similar laws were already in force in Minnesota (1864) and Rhode Island (1866).

[99] Kans. Laws 1867, ch. 125.

[1] Ind. Laws 1869 (Spec. Sess.), p. 41.

[2] Ind. Laws 1877, p. 124.

[3] Ill. P. L. 1872, p. 700.

[4] Report of Superintendent of Public Instruction, 1869–70. Ill. Doc. 1871, part 1, pp. 355–356.

[5] Ill. P. L. 1874, p. 120.

factory experience with mixed schools than with segregated schools was reported.[6]

Kentucky did not provide for a "common school system for the colored children" until 1874,[7] making it unlawful for children of any race to attend a school assigned to the other. Maryland in 1872, and Delaware in 1875, provided for separate public schools for Negroes.[8]

The contemporary discussions on segregated schools that are available do not show that the lawmakers and school administrators were aware of the relevance of the Fourteenth Amendment to the subject. The closest reference found is the remark of the Superintendent of Public Instruction of Indiana in 1868 that "whatever distinctions may have been previously made in the rights and privileges of citizens by our laws, they have been set aside by the emendations of our National Constitution and the 'Civil Rights Bill.'"[9] The context makes it clear that he was referring to the total exclusion of Negroes from the public school system; he pleaded for Negro education, but being aware of the "deeply-seated prejudice in the minds of many citizens," he suggested separate schools,[10] follow-

[6] Report of Superintendent of Public Instruction of Indiana, 1867–68, pp. 26–27, Ind. Doc. 1867–68, part 1.

[7] Ky. Laws 1873–74, ch. 521.

[8] Md. Laws 1872, c. 377, c. xviii (cf. Md. Laws 1868, c. 407, c. ix); Del. Laws 1875, ch. 48.

[9] Report of Superintendent of Public Instruction, 1867–68, p. 23. Ind. Doc. 1867–68.

[10] *Ibid.*; and see Report, 1865–66, Ind. Doc. 1867, Part 1, p. 339.

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ing the lead which Governor Morton had taken as early as 1865.[11] The debates on the Indiana school law of 1869 dealt with the question whether the inferior treatment of Negroes in schools satisfied the state constitutional requirements of equality, but no reference was made to the Fourteenth Amendment.[12]

In Illinois, the Superintendent of Public Instruction insisted in strong terms on the Negroes' right to an "equal education" as required by the state constitution of 1870 and implemented by the school law of 1872.[13] In his view,[14] the equality required by the state constitution was satisfied by either separate or mixed schools.[15]

The rulings of the Commissioner of Common Schools in Ohio, in 1869 and 1870, emphasized that colored youths have "precisely the same right to school funds" that white youths have; where their number is too small for a separate school, the school board has discretion either to admit them to the white school or to "have them taught in

[11] Brevier Legislative Reports (1865), pp. 31–32.

[12] 10 Brevier Legislative Reports (1869), pp. 193 *et seq.*, 340 *et seq.*, 490 *et seq.*; 11 *id.* (1869 Extra Session), pp. 114 *et seq.*, 387 *et seq.*

[13] Report of Superintendent of Public Instruction, 1871–72, Ill. Doc. 1873, vol. 2, p. 231 *et seq.*

[14] *Id.*, 1869–70, Ill. Doc. 1871, p. 355, *et seq.*

[15] Subsequently, the Superintendent adopted the view sustained in *State ex rel. Garnes* v. *McCann.* 21 Ohio St. 198 (1872), that the Fourteenth Amendment permitted separate schools. *Id.*, 1873–74, p. 416.

some other way"; "but they must be taught till their funds are exhausted." [16]

In the Constitutional Convention in Ohio in 1873 and 1874 there was a brief discussion of school segregation.[17] A delegate unsuccessfully proposed a constitutional amendment providing for separate schools for the two races, "so as to give each the equal benefit of a common school education," but with local option for mixed schools.[18] He argued that education was a matter exclusively for the states and urged his amendment "in order to have the Constitution of Ohio stand up for its own citizens against Federal usurpation * * *" in the form of the Fourteenth Amendment.[19]

In a debate on segregation in 1867 in the Pennsylvania legislature, in connection with a law providing for homes for soldiers' orphans,[20] the sponsor of a proposal for nonsegregated homes emphasized the inequalities which resulted from segregation in the common school system. No mention was made of the Fourteenth Amendment.

b. *Negro Education in the South.* In the Southern states there had been no public education for Negroes, and in most states any education for Negroes was prohibited. In the immediate postwar period, schools were established by the Freedmen's Bureau and benevolent associations,

[16] 18th Annual Report, Ohio Doc. 1869, p. 885, *et seq.*

[17] Ohio Constitutional Convention, 1873–74, Debates, vol. 2, part 2, p. 2238, *et seq.*

[18] *Id.*, pp. 2238–2839.

[19] *Id.*, pp. 2240–2241.

[20] Pa. Legislative Record 1867, Appendix, p. CCCXLII.

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but even for white children the public school systems had been disrupted by the war. (See pp. 8–9, *supra.*)

In the postwar period, education of the Negroes was regarded by the white leaders as a necessity arising out of emancipation, the changed status of the Negroes, and their obtaining the suffrage in the new state constitutions. Governor Smith of Alabama in 1868, for example, urged a common school system with provision for education for the colored people on the ground that

> With enlarged freedom and full opportunities for individual development should come the most ample facilities for obtaining that information that makes a man the peer of his fellows, and enables him to protect his own interests, at the same time that he is better fitted to discharge his duties as a citizen.[21]

Similar recommendations were made by the Governors of Arkansas,[22] Georgia,[23] Louisiana,[24] and North Carolina.[25]

During the years in which the Fourteenth Amendment was before the states for ratification, the question of separate or mixed schools was extremely controversial in the Southern states. In

[21] Alabama Senate Journal 1868, p. 14.

[22] Arkansas House Journal 1868, p. 296.

[23] Georgia House Journal 1870, p. 416.

[24] Louisiana Legislative Documents 1870, Message of the Governor, p. 7.

[25] North Carolina Public Documents 1867–68, Doc. No. 2, Sess. 1868, pp. 5–6.

most of the Reconstruction constitutional conventions, proposals were made to require or to prohibit separate schools.[26] In seven the constitution as adopted contained no specific provision on this point. In Louisiana [27] and South Carolina [28] the constitution required mixed schools, and in Florida [29] the requirement was implied. None required separate schools.[30]

The constitutions were submitted to Congress for approval in accordance with the requirement of the Reconstruction Act that they be "in conformity with the Constitution of the United States in all respects." [31] (See pp. 72–76, *supra.*) In addition to the provisions on education, these constitutions contained general provisions guar-

[26] Alabama Convention Journal, pp. 153, 237–8; Arkansas Convention Debates and Proceedings, p. 645, *et seq.;* Georgia Convention Journal, p. 151; Louisiana Convention Journal, pp. 60–61, 94, 200–2, 268–70, 277; Mississippi Convention Journal, pp. 316, 318, 479–80; South Carolina Convention Proceedings, pp. 71, 88, 100, 685–709, 889–894, 899–901; Texas Convention Journal, I, pp. 896, 898, 912; Virginia Convention Journal, pp. 67, 299, 308, 333, 335, 336, 339, 340.

[27] Louisiana Constitution of 1868, Arts. 135, 136.

[28] South Carolina Constitution of 1868, Art. X, sec. 10.

[29] Florida Constitution of 1868, Art. IX, sec. 1.

[30] The debates in Arkansas and South Carolina contain arguments on the policy of having mixed or separate schools, but do not show any specific reference to the applicability or inapplicability of the Fourteenth Amendment to the question, even though the members of the conventions were aware of the impact of the Amendment on other issues. The debates in the other conventions were not reported, except for the early stages of the Virginia convention.

[31] 14 Stat. 428, sec. 5.

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anteeing "equal civil and political rights and public privileges,"[32] or "the same" rights and privileges,[33] or prohibiting "distinctions" on account of race or color.[34] There were instances of a prohibition on discrimination in places of business or public resort,[35] and a prohibition on distinctions in public institutions.[36] In no instance did the constitution submitted to Congress and approved by it state that inequality or segregation was permitted.

The available records in these states do not, however, show an awareness that the Fourteenth Amendment might be relevant in determining the basis on which public education was furnished. The recommendations made concerning education to the same Reconstruction legislatures which ratified the Amendment contained no reference to it. Segregation was not stated to be permitted by the Amendment, nor was equality in education for Negroes stated to be required by the Amendment.

Except for Arkansas and Florida, none of the ten Southern states had a statutory provision for a segregated public school system at the time it ratified the Fourteenth Amendment.[37] In five

[32] Alabama Constitution of 1867, Art. I, sec. 2.

[33] Louisiana Constitution of 1868, Art. 2.

[34] South Carolina Constitution of 1868, Art. X, sec. 8.

[35] Louisiana Constitution of 1868, Art. 13.

[36] Mississippi Constitution, 1868, Art. I, sec. 21.

[37] An Arkansas statute in 1867 required Negroes to attend separate schools. (Arkansas Laws 1866–67, No. 35, Sec. 5, p. 100.) The new state constitution adopted in

of these ten states, school segregation was established by laws enacted within a year after ratification of the Fourteenth Amendment.[38] In Louisiana, the city of New Orleans succeeded in maintaining separate schools despite the state constitutional prohibition.[39] Again, however, no specific references have been found to show that the advocates of separate schools in these states were aware of the relevance of the Fourteenth Amendment to the question.

c. *State judicial decisions on Negro education.* During the period from 1868 to 1882, the school rights of colored children were litigated in state courts in a number of cases. These cases may be divided into three distinct groups, so far as the relevance of the Fourteenth Amendment is concerned.

April 1868, shortly before the legislature ratified the Amendment, provided generally that free schools for "all persons" should be maintained. Some members of the constitutional convention regarded this as requiring mixed schools. (Arkansas Convention Debates and Proceedings, pp. 660, 666, 672.) In Florida, separate schools for Negroes were established under an 1866 statute. (Florida Laws 1865, No. 12, ch. 1475.) The new state constitution adopted in 1868, before the Amendment was ratified, provided for "the education of all the children residing within its borders, without distinction or preference". (Constitution of 1868, Art. IX, sec. 1.)

[38] Alabama Laws 1868, p. 148 (Act of the Board of Education); Arkansas Laws 1868, No. 52, Sec. 107, p. 163; Georgia Laws 1870, No. 53, Sec. 32; North Carolina Laws 1868–69, ch. 184, Sec. 50, p. 471; Virginia Laws 1869–70, ch. 259, Sec. 47.

[39] Louisiana House Debates 1869, pp. 209–10, 217–20, 246–7.

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Some cases were argued and decided solely on the basis of state constitutional and statutory provisions. Thus, the Supreme Court of Iowa held in 1868 that the equality of school rights as guaranteed in the state constitution ("education of all the youths of the State") and as implemented by the school law denied school authorities any discretion to classify school children according to race or color. *Clark* v. *The Board of Directors, etc.,* 24 Iowa 267. Accord: *Smith* v. *The Directors, etc.,* 40 Iowa 518, and *Dove* v. *The Independent School District,* 41 Iowa 689, both decided in 1875. Similarly, in Illinois the state supreme court held in 1874 that school directors had no power under the state constitution and school law to make racial distinctions so as to deprive colored children of the benefits which white children received in the public schools. *Chase* v. *Stephenson,* 71 Ill. 383. A New York court in 1869 sustained the validity of a provision in a city charter requiring separate schools, on the ground that under state law there was no "right" to education. No reference was made to the Fourteenth Amendment. *Dallas* v. *Fosdick,* 40 How. Pr. Rep. 249 (Sup. Ct. 1869). (See pp. 88–89, *supra.*)

In other cases, although the Fourteenth Amendment was mentioned or considered, the decision was placed upon the narrower ground of state constitutional or statutory law. Thus, a Pennsylvania court in 1873 upheld the right of colored

children to be admitted to the white school in a district where no colored school was established. *Commonwealth ex rel. Brown* v. *Williamson,* 10 Phila. 490. In that case the judge applied what he regarded as the clear mandate of the school law, remarking that he failed to see that any right arising out of the Fourteenth Amendment was involved. The Supreme Court of Illinois, in *People ex rel. John Longress* v. *The Board of Education, etc.,* 101 Ill. 308 (1882), held that the state constitution and school law did not permit a school board to assign colored pupils to a school outside the district of their residence. It did not therefore reach the question of the applicability of the Amendment. The Supreme Court of Kansas, in deciding that a school board had no power under state law to establish segregated schools, left open the question whether state legislation authorizing segregated schools would violate the Fourteenth Amendment, pointing out that this question could be finally determined only by the Supreme Court of the United States. *Board of Education* v. *Tinnon,* 26 Kans. 1 (1881). See also *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342 (1872), which held that the equality of rights guaranteed by the state constitution was violated by the exclusion of Negroes from the public schools, but that the state statute, while "probably" opposed to the spirit of the Fourteenth Amendment, did not violate its letter.

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Finally, there is a group of cases in which the Fourteenth Amendment was the main issue and the principal ground of decision. The earliest of these is *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198 (Dec. Term 1871). The Supreme Court of Ohio held that the Amendment had no bearing on such exclusively domestic matters as school legislation, and that if it did, the classification of pupils according to color was not contrary to the Amendment, since all children were provided equal facilities. The *McCann* case became a leading precedent on the question of the validity of school segregation.[40] It was followed in New York (*People* v. *Easton,* 13 Abbott's Pr. R. (N. S.) 159, Sup. Ct., 1872) and Indiana (*Cory* v. *Carter,* 48 Ind. 327, 1874), although in the latter case the facilities for educating colored children were plainly unequal. In California, the Supreme Court reached the same conclusion in *Ward* v. *Flood,* 48 Cal. 36 (1874), relying exclusively upon *Roberts* v. *City*

[40] In the debates on the bill which became the Civil Rights Act of 1875, the minority Senators who unsuccessfully opposed a provision prohibiting school segregation expressly relied upon the *McCann* case, as well as *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, decided in 1850. See Congressional Globe, 42nd Cong., 2nd Sess., pp. 3257, 3261. Senator Frelinghuysen, in charge of the bill, distinguished both the *McCann* case and *Clark* v. *Board of Directors,* 24 Iowa 267, on the ground that they were based on state constitutional and statutory provisions and therefore "afford no precedent for the construction of this bill when enacted. The language of this bill secures full and equal privileges in the schools, subject to laws which do not discriminate as to color." 2 Cong. Rec. 3452. And see pp. 80–82, *supra.*

of Boston, 5 Cush. (Mass.) 198, decided eighteen years before the Amendment was adopted. On the other hand, a lower court in Pennsylvania held that classification of school children according to race or color violated the Fourteenth Amendment. *Commonwealth* v. *Davis,* 10 Weekly Notes 156 (1881).

These various groups of cases, taken in their entirety, thus fail to evidence any general and definite contemporaneous judicial construction of the Amendment as applied to school segregation.

d. *Significance of the contemporaneous state laws providing for school segregation.* The fact that a number of states had segregated school systems when the Fourteenth Amendment was adopted, or established them shortly thereafter, does not necessarily reflect a contemporaneous understanding that the Amendment permitted "separate but equal" schools for colored children. It is argued that this must have been the general understanding at the time, for otherwise these states could not consistently have ratified the Amendment.

The difficulty with this argument, however, is that the historical facts on which it is based do not support the conclusions which are drawn from them. The inquiry here must be, what was the state of mind—so far as their understanding of the scope and application of the Fourteenth Amendment is concerned—of those responsible for the simultaneous ratification of the Amend-

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ment and enactment or continuation of school segregation legislation? As has been shown (*supra*, pp. 57–65), virtually no evidence is to be found in the available records of the ratification proceedings indicating that the question of school segregation was considered in connection with the debates on the Amendment itself. Moreover, as has also been shown (*supra*, pp. 86–100), there is little evidence that the state legislators and other officials responsible for the school laws considered the relevance of the Fourteenth Amendment and deliberately concluded that these laws were not in conflict with the Amendment.

This absence of evidence showing an awareness that the Fourteenth Amendment might have some relation to school segregation is consistent with at least five different views which might conceivably have been held on this subject at that time: (1) that the Amendment had no application whatsoever to public education furnished by a state; (2) that the Amendment did apply to public education, but only to the extent that if a state provided education for white children, it also had to provide some education (not necessarily equal) for colored children; (3) that the Amendment permitted a state to have separate schools for colored children, provided the facilities afforded them were substantially equal to the schools for white children; (4) that the Amendment was essentially a grant of power to Congress, and unless or until Congress should

prohibit it from doing so, a state could make such provision for the education of its children as it deemed proper; or (5) that, while the Amendment required that colored children be treated equally with respect to public education, that requirement was then satisfied, in view of the special circumstances existing in the period following emancipation of the slaves, by establishing separate schools for colored children.

It is submitted that, of these various possible conclusions which might be drawn, the one least supported by the available historical materials is that which finds in them a contemporaneous understanding that the Amendment permitted the states to establish separate schools for white and colored children, so long as the facilities furnished were substantially equal. We believe that, while each of these various possible understandings can summon some support, none can be demonstrated to be valid to the exclusion of the others. This question is one as to which historians can rely only on conjecture and speculation rather than on demonstrable fact. In the circumstances, such inferences as may be drawn from the available data are too tenuous and inconclusive to furnish a reliable basis for present-day judicial interpretation of the Amendment.

Because public education was regarded as a privilege conferred by the state, rather than as a right due the citizen, and was supported wholly by state taxation, it may well have been considered

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that public schools were wholly within the domestic jurisdiction and discretionary control of each state and therefore unaffected by the Fourteenth Amendment. This possibility is given weight by early decisions of the state courts, e. g., *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, 207–208 (Dec. Term, 1871); *Ward* v. *Flood,* 48 Cal. 36 (1874); *Cory* v. *Carter,* 48 Ind. 327, 360 (1874); cf. *Cumming* v. *Board of Education,* 175 U. S. 528, 545 (1899), and is perhaps the conclusion which most logically explains the silence of the available contemporary historical materials on the question of the relation of the Fourteenth Amendment to school segregation. As a valid interpretation of the Amendment, however, it has now been emphatically rejected by this Court's repeated holdings that although it is a "privilege," public education, if granted to some citizens, must be extended to all on a basis of equality of right. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629.

One paramount difficulty with the "separate but equal" hypothesis as to the original understanding of the Amendment is its failure to account for the fact that colored children were educated in schools which were not equal even in a physical sense. Patent inequalities were often sanctioned by requiring that schools be established for white children while colored schools were merely authorized or permitted, or

were provided only when a given number of colored children lived in the school district. Even where the laws did not discriminate, colored schools were still largely inferior when compared with white schools on a physical or pedagogical basis. This fact is more consistent with an understanding that the Amendment was satisfied if some provision, however unequal, was made for colored children than with a "separate but equal" understanding. But the former conception of the Amendment, if it existed, has been unequivocally rejected by this Court. *Missouri ex rel. Gaines* v. *Canada, supra; Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra.*

In 1868 public schools had been hardly begun in many states and were still in their infancy. School attendance was, as a general matter, not compulsory. The Negroes had just been released from bondage and were generally illiterate, poor, and retarded socially and culturally. To educate them in the same classes and schools as white children may have been regarded as entirely impracticable. It is possible that state legislatures—while recognizing in the Fourteenth Amendment a clear mandate of equality—may have considered separate schools for colored children as a temporary practical expedient permitted by the Amendment. Many proponents of Negro education regarded separate schools as a more effective means of extending the benefits of the public school system to the colored people; for, since school attendance was generally

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not compulsory, fear of discrimination might well have deterred Negro children from attending existing "white" schools in many areas.[41]

It is not necessary to assume that these state legislatures considered their segregated schools as completely free from possible attack under the Amendment, nor does it necessarily follow that they were deliberately flouting its prohibitions. It was widely thought that the Amendment was primarily intended to remove constitutional doubts from the Civil Rights Act of 1866 and to give Congress the power to redress inequalities and discriminations imposed on the Negroes in the states. This is echoed in this Court's opinion in *Ex Parte Virginia,* 100 U. S. 339, 345, which hinted that the federal judiciary might have no power to enforce the Amendment except where expressly authorized by Congress, and also in Senator Sumner's attempts until his death to persuade Congress to use its power under Section 5 to prohibit separate schools. (*Supra,* pp. 76–86.) It is not unlikely that state legislators may have felt themselves free to exercise their judgment as to the desirability of school

[41] "* * * Previously, such [colored] children were received into any public school at which they presented themselves; but the prevailing prejudice against them was so great that many preferred rather to remain away from school altogether than to face it. The provision for separate schools was practically a boon to the colored people, although it probably grew out of an indisposition to permit their children to attend school with white children." J. P. Wickersham, *A History of Education in Pennsylvania* (1886), p. 506.

segregation until Congress should act. It may also have been thought, although not articulated, that the constitutional issue would ultimately be resolved by this Court, and that the states were not bound to observe any constitutional prohibitions against school segregation unless and until this Court should declare them.

All of these hypotheses are possible. None can be demonstrated to be true. We do not contend for the validity of any one above the others. We conclude only that the historical facts, as distinguished from assumptions, are too equivocal and inconclusive to furnish a solid basis upon which this Court can determine the application of the Amendment to the question of school segregation as it exists today, when school attendance is compulsory and when there are no considerations of an educational character which warrant separation of children of different races in public schools.

In striking down various forms of state legislation as unconstitutional racial discriminations, this Court has not been deterred by the existence of such legislation on the statute books during the period when the Fourteenth Amendment was ratified. Thus, in 1879, the Court held that state laws which excluded Negroes from juries denied them the equal protection of the laws. *Strauder* v. *West Virginia,* 100 U. S. 303. Such statutes were to be found in a number of states. *E. g.,* West Virginia (Acts of 1872–1873, p. 102, reenacting chapter 116 of the 1870 Code), Kentucky (Gen. St. 1873 (Bullock & Johnson), ch. 62, Art. III, § 2),

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Missouri (Wagner's Mo. Stat. 1870 (2d ed.), ch. 80, § 2), and Oregon (Gen. Laws of Oregon, 1843–1872, Civil Code, § 918). The Court in the *Strauder* case observed (p. 306) that at the time the Fourteenth Amendment was incorporated into the Constitution "it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. *It was well known that in some States laws making such discriminations then existed, and others might well be expected.*" [Italics added.]

In the racial restrictive covenant cases (*Shelley* v. *Kraemer,* 334 U. S. 1; *Hurd* v. *Hodge,* 334 U. S. 24), there was a background of unbroken judicial enforcement of such covenants in nineteen states and the District of Columbia extending over a period of 33 years (No. 72, 1947 Term, Brief for the United States, pp. 40–45). In overturning the rule applied by these decisions, no reference was made either to their number, their uniformity, or their age. And when the Court held in *Nixon* v. *Herndon,* 273 U. S. 536, decided in 1927, that a state statute excluding Negroes from participation in primary elections was a "direct and obvious infringement" of the Fourteenth Amendment, the

prevailing view of the state courts, going back as far as 1887 (*Commonwealth* v. *Helm,* 9 Ky. L. Rep. 532), was that a primary election is "purely a legislative creation" as to which "the legislature was subjected to no constitutional inhibition" (*State ex rel. Hatfield* v. *Carrington,* 194 Iowa 785, 786).[42] Mr. Justice Holmes, speaking for the Court in *Nixon* v. *Herndon,* disposed of the matter in a few words (p. 541): "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

G. SUMMARY AND CONCLUSIONS

(*1*)

The Congressional history of the Fourteenth Amendment shows that the Amendment was proposed and debated as part of a broad and continuing program to establish full freedom and legal equality for Negroes. Many in the Congress which considered the Thirteenth Amendment understood it to abolish not only slavery but also its concomitant legal discriminations. This understanding rested on a belief that that Amendment had made the Negro an indistinguishable part of the population and hence entitled to the same rights and privileges under the laws as all others. The enactment of the Black Codes in

[42] The cases are collected in Mangum, *The Legal Status of the Negro* (1940) pp. 407–409.

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the Southern states made it obvious, however, that additional protection by the national government was required.

The civil rights legislation enacted by the 39th Congress was designed to strike down distinctions based on race or color. From the debates on that legislation, however, there emerged the view that the Thirteenth Amendment alone did not afford a sufficient constitutional basis for such action, and that a further amendment was necessary. In the same debates there was also crystallized the view that only explicit constitutional embodiment of the principle of equality before the law could protect that principle from change by some future Congress.

The attempt in the 39th Congress, through the Bingham "equal rights" amendment, to provide a direct constitutional basis for national legislation guaranteeing equal treatment under the law failed because of the belief that it left the matter open to future congressional change and destroyed the balance between federal and state power. The Fourteenth Amendment was proposed to remedy these deficiencies. Section 1 of that Amendment, to both its proponents and opponents, was an express constitutional recognition of the doctrine of "absolute and perfect" equality under the law—the same doctrine which had underlain the Thirteenth Amendment, the civil rights legislation, and Bingham's unsuccessful "equal rights" amendment.

Neither the majority nor the minority in the 39th Congress evidenced any substantial disagreement as to the broad scope of Section 1 of the Amendment. The majority repeatedly affirmed that it would firmly secure the principle that the "law which operates on one man shall operate equally upon all" and would prohibit all legisation by the states drawn on the basis of race and color. The opposition similarly understood its broad purpose; it was on that basis that they voiced their objections.

While the debates reflect a clear understanding as to the breadth of the principle of equality under law embodied in the Fourteenth Amendment, neither its proponents nor its opponents found it necessary or appropriate to catalog exhaustively the specific application of its general principle. Only a few such examples were given during the debates on the Amendment itself. It is noteworthy that one of the majority spokesmen, at a time when the majority was proceeding under the discipline of party caucus, illustrated the racial discriminations which the Amendment would reach by reference to a state law discriminating against Negroes in public schools. He did not, however, make specific mention of the system of racial segregation which the state law required.

In the debates on the civil rights legislation, which are an integral part of the immediate background of the Fourteenth Amendment, the minority expressed the view that existing state systems of racially-segregated public schools would be

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stricken down by the broad principle of equal treatment under the law. This view was not disputed by the majority. A like objection was voiced to Bingham's "equal rights" amendment which sought to embody the same general principle. Again, the majority did not take issue with this understanding of its scope. It is also worthy of note that not only were Bingham's proposal and Section 1 of the Fourteenth Amendment alike in their general purpose; they were also similar in language.

In sum, while the legislative history does not conclusively establish that the Congress which proposed the Fourteenth Amendment specifically understood that it would abolish racial segregation in the public schools, there is ample evidence that it did understand that the Amendment established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color. Concerned as they were with securing to the Negro freedmen these fundamental rights of liberty and equality, the members of Congress did not pause to enumerate in detail all the specific applications of the basic principle which the Amendment incorporated into the Constitution. There is some evidence that this broad principle was understood to apply to racial discriminations in education, and that it might have the additional effect of invalidating state laws providing for racial segregation in the public schools.

(2)

There is a paucity of available evidence as to the understanding of the state legislatures which ratified the Amendment, in part because of the almost complete absence of records of debates, in part perhaps because their function was to accept or reject a proposal rather than to draft one.

In the states most attention was given to the political aspects of the Republican "plan of reconstruction," which received popular approval in the elections of 1866. It was frequently stated that the Amendment guaranteed to the Negroes full rights of equality as citizens, but the scope and content of those rights were not detailed. The opponents of the Amendment objected to the first section on the ground that it, together with the fifth section, expanded the powers of the Federal Government at the expense of the rights of the states. There were almost no references to schools during consideration of the amendment.

At the time of consideration and ratification of the Fourteenth Amendment, some of the Northern states had and continued segregated schools and some of the Southern states, in providing for the first time for public education for Negroes, established separate schools. In the historical context in which these actions were taken, however, they do not evidence an understanding as to the reach of the Fourteenth Amendment. The inferences to be drawn from these actions necessarily rest on conjecture and speculation. The scanty evidence available suggests that the

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legislatures were probably unaware that the Amendment was relevant to education, even to the extent of requiring equal, though separate, schools. Proponents of education for Negroes based their arguments on grounds other than the Fourteenth Amendment, and made no reference to it.

In sum, the available materials are too sparse, and the specific references to education too few, to justify any definite conclusion that the state legislatures which ratified the Fourteenth Amendment understood either that it permitted or that it prohibited separate schools.

(*3*)

There is no direct evidence at the time of the adoption of the Amendment that its framers understood specifically that future Congresses might, in the exercise of their power under section 5, abolish segregation in the public schools. They clearly understood, however, that Congress would have the power to enforce the broad guarantees of the Amendment, and the Amendment was deliberately framed so as to assure that the rights protected by section 1 could not be withdrawn or restricted by future Congresses.

Subsequently, in the debates on the Civil Rights Act of 1875, some of the framers expressed an understanding that segregated schools were contrary to the Amendment and that Congress could and should abolish them. While an express prohibition against segregated schools was not con-

tained in the Act in its final form, its omission did not spring from doubt of the power of Congress to enact such a prohibition; other types of segregation were barred by the Act. Since section 5 of the Fourteenth Amendment authorizes Congress only to enforce the provisions of the Amendment, the apparently prevalent understanding in Congress that it could prohibit school segregation is evidence of a tacit assumption that segregation in schools was in conflict with the broad principles declared in section 1.

No specific references have been found in the debates on the Fourteenth Amendment to show any expressed contemporary understanding of its framers as to the judicial power, in light of future conditions, to construe the Amendment as abolishing school segregation of its own force. Some evidence of such an understanding is, however, found in the debates on the Civil Rights Act of 1875.

(4)

In the *Slaughter-House Cases,* 16 Wall. 36, decided on April 14, 1873, less than five years after the Fourteenth Amendment was adopted, this Court was called upon for the first time to construe that Amendment. Six years later, in *Strauder* v. *West Virginia,* 100 U. S. 303, the Court first considered the application of the Amendment to a state law involving a racial discrimination. In each instance the opinion of the Court dwelt at length upon the history and purposes of the

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Reconstruction Amendments. The studies which have been made in preparing this brief have only served to confirm the accuracy of the contemporary historical observations made in the *Slaughter-House* and *Strauder* opinions by the members of this Court who themselves had lived during the period when the Amendment was adopted. The great events of the Reconstruction period were still fresh in their minds, and required for them no elaborate investigation into recondite historical materials.

Mr. Justice Miller's opinion for the Court in the *Slaughter-House Cases* noted at the outset (pp. 67–68): "The most cursory glance at these articles [the Thirteenth, Fourteenth, and Fifteenth Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. * * * Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt." After referring to the abolition of slavery by the Thirteenth Amendment, the Court pointed out (pp. 70–71):

> The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the

formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

* * * * *

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

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The Court concluded its review of the history of the Amendments as follows (pp. 71–72):

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.
>
> We do not say that no one else but the negro can share in this protection. * * * But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accom-

plished, as far as constitutional law can accomplish it.

In *Strauder* v. *West Virginia,* 100 U. S. 303, Mr. Justice Strong's opinion for the Court contains a similar exposition of the history and objectives of the Fourteenth Amendment (pp. 306–308):

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was

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abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. * * * It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.
>
> * * * The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Decided the same day as the *Strauder* case were *Virginia* v. *Rives,* 100 U. S. 313, and *Ex parte Virginia,* 100 U. S. 339, which also involved questions under the Fourteenth Amendment as to exclusion of Negroes from juries. In *Virginia* v. *Rives,* the Court, referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, said (p. 318): "The plain object of these statutes, as of the Constitution which authorized them, was

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to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Similarly, in *Ex parte Virginia,* the Court stated (pp. 344–345): "One great purpose of these [Thirteenth and Fourteenth] amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."

Elsewhere in this brief (see pp. 139–141, *infra*) we have quoted at length from the opinions of this Court, extending over a period of more than three-quarters of a century, which show a consistent recognition that the Fourteenth Amendment is to be construed liberally so as to carry out the great and pervading purpose of its framers to establish complete equality for Negroes in the enjoyment of fundamental human rights and to secure those rights against enforcement of legal distinctions based on race or color.

(5)

As has been shown, no conclusive evidence of a specific understanding as to the effect of the Fourteenth Amendment on school segregation has been found in its legislative history. But this Court has neither declared nor applied any canon

of constitutional interpretation that a construction of an amendment which is warranted by its provisions and manifest policy cannot be adopted unless it is also affirmatively supported by specific evidence in the legislative history showing that its framers so "intended." See *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 63–64; *Breedlove* v. *Suttles*, 302 U. S. 277. To be sure, the Court will review "the background and environment" of the period in order to illuminate the broad purposes which an amendment was designed to achieve. *E. g., Everson* v. *Board of Education*, 330 U. S. 1, 8; *McPherson* v. *Blacker*, 146 U. S. 1, 27. In attempting to determine the application of the amendment to a specific issue, however, the Court will give scant regard to inconclusive excerpts from debates which are relied upon to show a "legislative intent." The Court's attitude on this subject was summarized in *Maxwell* v. *Dow*, 176 U. S. 581, 601–602, involving a claim that the Fourteenth Amendment was intended to make applicable to the states the jury requirements of the Sixth Amendment:

> Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, * * * and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

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* * * It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, * * * does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which members voted in adopting it. * * *

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.

And see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 699.[43]

The Court has emphasized in many cases that the process of interpreting and applying the provisions of the Constitution, which as Chief Justice Marshall said was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs,"[44] is not comparable to construing a contract or statute, where the judicial task is essentially to ascertain and give effect to the intended meaning of the words used. Constitutional provisions like "due process of law" and "equal protection of the laws" express broad principles of government the essence of which is their vitality and adaptability to the progressive changes and needs of the nation. The Court, speaking through Chief Justice Hughes, has said:[45]

> If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the

[43] Mr. Justice Frankfurter, concurring in *Adamson* v. *California*, 332 U. S. 46, stated (p. 64) that "Remarks of a particular proponent of the [Fourteenth] Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech." And see the concurring opinion of Mr. Justice Bradley in the *Legal Tender Cases*, 12 Wall. 457, 560.

[44] *McCulloch* v. *Maryland*, 4 Wheat. 316, 415.

[45] *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 442–443.

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> framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407) * * *.

The opinions of the Court, particularly those which have come to be recognized as landmarks in the development of American constitutional law, are replete with expressions of a similar nature. They are familiar to the Court, and it is not necessary to repeat them here *in extenso.* A few examples will suffice to show how clearly and consistently the Court has articulated this rule of constitutional interpretation:

Weems v. *United States,* 217 U. S. 349, 373–374 (McKenna, J.):

> * * * Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which

> no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. * * *

Gompers v. *United States,* 233 U. S. 604, 610 (Holmes, J.):

> * * * But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. * * *

United States v. *Classic,* 313 U. S. 299, 316 (Stone, J.):

> * * * in setting up an enduring framework of government they [the framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of

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> the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

Wolf v. *Colorado,* 338 U. S. 25, 27 (Frankfurter, J.):

> * * * basic rights do not become petrified as of any one time, even though as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.[46]

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[46] See also *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hurtado* v. *California*, 110 U. S. 516, 530–531; *Holden* v. *Hardy*, 169 U. S. 366, 385, 386–387; *South Carolina* v. *United States*, 199 U. S. 437, 448; *Helvering* v. *Davis*, 301 U. S. 619, 640–641; *Rochin* v. *California*, 342 U. S. 165, 169–172; and cf. *Browder* v. *United States*, 312 U. S. 335, 339–340. For non-judicial writings of the members of this Court, see Holmes, *The Common Law* (1881), pp. 35–36; *The Path of the Law*, 10 Harv. L. Rev. 457, 469, 472 (1897); Brandeis, *The Living Law*, 10 Ill. L. Rev. 461 (1916); Hughes, *Addresses* (1916), pp. 354–355; *The Supreme Court of the United States* (1928), pp. 142, 152, 196; Cardozo, *The Nature of the Judicial Process* (1921), pp. 71, 83, 88; *The Growth of the Law* (1924), pp. 73–74, 104, 105–106; *The Paradoxes of Legal Science* (1928), p. 99; Stone, *Law and Its Administration* (1924), pp. 142–143; *Fifty Years' Work of the Supreme Court* (1928), 14 A. B. A. Journ. 428; Reed, *Stare Decisis and Constitutional Law* (1938), No. 35 Penna. Bar Ass'n Quarterly, 131, 141, 142–143, 149; Frankfurter, *Mr. Justice Holmes' Constitutional Opinions* (1923), 36 Harv.

III

IT IS WITHIN THE JUDICIAL POWER, IN CONSTRUING THE FOURTEENTH AMENDMENT, TO DECIDE THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL

Question 3 reads as follows:

> On the assumption that the answers to questions 2 (a) and (b)[47] do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

In the cases at bar the plaintiffs seek an adjudication of their claim that rights secured to them by the Constitution are violated by the maintenance of separate schools for white and colored children. Question 3, as we understand it, requests counsel to consider whether this claim is of such a nature that it falls within the exclusive province of the political branches of government

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L. Rev. 909, 917, 920; *Mr. Justice Holmes and the Supreme Court* (1938), pp. 8, 75; *Law and Politics* (1939), pp. 13, 48, 91, 99, 192, 196; Douglas, *Stare Decisis* (1949), pp. 9, 12; Jackson, *The Struggle for Judicial Supremacy* (1941), pp. 23, 174; *Full Faith and Credit* (1945), pp. 42–43, 58.

[47] Question 2 is:

"If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

"(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

"(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?"

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and cannot properly be entertained and decided by the federal courts. In his opinion for the district court in the *Briggs* case, Chief Judge Parker stated that racial segregation in public schools of the states presents "not questions of constitutional right but of legislative policy * * *. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in the interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter." (No. 1, R. 186–187.)

1. It is respectfully submitted that the constitutional question before this Court is not the same as that before a state legislature considering whether, solely as a matter of educational and social policy, a system of racially separate or mixed schools should be established. If the Fourteenth Amendment leaves a state entirely free to choose whichever system it considers desirable and beneficial for its people, then, of course, no federal court can substitute its judgment for the choice made by the state. The question presented here, however, is whether the Amendment does give such a freedom of choice to a state. This is a question not of legislative

policy but of constitutional power—and it is a question which under our system of government must ultimately be determined by this Court on the basis of its construction of the Fourteenth Amendment.

The plaintiffs in these cases contend that the Amendment should be construed as withdrawing from a state, in providing public education to its citizens, the authority to make legal distinctions based solely on race or color. The defendants, on the other hand, argue that this Court's decisions interpreting the Amendment have established the right of a state to maintain separate schools for white and colored pupils, provided the facilities for education offered to all are substantially equal. The dispute in these cases thus centers on the proper construction to be given the Fourteenth Amendment. The judicial function here is not to review the wisdom of a state's policy favoring segregation in education but rather to determine its constitutional power to adopt such a policy. Such a task clearly falls within the traditional authority and competence of this Court.

The authority under which federal courts act in enforcing rights secured by the Constitution is derived from the Constitution itself. Article III of the Constitution vests the "judicial Power of the United States" in the Supreme Court and the lower federal courts established by Congress, and provides that the judicial power so vested

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"shall extend to all Cases, in Law and Equity, arising under this Constitution * * *." The right asserted by the plaintiffs in these cases arises under the Constitution, and the relief prayed for (*i. e.,* decrees enjoining continuation of the defendants' allegedly unconstitutional practices) is of the sort which Anglo-American courts of equity have granted for centuries.

2. The judicial power is not lessened because the right invoked arises under the Fourteenth Amendment. Section 5 of the Amendment, which empowers Congress to enforce its provisions by appropriate legislation, neither expressly nor impliedly limits the independent power of this Court to vindicate, through appropriate judicial proceedings and remedies, rights guaranteed by the Amendment. In countless cases, too numerous for citation here, the Court has construed the Amendment of its own force, without any implementing act of Congress, as requiring judicial invalidation of state action found to infringe rights protected by the Amendment. In the vast majority of these cases no act of Congress was involved or even suggested. If it should now be held, for the first time since its adoption in 1868, that the power of this Court to enforce the Fourteenth Amendment depends on the enactment of implementing legislation by Congress, literally scores of decisions would have to be overruled. Among these would be the most recent applications of the Amendment to racial discrim-

inations in public education: *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337. If one who claims that his right to equality in the enjoyment of public educational benefits has been violated must present his claim to Congress rather than the courts, then all of these cases—in which violation of that right was found and appropriate judicial relief granted—were erroneously decided.

Congress has, of course, exercised to some extent its power to enforce the Fourteenth Amendment. It has provided criminal and civil sanctions for violation of rights secured by the Amendment (18 U. S. C. 241–243; 8 U. S. C. 41–48; cf. *Screws* v. *United States,* 325 U. S. 91; *Williams* v. *United States,* 341 U. S. 97), and it has conferred jurisdiction on the federal district courts to redress violations of such rights (28 U. S. C. 1343). Referring to the federal statute prohibiting disqualification of jurors in federal and state cases because of race, color, or previous condition of servitude (18 Stat. 336, 8 U. S. C. 44), the Court recently observed in *Fay* v. *New York,* 332 U. S. 261, 282–283 (the "blue ribbon" jury case):

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of illegal discrimination.

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In the *Fay* opinion (p. 283) the Court noted that in ***Ex parte Virginia,*** 100 U. S. 339, 345, one of the earliest cases arising under the Fourteenth Amendment, it was "hinted that there might be no judicial power to intervene except in matters authorized by Congress." The question in ***Ex parte Virginia,*** however, was whether the Fourteenth Amendment empowered Congress to enact 18 Stat. 336, the Act cited above; no question was involved as to the independent judicial power to enforce the Amendment. It was decided on the same day as *Virginia* v. *Rives,* 100 U. S. 313, and the opinions for the Court in both cases were delivered by Mr. Justice Strong. In the latter case the opinion expressly stated (p. 322) that "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court." And the decisions of this Court have established beyond any possible doubt that its "revisory powers" to invalidate violations of the Fourteenth Amendment extend to every kind of state action, whether judicial, legislative, or executive, civil or criminal, substantive or procedural.

If any exception from this general principle is now to be carved out, so that this Court will decline to exercise its power to enforce the Amendment where the plaintiff is a Negro child complaining that his constitutional right to equal protection of the laws has been violated by a state law compelling him to attend a segregated school, such an exception could not be justified by precedent.

The "hint" in *Ex parte Virginia* was never followed in subsequent cases. It cannot today be regarded as raising any serious question as to this Court's power and obligation to enforce all rights arising under the Fourteenth Amendment, without awaiting exercise of the independent enforcement power granted Congress in Section 5. When a litigant claims that a state law denies him due process or equal protection, this Court does not remand the case to Congress for remedial action. If the claim is sustained, the Court grants appropriate judicial relief. Congress and the Court have concurrent power, each within its own proper sphere, to enforce the Fourteenth Amendment. Judicial remedies are specific and directed to particular cases and parties; legislative remedies are necessarily general. An available judicial remedy for violation of the Amendment cannot be, and has never been, withheld merely because Congress has not found it necessary to enact general remedial legislation.

3. Of the rights arising under the Amendment which this Court has enforced, none has received more consistent and solicitous judicial vindication than the right to equality before the law and to be free from governmental discriminations based on race or color. The familiar test of the constitutionality of a legislative classification is whether it has a reasonable basis. *Railway Express* v. *New York,* 336 U. S. 106, 110. But reasonableness is not measured in the abstract; the standard of rea-

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sonableness is found in the provisions and policy of the Fourteenth Amendment. And that Amendment, as is demonstrated by its history (see pp. 112–116, *supra*) and by decisions of this Court extending from the *Slaughter-House Cases,* 16 Wall. 36, 81, to the *Sweatt* and *McLaurin* cases, 339 U. S. 629, 637,[48] has made it unreasonable and

[48] The consistency of the Court's position deserves fuller exposition:

Slaughter-House Cases, 16 Wall. 36, 71:

"[N]o one can fail to be impressed with the one pervading purpose found in * * * all [of the reconstruction amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited domination over him. * * *"

Strauder v. *West Virginia*, 100 U. S. 303, 306–307:

"This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. * * * It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *"

Virginia v. *Rives*, 100 U. S. 313, 318:

"The plain object of these statutes [the civil rights laws enacted by Congress under the Fourteenth Amendment], as

unconstitutional, at least in the absence of compelling reasons of national security, for a state to establish or enforce legal distinctions based on race or color. Even though other types of legislative classifications are valid if found to have a rational basis, the Court not only refuses to give laws imposing racial distinctions a presumption of constitutionality but regards them as at least *prima facie* unconstitutional. In *Korematsu* v. *United States,* 323 U. S. 214, 216, the Court said:

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of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Ex parte Virginia, 100 U. S. 339, 344–345:

"One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights * * *. They were intended to take away all possibility of oppression by law because of race or color."

Neal v. *Delaware*, 103 U. S. 370, 389:

"The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty, and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national Constitution."

Plessy v. *Ferguson*, 163 U. S. 537, 544:

"The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law * * *."

Maxwell v. *Dow*, 176 U. S. 581, 592:

"[T]he primary reason for that [Fourteenth] amendment was to secure the full enjoyment of liberty to the colored race * * *."

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> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

The standard of reasonableness established by the Fourteenth Amendment is necessarily flexible

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Buchanan v. *Warley*, 245 U. S. 60, 76:

"[A] principal purpose of the * * * Amendment was to protect persons of color * * *."

Nixon v. *Herndon*, 273 U. S. 536, 541:

"That Amendment [the Fourteenth], while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. * * * States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case [to vote at a state primary election]."

Shelley v. *Kraemer*, 334 U. S. 1, 23:

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."

and dynamic. Changing conditions can make unjustifiable and unconstitutional today that which yesterday may have been entirely justifiable and constitutional. In *Wolf* v. *Colorado,* 338 U. S. 25, 27, the Court said of the due process clause of the Fourteenth Amendment:

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Cf. *Euclid* v. *Amber Realty Co.,* 272 U. S. 365, 387, where the Court observed that the application of constitutional guarantees "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

It would be idle, therefore, to speculate whether the principle of equality before the law was violated by the continuation or establishment shortly after the Civil War in many states of separate schools for the children of the newly-freed slaves. Had the issue been raised, constitutional justification for such action might conceivably have been found in the illiteracy and retarded social and economic status of a race so recently liberated from the bonds of slavery, as well as in the rudimentary and inadequate character of then-existing

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public school systems, which might have made it impracticable to teach the two races in the same classes. Moreover, school attendance was not generally compulsory then, as it is now. (See pp. 9, 110, *supra.*) The question now before the Court is not whether conditions existing when these school systems began may have justified them, practically and legally. The question, rather, is whether, under the far different conditions existing today, a legal requirement that colored children must attend public schools where they are segregated solely because of their color deprives them of their constitutional right to equality in the enjoyment of public educational advantages and opportunities.

4. The judicial inquiry, it must be emphasized, is not simply to determine whether there is equality as between schools: the Constitution requires that there be equality as between *persons.* The Fourteenth Amendment compels a state to grant the benefits of public education to all its people equally, without regard to differences of race or color. This has not always been as clear as it is today. Prior to this Court's decision in 1938 in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, it could plausibly have been contended, in reliance on cases decided before then, that because public education is a "privilege" furnished at the pleasure of the state and maintained by local taxation, the Fourteenth Amendment does not impose any limitation (apart from a require-

ment that separate schools must be physically equal) on the state's discretion to prescribe the terms and conditions on which such privilege is granted. Thus, in the first case in this Court involving a claim under the Fourteenth Amendment that a state's public educational system was unconstitutional, *Cumming* v. *Board of Education,* 175 U. S. 528, decided in 1899, the Court in an opinion by Mr. Justice Harlan, who had dissented so vigorously in *Plessy* v. *Ferguson,* 163 U. S. 537, stated (p. 545):

> * * * while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[49]

[49] See also *Berea College* v. *Kentucky,* 211 U. S. 45, where the Court upheld a state statute making it unlawful for a state-chartered corporation to operate a private school where white and colored pupils are taught together. Harlan, J., dissented on the ground that the statute was inconsistent with "the great principle of the equality of citizens before the law." (p. 69.) He was careful to add, however: "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense. No such question is here presented and it need not be now discussed." (*Id.*)

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Similarly, in *Gong Lum* v. *Rice,* 275 U. S. 78, decided in 1927, the Court dealt with the question "whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black" (p. 85). Answering this question in the negative, the Court, in an opinion by Mr. Chief Justice Taft, held that "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear" (*ibid.*), citing and quoting from the *Cumming* case.

Mr. Chief Justice Taft's opinion in *Gong Lum* stated (pp. 85–86): "Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution." In support of this statement were cited fifteen cases, none of them decided by this Court. Twelve were state cases, beginning with *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, decided in 1850, eighteen years before the Fourteenth Amendment was adopted. At least some of these cases expressed the view that control over public education is a subject-matter inherently within a state's police power, and that the Fourteenth Amendment imposes no limitation on its power in that regard.

E. g., State ex rel. Stoutmeyer v. *Duffy,* 7 Nev. 342, 346; *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198, 209; *Cory* v. *Carter,* 48 Ind. 327, 360.

In *Missouri ex rel. Gaines* v. *Canada, supra,* however, this Court unequivocally dispelled any notion that because public education is provided as a matter of "privilege" rather than of right, the state has full discretion to determine the terms and conditions on which such privilege is granted. The Court, speaking through Mr. Chief Justice Hughes, said (305 U. S. at pp. 349–350):

> The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. * * * That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up * * *.

As we read its opinion, the Court in the *Gaines* case made it clear that its function in cases of this type is not limited to appraising questions of fact concerning the physical equality of schools or facilities, and that its primary concern is whether the *individual* is being denied, because of

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race or color, equality of treatment in the opportunities, advantages, and benefits offered by the state. In that case the Court decided that a legal education—assumedly equal in quality—offered in schools outside the state did not meet the required standard of personal equality of right when contrasted with the privilege, afforded only to white students, of legal education in a school within the state. That this was a departure from the approach taken in the *Cumming* and *Gong Lum* cases is indicated by the dissenting opinion of Mr. Justice McReynolds (305 U. S. at 353–354), who unsuccessfully invoked those cases to support his view that "the settled legislative policy of the State" for "separation of whites and Negroes in schools" should not be upset by the Court.[50]

[50] In *Atkin* v. *Kansas*, 191 U. S. 207, 222, the Court had stated that "it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." This principle was applied in *Heim* v. *McCall*, 239 U. S. 175, to uphold the validity of a state law excluding aliens from employment on public works, the Court declaring (pp. 191–193) that regulations on this subject involve only considerations of public policy with which the courts have no concern. To the extent that these cases hold that the prohibitions of the Fourteenth Amendment do not apply at all to public employment because it is a "privilege" wholly subject to the discretion of the state, they have been limited by *Wieman* v. *Updegraff*, 344 U. S. 183, 191–192, and *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, as well as by the cases cited in the text.

Following the *Gaines* case came *Sipuel* v. *Board of Regents,* 332 U. S. 631; *Sweatt* v. *Painter,* 339 U. S. 629; and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. Those cases emphasized the personal character of the right to equal protection of the laws. In *Sweatt* and *McLaurin,* the Court directed its attention to the individual plaintiff, and appraised the educational opportunities afforded by the state solely in terms of their value to him, considering all the conditions (tangible and intangible) on which they were offered. In those cases the Court, looking beyond any claimed physical equality of the facilities furnished, found a denial of the plaintiff's constitutional right to equal treatment. Thus, in the *McLaurin* case, a Negro graduate student was furnished an education not only equal but identical to that offered whites, but he was subjected to such segregated treatment because of his color that this Court, adverting to psychological and sociological considerations such as are urged here, ordered that he be treated completely without reference to his color (p. 642):

> We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt* v. *Painter, ante,* p. 629. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been

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admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.

In one of the cases at bar, No. 1, the *Kansas* case, the district court found (R. 245–246) that racial segregation in public schools has a detrimental effect on colored children; that it affects their motivation to learn; and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. The opinions in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633–635 and 641–642, show that similar considerations were found persuasive by the Court in concluding that the plaintiffs in those cases were denied the equality of right secured them by the Fourteenth Amendment. In neither of those cases is there any suggestion that the question presented is not justiciable; or that it involves the determination of matters of educational or social policy outside the judicial power; or that the constitutional question of segregation in higher education is in any respect different from segregation in elementary and high schools.

5. Finally, it is clear that the cases at bar do not involve "political questions" beyond the authority and competence of federal courts to decide. The Court has clearly marked out the types of questions which it will not undertake to adjudicate because their nature is such as to make them

exclusively the concern of the political depar
ments. Thus, the federal courts will decline t
determine whether and when a state of war exist
leaving such questions to the legislative and exe
utive branches of government. *The Protector,* 1
Wall. 700. Similarly, the constitutional respons
bility of each house of Congress to be "the Judg
of the Elections, Returns and Qualifications of i
own Members" (Article I, section 5) implies
corollary lack of authority in the courts to de
with such "political" questions as apportionmen
Colegrove v. *Green,* 328 U. S. 549; cf. *Giles*
Harris, 189 U. S. 475. And, of course, it has lo
been settled that it is not part of the feder
judicial function to enforce the guarantee
Article IV, section 4, that every state shall ha
a republican form of government. *Luther*
Borden, 7 How. 1; *Georgia* v. *Stanton,* 6 Wall.
Pacific States Telephone and Telegraph Co.
Oregon, 223 U. S. 118.

None of the considerations governing tho
cases is applicable here. Determination of t
constitutional question presented in the insta
cases would in no respect conflict with, or intru
upon, any power which the Constitution vests
the Congress or the President. Indeed, as is e
denced by the countless decisions of this Co
enforcing the Fourteenth Amendment, the pri
cipal responsibility for vindicating rights secur
by that Amendment has properly been assum
by the judiciary. A decision that racial segre

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tion in public elementary and high schools is unconstitutional would be no more "political" or "legislative" than those which have ended segregation in higher levels of public education. *Sweatt* v. *Painter, supra; McLaurin* v. *Oklahoma State Regents, supra.*

In answer to any contention that this Court lacks the competence to decide the question of constitutional interpretation which has been placed before it in these cases, we call to mind its words in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638, 639–640:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. * * *
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. * * * [C]hanged conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

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IV

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT HAS POWER TO DIRECT SUCH RELIEF AS IN ITS JUDGMENT WILL BEST SERVE THE INTERESTS OF JUSTICE IN THE CIRCUMSTANCES

Question 4 reads as follows:

> Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

This question assumes that the Court will hold that the plaintiffs in these cases have a constitutional right not to be excluded, solely because of their color, from schools which they would otherwise be allowed to attend. The question is addressed solely to the Court's power to fashion an appropriate remedy. Is its power so limited that, if it finds that racial segregation in public schools is unconstitutional, it must necessarily enter decrees requiring immediate admission of the plaintiffs to nonsegregated schools—or can it direct some other form of relief? The alternative type of

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relief suggested by the Court's question is to "permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions."

In dealing with question 5, *infra,* pp. 170–185, we shall consider the problems which may arise, at least in some areas, in giving effect to a decision that segregation in public schools is unconstitutional. We shall there discuss the question whether, and to what extent, it would be equitable and in the public interest for the Court to enter decrees in these cases requiring that Negro children should "forthwith" be admitted to nonsegregated schools.

The shaping of relief in the present cases involves reference to three fundamental principles governing the granting of judicial remedies, each of which is to some degree applicable here: (1) One whose legal rights have been and continue to be violated is entitled to relief which will be effective to redress the wrong. If a court finds that certain conduct is unlawful, it normally enters a decree enjoining the continuation of such conduct. (2) A court of equity is not inflexibly bound to direct any particular form of relief. It has full power to fashion a remedy which will best serve the ends of justice in the particular circumstances. (3) In framing its judgment a court must take into account not only the rights of the parties but the public interest as well. The needs of the public, and the effect of proposed decrees

on the general welfare, are always of relevant, if not paramount, concern to a court of justice.

The principal problem here, as so often in the law, is to find a wise accommodation of these principles as applied to the facts presented. "The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the [law] in the light of the facts of the particular case." *United States* v. *National Lead Co.,* 332 U. S. 319, 335. But, whatever the difficulties of determining what remedy would be most effective and fair in redressing the violation of constitutional right presented in these cases, we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice.

Congress has expressly empowered the Court, in dealing with cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U. S. C. 2106. The breadth of this power, and the flexibility of judicial remedies which it permits the Court to utilize, have been demonstrated in a great variety of situations. See *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 555; *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431; *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 132; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 620, 622; *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–

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330; *Alexander* v. *Hillman,* 296 U. S. 222, 239; *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, 316; *Central Kentucky Co.* v. *Railroad Commission,* 290 U. S. 264, 271; *Union Pacific Railway Co.* v. *Chicago, &c. Railway Co.,* 163 U. S. 564, 600–601; and see Story, *Equity Jurisprudence* (14th ed.), §§ 28, 578; Pomeroy, *Equity Jurisprudence* (5th ed.), §§ 111, 170, 175a. In *Hecht Co.* v. *Bowles, supra,* this Court said (pp. 329–330):

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

In *Addison* v. *Holly Hill Co., supra,* at 619, the Court emphasized that where governmental action has been in violation of law, the judicial task is to seek a disposition which "is most consonant with justice to all interests in retracing the erroneous course that has been taken." Commenting upon *United States* v. *Morgan,* 307 U. S. 183, and other instances of judicial adaptation of conventional remedies to meet the needs of unusual situations, the Court said (pp. 620, 622):

> The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness,

> have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law. * * *
>
> * * * * *
>
> In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them.

Where public interests are involved, equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Co.*, 328 U. S. 395, 398; and see *Radio Station WOW, Inc.* v. *Johnson, supra,* at 132; *Yakus* v. *United States,* 321 U. S. 414, 441; *Hecht Co.* v. *Bowles, supra,* at 329–330; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 670; *Railroad Commission of Texas* v. *Pullman Co.,* 312 U. S. 496, 500; *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157; *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515, 552; *Beasley* v. *Texas and Pacific Ry. Co.,* 191 U. S. 492, 498.

In habeas corpus cases arising out of criminal and deportation proceedings the Court has framed its relief to permit correction of illegality where possible, instead of directing immediate or outright discharge of the petitioner. Thus, in *In re Bonner,* 151 U. S. 242, where the trial court had exceeded its jurisdiction in sentencing the petitioner, the Court delayed his discharge in order to afford opportunity for the court to correct its error. The Court held that Section 761 of the

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Revised Statutes (now contained in 28 U. S. C. 2243), authorizing "the court * * * to dispose of the party as law and justice require," invested it "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*" (p. 261). And see *Medley, Petitioner,* 134 U. S. 160. Similarly, in *Mahler* v. *Eby,* 264 U. S. 32, where the Court held that a warrant of deportation was defective, it stated that "We need not discharge the petitioners at once because of the defective warrant" (p. 45). To the same effect are *Tod* v. *Waldman,* 266 U. S. 113, and *Butterfield* v. *Zydok,* 342 U. S. 524, 546–47.[51]

In granting relief in civil cases against a practice or condition found to be unlawful, courts have frequently suspended the operation of their decrees on grounds of inconvenience to the public or undue hardship to the wrongdoer, and have allowed sufficient time for removing the illegality. Thus, in *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, an original bill in equity by Georgia to enjoin the defendant copper companies from dis-

[51] Compare *United States* v. *Morgan,* 307 U. S. 183, holding that where an order of the Secretary of Agriculture fixing stockyard rates was void for procedural defects but there was no judicial determination of the reasonableness of the rates fixed by the order, the money representing the difference between the rates in effect and the lower rates of the order should be retained in the registry of the District Court to await a further and valid determination of reasonable rates by the Secretary.

charging noxious gas from their works in Tennessee over Georgia's territory, the Court, in an opinion by Mr. Justice Holmes, held that, notwithstanding that the defendants' activities were unlawful, an injunction would issue "after allowing a reasonable time to the defendants to complete the structures that they are now building, and the efforts that they are making to stop the fumes" (p. 239).[52] Cf. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *Great Central Ry* v. *Doncaster Rural Council*, 87 L. J. R. N. S. 80;[53] *Gregory* v. *Crain*, 291 Ky. 194; *City of San Diego* v. *Van Winkle*, 69 Cal. App. 2d 237, 241.[54]

[52] Although the decision was rendered in 1907, the matter was still before the Court in 1916. See 237 U. S. 474, 678, and 240 U. S. 650.

[53] Other English cases, each involving abatement of a nuisance, are: *City of Manchester* v. *Farnworth* [1930] A. C. 171, 185; *Attorney General* v. *Birmingham*, 4 Kay & J. 528, 541, 547–548 (1858); *Attorney-General* v. *Proprietors of the Bradford Canal*, L. R. 2 Eq. 71 (1866); *Attorney-General* v. *Colney Hatch Lunatic Asylum*, 4 Ch. App. 146, 165–166 (1868); *Attorney General* v. *Corporation of Halifax*, 39 L. J. Ch. N. S. 129 (1869); *North Staffordshire Ry. Co.* v. *Board of Health*, 39 L. J. Ch. N. S. 131 (1870); *Attorney-General* v. *Finchley Local Board*, 3 Times L. R. 356 (1887). See also 1 Seton, *Judgments and Orders* (7th ed.), p. 612.

[54] Other state cases in which the effective date of an injunction was suspended to permit time for necessary readjustment, most of them involving abatement of a nuisance, are: *Harding* v. *Stamford Water Co.*, 41 Conn. 87; *Stovern* v. *Town of Calmar*, 204 Ia. 983, 986; *Caretti* v. *Broring Building Co.*, 150 Md. 198, 210–211; *Brehm* v. *Richards*, 152 Md. 126, 136–137; *Baltimore* v. *Brack*, 175 Md. 615; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396, 401; *Breed* v. *City of Lynn*, 126 Mass. 367, 370; *Suburban Land Co., Inc.*

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In the field of monopolies and illegal combinations federal courts have regarded their powers to be of sufficient flexibility to permit elimination of unlawful practices to take place over a reasonable period of time. Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 360.[85] Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would, in the particular circumstances, be impracticable. See, for example, the provisions for dissolution of the illegal combinations involved in the *Tobacco, Standard*

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v. *Billerica*, 314 Mass. 184, 194; *Gundy* v. *Village of Merrill*, 250 Mich. 416; *Lohman* v. *The St. Paul, etc. R. R. Co.*, 18 Minn. 174; *Doremus* v. *Mayor and Aldermen of Paterson*, 79 N. J. Eq. 63; *State* v. *White*, 90 N. J. Eq. 621; *Chapman* v. *City of Rochester*, 110 N. Y. 273; *Moody* v. *Village of Saratoga Springs*, 17 App. Div. (N. Y.) 207, affirmed, 163 N. Y. 581; *Sammons* v. *City of Gloversville*, 34 Misc. (N. Y.) 459; *Bailey* v. *City of New York*, 38 Misc. (N. Y.) 641; *French* v. *Chapin-Sacks Mfg. Co.*, 118 Va. 117; *Town of Purcellville* v. *Potts*, 179 Va. 514, 524, 525; *Winchell* v. *City of Waukesha*, 110 Wis. 101. See Pomeroy's *Eq. Rem.* (1905), §§ 531, 535; Beach, *Injunctions* (1895), §2; *High on Injunctions* (4th ed.), § 746.

[85] There the Court, in speaking generally of remedies in a civil antitrust suit, said (p. 360):

"This, it must be remembered, is a suit in equity * * *; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand."

Oil and *Motion Picture* cases.[56] The decree entered in the *Tobacco* case furnishes a useful precedent and guide to the disposition of the present cases, and for that reason we quote at length from the Court's opinion there (pp. 185, 187–188):

> * * * In considering the subject [of relief] * * * three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. * * *
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[56] *United States* v. *American Tobacco Co.*, 221 U. S. 106, 191 Fed. 371 (S. D. N. Y.); *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures*, 70 F. Supp. 53, 74–75 (S. D. N. Y.), 334 U. S. 131, 85 F. Supp. 881, 899, 339 U. S. 974. See also *United States* v. *National Lead Co.*, 332 U. S. 319, 329–335, 363; *United States* v. *Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (C. A. 2), 171 F. 2d 285, 91 F. Supp. 333, 419 (S. D. N. Y.); *United States* v. *International Harvester Co.*, 214 Fed. 987 (D. Minn.), 274 U. S. 693.

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* * * Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Antitrust Act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegra-

> tion in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirement of the statute.[57]

Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1, where this Court directed extension of the time for executing the decree from a period of thirty days to at least six months, "in view of the magnitude of the interests involved and their complexity" (p. 81).[58]

[57] A plan was formulated under the supervision of the district court at a series of conferences extending for a period of more than two months. A hearing was held on the plan at which not only the parties but also any person who wished to express his views as a friend of the court was given an opportunity to do so. See 191 Fed. at 373. In the decree approving the plan it was adjudged that it "will recreate out of the elements now composing it [the illegal combination] a new condition which will be honestly in harmony with, and not repugnant to, the law, and without unnecessary injury to the public or the rights of private property." The decree also gave the defendants an extension of the period for carrying the plan into execution and provided for retention of jurisdiction by the court "for the purpose of making such other and further orders and decrees, if any, as may become necessary for carrying out the mandate of the Supreme Court." 191 Fed. at 428, 430–431.

[58] In the *International Harvester* case (214 Fed. 987 (D. Minn.)), the court directed that "the entire combina-

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The Court has expressed a reluctance to enter decrees which would involve the judiciary in the administration of complex and detailed matters: "The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective." *United States* v. *Paramount Pictures,* 334 U. S. 131, 163; see also *Brown* v. *Board of Trustees,* 187 F. 2d 20, 25 (C. A. 5). It is clear, however, that this goes to the exercise of the Court's discretion and not to its power to act in such situations. The choice whether or not the courts are to be thrust into a system involving difficult policing problems "should not be faced unless the need for the system is great and its benefits plain." *United States* v. *Paramount Pictures, supra,* at 164. The

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tion and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations," and it was further provided that "in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of * * *" (214 Fed. at 1001). The decree was entered in August 1914 and modified in October of that year. In November 1918 a consent decree was entered, and in 1927 this Court affirmed dismissal of a supplemental petition of the Government for further relief in the case. See 274 U. S. 693.

Court, in rejecting the argument that it should not act because it would be required to embark upon an enterprise involving burdensome administrative functions, said in *Nebraska* v. *Wyoming,* 325 U. S. 589, 616: "The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." See also *Joy* v. *St. Louis,* 138 U. S. 1, 47; *Southern R. Co.* v. *Franklin &c. C. R. Co.,* 96 Va. 693; *Harper* v. *Railway Co.,* 76 W. Va. 788, 794; Pomeroy, *Equitable Remedies* (1905) § 761. In *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237 U. S. 474, 678, the Court did not hesitate to enter a decree which involved it deeply in the details of effective enforcement.

It may be contended, however, that the powers of a court of equity are not so comprehensive where vindication of the constitutional right to equal protection of the laws is involved. Such right, the Court has pointedly observed, is "personal and present." *Sweatt* v. *Painter,* 339 U. S. 629, 635; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 642; *Shelley* v. *Kraemer,* 334 U. S. 1, 22; *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 161–162. Thus a complainant must show that his own rights have been unconstitutionally impaired; it is not sufficient for him to establish that the rights of others have been

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affected (*McCabe* v. *Atchison, T. & S. F. Ry. Co.*). Similarly, it is no answer to a particular plaintiff's claim to say that at some time in the future he will receive the equality of treatment which is his constitutional right (*Sipuel* v. *Board of Regents*). So, too, in the present cases, the plaintiffs could well say that, as individuals whose constitutional rights have been and are continuing to be violated, it affords them inadequate redress to enter decrees providing only that at some time in the future (perhaps after they are too old themselves to enjoy the benefits of the Court's decision) colored children as a group must be given public education on a non-segregated basis. For these plaintiffs the remedy of immediate admission to non-segregated schools is an indispensable corollary of the constitutional right, for to recognize a litigant's right without affording him an adequate remedy for its violation is to nullify the value of the right.

On the other hand, it is also true that the constitutional issues presented to the Court transcend the particular cases and complainants at bar, and in shaping its decrees the Court may take into account such public considerations as the administrative obstacles involved in making a general transition throughout the country from existing segregated school systems to ones not based on color distinctions. If the Court should hold in these cases that racial segregation *per se* violates the Constitution, the immediate consequence

would be to invalidate the laws of many states which have been based on the contrary assumption. Racial segregation in public schools is not an isolated phenomenon limited to the areas involved in the cases at bar, and it would be reasonable and in accord with its historic practices for the Court in fashioning the relief in these cases to consider the broad implications and consequences of its ruling.

The "personal and present" language appears in cases involving education on the professional and graduate levels. Each case involved a single plaintiff. It is one thing to direct immediate relief where a single individual seeks vindication of his constitutional rights in the relatively narrow area of professional and graduate school education, and an entirely different matter to follow the same course in the broad area of public school education affecting thousands of children, teachers, and schools. We do not think that when the Court in those cases characterized the right to equal protection of the laws as "personal and present", it was thereby rejecting the applicability, to cases involving the right, of settled principles governing equitable relief.[59] On the con-

[59] This Court long ago cautioned "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Chief Justice Marshall in *Cohens* v.

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trary, the Court has recognized that such principles are equally applicable to litigation involving fundamental constitutional rights of individuals. Thus, in *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, five Negro citizens brought suit to enjoin the defendant railroads from complying with the Oklahoma "Separate Coach Law" for the reason, among others, that it violated the Fourteenth Amendment. This Court, while it concluded that certain provisions of the law were unconstitutional, held that the complainants were not entitled to the relief sought because they did not show any injury to themselves (235 U. S. at 162, 164):

> The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.

We conclude, therefore, that the Court has undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision.

Virginia, 6 Wheat, 264, 399. And see *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132–133.

V

IF THE COURT HOLDS THAT RACIAL SEGREGATION IN PUBLIC SCHOOLS IS UNCONSTITUTIONAL, IT SHOULD REMAND THESE CASES TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS SPEEDILY AS THE PARTICULAR CIRCUMSTANCES PERMIT

Question 5 is:

> On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),[60]
>
> (a) should this Court formulate detailed decrees in these cases;
>
> (b) if so, what specific issues should the decrees reach;
>
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

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[60] Question 4 reads as follows:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

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(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

This question is predicated on three assumptions: (1) that the Court will hold that racial segregation in public schools is unconstitutional; (2) that it can permit an effective gradual adjustment to be brought about from existing segregated school systems to ones not based on color distinctions; and (3) that the Court will exercise its equity powers to that end. The question which remains to be considered, therefore, is how the decrees in the present cases should be framed so as to give effective force to the Court's ruling on the constitutional question and at the same time to permit orderly solution of the problems which may arise in eliminating existing racial segregation in public schools.

In this concluding section of the brief, we discuss (a) the difficulties which may be met in carrying out transition to nonsegregated school systems, and (b) the various factors which appear to be relevant in framing the decrees in the cases at bar.

A. *Obstacles to Integration.* In carrying out an adjustment from existing segregated school systems to new ones not based on color distinctions, the difficulties likely to be encountered fall into two groups: (1) those of an administrative nature; (2) those deriving from the fact that racial segregation in public schools has been in existence for many years in a large part of the country.

1. It is not difficult to envisage some of the kinds of administrative problems which may arise in giving effect to a holding that separate school systems are unconstitutional. Such a decision will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states. In many areas existing boundaries of school districts may require extensive revision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Schools may have to be consolidated, teachers and pupils transferred, teaching schedules revised, and transportation arrangements altered. In jurisdictions (*e. g.*, South Carolina, District of Columbia) where by statute the allocation of public school funds depends on the relative number of Negro and white children of school age, changes in the law may be required.[61] In some jurisdictions (*e. g.*, District of Columbia, Maryland) it may be necessary to elim-

[61] South Carolina Code (1952), §§ 21-251, 21-290; D. C. Code (1951 ed.), §§ 31-1110, 31-1112.

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inate duplication of functions arising from the existence of separate sets of supervisory and administration officials for white and Negro schools.[62] In states (*e. g.*, Mississippi, Texas) which have statutory provisions for separate training schools for Negro teachers, the law may require amendment.[63]

It is not unlikely that in many communities, particularly where separate white and colored residential districts still exist, abolition of segregation would produce no serious dislocations, and no wholesale transfers of teachers or pupils would occur. This could result from purely geographical factors, because the pupils of a school ordinarily reflect the composition of the population of the district in which it is located. The extent of the administrative and legal changes required will thus vary in the different jurisdictions involved, depending on these and other factors which now cannot be evaluated or measured. Accordingly, it is impossible to determine at this time what specific period of time would be required to overcome the administrative obstacles to school integration in any particular area.

In this connection it should be noted that financial cost, which would play so large a role in any program for "equalization" of separate schools,

[62] D. C. Code (1951 ed.), §§ 31–670, 31–671; Anno. Code of Maryland (Flack ed., 1951), Art. 77, §§ 42 (4), 208.

[63] Mississippi Code (1942 ed.), Art. 15, §§ 6808–6811; Vernon's Texas Civil Statutes, title 49, ch. 8.

furnishes no substantial obstacle to integration. As the Attorney General of Virginia stated in his brief on the merits filed last term in No. 4 (p. 21), "It is crystal clear that segregation is more expensive than amalgamation." It has been estimated that a capital outlay of as much as 2 billion dollars might be required in order to make the separate public schools for Negroes "equal", in a physical sense, to those now maintained for white pupils. On the basis of the 1949–50 level of *per capita* current expenditure for Negro pupils in the separate school areas, it has been estimated that it would take an additional $134,824,000 to bring the Negro expenditure up to that for the white pupils, an increase of almost 70 per cent. To raise the cost of transporting Negro pupils at the 1949–50 level to a par with that of transporting white pupils would entail an additional $55,574,582.[64]

An additional economic consideration favoring integration results from recent changes in the number and relative proportion of Negroes in the areas which maintain separate public schools for colored children. During the last decade there have been significant changes in the distribution

[64] These estimates have been made by the Office of Education, Department of Health, Education and Welfare, on the basis of data contained in *Statistics of State School Systems 1949–1950*, being chapter 2 of the *Biennial Survey of Education in the United States* (1948–1950), published by the Office of Education, and in the article *School Building Unit Costs* about to be published in *School Life*, an organ of the Office of Education.

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of the Negro population of the country.[65] There has occurred a significant shift of Negroes from the Southern to the Northern, Central, and Western States. A decline in the number and proportion of Negroes in the population has taken place in West Virginia, Georgia, Kentucky, Alabama, Mississippi, Arkansas, and Oklahoma. The Middle Atlantic, East North Central, and Pacific States had the most appreciable increases in their Negro population, and the percentage increases for Negroes far exceeded those of the white population.[66]

The financial burden of maintaining "separate but equal" public schools becomes increasingly onerous and unjustifiable as the Negro population in a particular area decreases. A community re-

[65] See S. Doc. No. 14, 83d Cong., 1st Sess., pp. 4–8.

[66] *Ibid.* The following table taken from data published by the Bureau of the Census shows the changes in Negro population in 17 Southern and border states and the District of Columbia:

	1940		1950	
	Non-whites	Percent non-white	Non-whites	Percent non-white
Delaware	35,977	13.5	44,207	13.9
Maryland	302,763	16.6	388,014	16.6
District of Columbia	188,765	28.5	284,031	35.4
Virginia	662,190	24.7	737,038	22.2
West Virginia	117,872	6.2	115,268	5.7
North Carolina	1,003,988	28.1	1,078,819	26.6
South Carolina	815,496	42.9	823,624	38.9
Georgia	1,085,445	34.7	1,064,005	30.9
Florida	515,428	27.2	605,258	21.8
Kentucky	214,202	7.5	202,876	6.9
Tennessee	508,035	17.5	631,468	16.1
Alabama	983,864	34.7	982,243	32.1
Mississippi	1,077,469	49.3	990,485	45.5
Arkansas	483,303	24.8	428,003	22.4
Louisiana	852,141	36.0	886,968	33.1
Oklahoma	232,266	9.9	200,796	9.0
Texas	927,279	14.5	984,963	12.8
Missouri	245,477	6.5	299,066	7.6

quired to support for a handful of Negro children a separate school which must be physically equal in all respects to the schools it operates for white children is, from a purely economic standpoint, obviously not receiving the most for the money it expends for the education of its children. The same money, if expended for integrated schools, would result in greater educational benefits for both white and colored children. These economic considerations alone go far to indicate the relative feasibility of integration as a practical alternative to "equalization".

2. Some Southern leaders have expressed the view that considerable popular opposition will be met in the execution of any program for integration of public schools. In their opinion, separation of the races in the public schools is one of the ways of life in the South (see the finding of the district court in No. 4, R. 620). They predict that popular antagonism to elimination of segregation in public schools, arising from a traditional hostility to the mingling of the races, will most likely be reflected in withdrawal of state aid for those schools (see, e. g., the testimony of Dr. Colgate W. Darden, R. 452, No. 4). On the other hand, the conviction has been expressed that these fears are exaggerated and unjustified, and that there is no reason to assume that, once this Court has authoritatively resolved the constitutional question, the people of the entire coun-

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try, including the South, will not abide by its decision (see e. g., R. 197–198, No. 4).

We believe it would be futile and irrelevant to enter into such speculation. Recent years have witnessed, on a fairly large scale, an ever-increasing trend towards the elimination of racial segregation and discrimination in all fields and in every part of the country. In almost every instance this progress has been accomplished without disorder or friction. Traditional attitudes on racial relations are in process of constant revision, particularly in the South. As illustrative, we shall here describe (a) New Jersey's successful experience in integrating segregated public schools in the past few years and (b) the notable achievements of the Armed Forces of the United States in carrying out a program of racial integration.[67]

New Jersey.—Following the adoption in 1947 of a state constitution expressly forbidding racial segregation in the public schools of the state, a program for elimination of segregated schools was put into operation. A survey disclosed that there were 43 school districts in New Jersey which had one or more separate Negro schools. These were located in urban areas, agricultural town-

[67] The materials cited in the following portion of the brief were collected by Dr. Ambrose Caliver, Assistant to the Commissioner of Education, Department of Health, Education and Welfare.

ships, and in some relatively well-to-do suburban communities. Practically all the school officials and a majority of the school board members concerned did not oppose the program of racial integration of pupils.

Since many of the communities involved had individual problems, no single formula could be applied. In a number of districts the existing small Negro schools were closed; in others new consolidated schools were built. In several communities the Negro elementary schools were converted into intermediate or junior high schools. In the larger towns and cities, school districts were rezoned and transfer regulations adopted that required all pupils to attend the schools nearest their homes.

Varying techniques were used for placing white children under colored teachers for the first time. One device used was as follows: where there were two classes of the same grade in a particular school, one class was given a white teacher, the other, a colored teacher, and a class which had a white teacher in the first grade was given a colored teacher in the second grade and a white teacher in the third grade, and so on. Many communities, however, merely placed colored teachers in the same grades in the new system that they had been teaching in the colored schools, and this appeared to work just as effectively.

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Some school boards made a single formal public announcement that the schools under their jurisdiction would be integrated; in other districts public meetings were sponsored by the boards after plans for integration had been formulated and approved. In one community a plan for integration over a two-year period was adopted with the approval of Negro parents. During the first year the superintendent of schools conducted public meetings, and integration was completed by the end of that year.

One of the fears anticipated in many communities was withdrawal of pupils from the public schools and their transfer to parochial or private schools. This, however, did not eventuate. In one community where a few children were withdrawn, most of them later reentered the school. Parents who objected to having their children placed under Negro teachers were requested by school officials to give the new system a chance. Most of the protests evaporated.

The program was also successfully carried out in areas where public opposition might have been expected to present a difficult problem. For example, in Salem, which is in the southern part of the state and directly across the river from Delaware, many of the residents were raised and educated in the traditions of the South. Salem had three schools, two for white children and one for colored children. The latter constituted approximately one-third of the total enrollment.

All three schools were integrated; one of them with a colored principal in charge of five white teachers. The school superintendent reported that this was accomplished without incident or friction.

By September 1951, 40 of the 43 school districts involved in the New Jersey program were completely integrated and the remaining three districts had taken substantial steps towards integration. The state official in charge of the program summarized the New Jersey experience as follows:

> While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it.[68]

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[68] Bustard, *The New Jersey Story: The Development of Racially Integrated Public Schools*, 21 Journ. of Negro Education 275, 285 (1952). Other areas where public school systems have successfully been integrated include Indianapolis, Indiana, Topeka, Kansas, and Tucson, Arizona. In the District of Columbia a program of racial integration is under way in the Catholic elementary and secondary schools. The Department of Defense has recently announced that it has set the fall of 1955 as its target date for eliminating racial segregation in state-operated schools located on federal military installations. (New York Times, Aug. 24, 1953, p. 21.)

In the field of higher education, many Southern colleges and universities have opened their doors to Negro students. There are at least 17 public institutions of higher learning

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The Armed Forces.—Racial integration on a large scale has been successfully achieved in the Armed Forces. The program for elimination of racial segregation and discrimination in the Armed Forces had its origin in Executive Order No. 9981 of July 26, 1948 (13 F. R. 4313).[69] The order established the policy "that there shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion, or national origin." The President's Committee on Equality of Treatment and Opportunity in the Armed Forces, which was charged with the task of seeing that the policy was implemented effectively, found in its report of May 22, 1950, "Freedom to Serve," that

in 12 Southern states which now have Negro students. Negroes have been admitted to 38 private institutions of higher education located in the South and the District of Columbia.

[69] Executive Order 9980 of July 26, 1948, 13 F. R. 4311, declared it to be the policy of the Federal Government that all personnel actions were to be taken without discrimination on account of race, color, religion or national origin. See also 5 C. F. R. 410.1–7 (1952 Supp.) for the regulations implementing this policy. Since 1941, it has been the policy of the Federal Government that there shall be no racial discrimination in employment by Government contractors or subcontractors. See Executive Order 9346 of May 27, 1943, 8 F. R. 7183, and Executive Order 10479 of August 15, 1953, 18 F. R. 4899, for enforcement provisions. Since 1938 public parks and recreational facilities under the jurisdiction of the Department of the Interior have been operated on a non-segregration basis. This policy has been uniformly successful, and there have been no untoward incidents of racial friction.

broad programs for racial integration adopted by the Navy and the Air Force had been successfully carried out without animosity or incident. The following conclusions of the Committee are significant (Rept. 44):

> Integration of the two races at work, in school, and in living quarters did not present insurmountable difficulties. As a matter of fact, integration in two of the services [the Navy and Air Force] had brought a decrease in racial friction.
>
> The enlisted men were far more ready for integration than the officers had believed.
>
> The attitude of command was a substantial factor in the success of the racial policies of the Air Force and the Navy.

In a recent interview, Dr. John A. Hannah, Assistant Secretary of Defense, stated that "remarkable progress" had been made in the program for ending racial segregation in the Armed Forces and that "In eight months there will be no nonintegrated units in the Army". Dr. Hannah also reported that "Universally the answer from our commanders is that it is desirable and works out very well in spite of contrary predictions," and that there had been no resistance, violence, or demonstrations. (U. S. News & World Report, October 16, 1953, pp. 46, 99.) The success of integration in the Armed Forces furnishes strong evidence of the feasibility of integration in other fields, such as public

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schools, where contacts are less intimate and constant.[70]

[70] Other successful experiences have been reported in such fields as industry and labor, housing, the professions, and sports. Both the American Federation of Labor and the Congress of Industrial Organizations have consistently opposed racial discriminations. In industry, racial differentiations have tended to become less significant. For an account of the successful experience of the International Harvester Company in its plants in Evansville, Louisville, and Memphis, see *Selected Studies of Negro Employment in the South: 3 Southern Plants of International Harvester Company* (National Planning Association, 1953). The techniques utilized in those plants are said to have involved "a mixture of persuasion, education, and some judiciously applied coersion." (*Id.*, p. 50.)

The Federal Housing and Home Finance Agency has reported that racial integration has been on the whole entirely satisfactory in 268 public housing projects located in the District of Columbia and in 71 other communities. See *Open Occupancy in Public Housing* (Housing and Home Finance Agency, Public Housing Administration, 1953). Since the ruling by this Court in 1948 that judicial enforcement of racial restrictive covenants is forbidden by the Constitution, *Shelley* v. *Kraemer*, 334 U. S. 1, there has been a growing and substantial dispersal of Negroes throughout residential areas. This has been accompanied by practically no friction or disorder. See the survey conducted by the United Press and reported in the New York Times, January 22, 1951, p. 19; "The People of Chicago," Report of the Chicago Commission on Human Relations for the 5-year period 1947–1951; Report of the Toledo Board of Community Relations, 1951; "The Transitional Housing Area", report of the Director of the Mayor's Interracial Committee in the city of Detroit (1952).

In recent years a number of Southern law schools and medical colleges have relaxed their restrictions against the admission of Negroes. In 1950 the American Medical Association adopted a resolution, reaffirmed in 1952, declaring its

B. *The decrees.* On the basis of the foregoing, the considerations which appear to be relevant to the framing of the decrees in the present cases may briefly be summarized as follows:

1. The constitutional right involved in these cases is "personal and present." The plaintiffs can forcefully argue that the only remedy adequate to redress the existing, continuing violation of their constitutional rights is to direct their admission to nonsegregated schools now and not at some future date when such relief would come, at least for some of them, too late to have any benefits. In the absence of compelling reasons to the contrary, vindication of constitutional rights should be as prompt and effective as is possible in the circumstances.

2. On the other hand, the effects of a decision holding school segregation to be unconstitutional would not be limited to the areas and parties involved in the cases at bar. Such a decision would have national significance and consequences. As a binding precedent, the Court's decision would entail revision of school laws and procedures in

---

policy to be against racial qualifications in the admission of physicians to its constituent societies. At the present time Negro doctors have been admitted to 27 constituent societies, located in southern and border states, which had formerly barred Negroes.

The field of professional sports evidences a striking change in racial attitudes. Negroes are now common in the ranks of the professional baseball and football teams. See, generally, *The Integration of the Negro into American Society* (Howard University Press, 1951).

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at least seventeen states and the District of Columbia. Administrative and other obstacles will have to be overcome in order to accomplish complete transition to nonsegregated systems. The nature and extent of such problems will vary throughout the country, and the time required for eliminating school segregation in any particular community will depend on numerous factors which neither this Court nor counsel can now evaluate. Regardless whether this Court should direct that school integration be carried out "forthwith" or "gradually", a brief period of time should be allowed for making necessary administrative adjustments.

3. In some places (such as the District of Columbia, Kansas and Delaware) change-over to a nonsegregated system should be a relatively simple matter, requiring perhaps only a few months to accomplish. In such areas, where there are no serious administrative or other impediments to integration, there can plainly be no valid justification for delay in ending exclusion of colored children from schools which they would otherwise be entitled to attend. In other areas, a longer period of time may be needed, depending on local conditions.

4. Despite a decision by this Court that racial segregation in public schools is unconstitutional, there will still remain many areas in which, as a practical matter, the schools will be attended by

at least a preponderance of children of one color. This could arise from purely geographical factors, even though there is full compliance with the letter and spirit of the decision. There are numerous communities characterized by exclusively Negro or white occupancy of particular residential sections. Even under normal school districting drawn on a wholly geographical and nonracial basis, the pupils of a public school in a district reflect the racial composition of its population. It may reasonably be assumed that this factor alone will have considerable effect in many areas in reducing the extent of the adjustments required by a decision prohibiting racial segregation in public schools.

5. There is no single formula or blueprint which can be uniformly applied in all areas where existing school segregation must be ended. Local conditions vary, and what would be effective and practicable in the District of Columbia, for example, could be inappropriate in Clarendon County, South Carolina. Only a pragmatic approach based on a knowledge of local conditions and problems can determine what is best in a particular place. For this reason, the court of first instance in such area should be charged with the responsibility for supervision of a program for carrying out the Court's decision. This Court should not, either itself or through appointment of a special master, undertake to formulate specific and detailed programs of implementation

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adapted to the special needs of particular cases.

6. The burden of (a) showing that, in the particular circumstances, a decree requiring the immediate admission of the plaintiffs to nonsegregated schools would be impracticable or inequitable, and, in that event, of (b) proposing, for the court's approval, an effective program for accomplishing transition to a nonsegregated system as soon as practicable, should rest on the defendants. As the responsible authorities in charge of the public schools, they would be in the best position to develop a program most suited to local conditions and needs, and to indicate the length of time required to put it into effect. In passing upon such a program, the lower court could receive the views not only of the parties but of interested persons and groups in the community. Such a locally-developed program for orderly and progressive transition to nonsegregation would tend to encounter less resistance and thus be more likely to achieve success.

As has previously been noted (pp. 160–162, *supra*), the decree entered by this Court in *United States* v. *American Tobacco Co.*, 221 U. S. 106, furnishes a useful precedent and guide to the disposition of the present cases. Adapting the provisions of that decree to the circumstances here involved, the Government respectfully suggests to the Court that, if it holds school segregation to be unconstitutional, the public interest would be

served by entering decrees in the instant cases providing in substance as follows:

(1) That racial segregation in public schools be decreed by this Court to be a violation of rights secured by the Constitution;

(2) That each case be remanded to the appropriate court of first instance for such further proceedings and orders as are necessary and proper to carry out the Court's decision;

(3) That the lower courts be directed on remand to enter decrees under which the defendants shall forthwith be enjoined from using race or color as a basis for determining admission of children to public schools under their authority or control; provided, however, that if the defendants show that it is impracticable or inequitable to grant the plaintiffs the remedy of immediate (i. e., at the beginning of the next school term) admission to nonsegregated schools, the court shall order the defendants to propose and, on approval by the court after a public hearing, to put into effective operation a program for transition to a nonsegregated school system as expeditiously as the circumstances permit;

(4) That for the accomplishment of these purposes, taking into view the difficulties which may be encountered, a period of one year be allowed from the receipt of this Court's mandate, with leave, however, in the event, in the judgment of the lower court, the necessities of the situa-

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tion so require, to extend such period for a further reasonable time; and that, in the event before the expiration of the period thus fixed, a condition in harmony with the requirements of the Constitution is not brought about, it shall be the duty of the lower court to enter appropriate orders, by way of injunction or otherwise, directing immediate admission of the plaintiffs to nonsegregated schools; and

(5) That this Court retain jurisdiction for the purpose of making such further orders and decrees, if any, as may become necessary for carrying out its mandate.

CONCLUSION

In response to the questions stated in the Court's order directing reargument of these cases, the United States respectfully submits (1) that the primary and pervasive purpose of the Fourteenth Amendment, as is shown by its history and as has repeatedly been declared by this Court, was to secure for Negroes full and complete equality before the law and to abolish all legal distinctions based on race or color; (2) that the legislative history of the Amendment in Congress is not conclusive; (3) that the available materials relating to the ratification proceedings in the various state legislatures are too scanty and incomplete, and the specific references to school segregation too few and scattered, to justify any definite conclusion as to the existence of a general understanding in such legislatures as to the effect

which the Amendment would have on school segregation; (4) that it is within the judicial power to direct such relief as will be effective and just in eliminating existing segregated school systems; and (5) that if the Court holds that laws providing for separate public schools for white and colored children are unconstitutional, it should remand the instant cases to the lower courts with directions to carry out the Court's decision as expeditiously as the particular circumstances permit, as indicated *supra*.

Respectfully submitted.

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*Reginald W. Barnes and Arthur L. Biggins, attorneys in the Department of Justice, also assisted in the historical research.

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APPENDIX

I. The Federal Materials

A. THE THIRTEENTH AMENDMENT

The Thirteenth Amendment originated in S. J. Res. 16, introduced by Senator Henderson of Missouri on January 11, 1864.[1] It was referred to the Judiciary Committee, of which Senator Lyman Trumbull of Illinois was chairman (Globe, 38th Cong., 1st Sess., p. 145).[2] The resolution was reported by Trumbull on February 10, 1864

[1] The text of the resolution was as follows:

> Art. 1. Slavery or involuntary servitude except as a punishment for crime, shall not exist in the United States.
>
> Art. 2. The Congress, whenever a majority of the members elected to each House shall deem it necessary, may propose amendments to the Constitution, or, on the application of the Legislatures of a majority of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the Legislatures of two thirds of the several States, or by conventions in two thirds thereof, as the one or the other mode of ratification may be proposed by Congress (Globe, 38th Cong., 1st Sess., p. 1313).

[2] All references to the Congressional Globe in this section, until otherwise noted, are to the 38th Congress, 1st Session.

(Globe, p. 553), in an amended form.[3] Consideration was postponed until March 28, 1864. At that time Senator Trumbull opened the debate, stating that the measure was intended to remove from the Constitution the inconsistency of the founding fathers in proclaiming the equal rights of all persons to life, liberty and happiness, while denying these rights to a whole race. This was to be accomplished by a constitutional provision abolishing the institution of slavery and all its incidents (Globe, p. 1313). Senator Wilson of Massachusetts described the incidents of slavery which would be removed:

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant, barbarizing spirit * * *

---

[3] The amended form, which was the one finally adopted, read as follows:

> (Two thirds of both Houses concurring,) That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three fourths of said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:
>
> ARTICLE XIII
>
> SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation (Globe, p. 1313).

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> * * * Then the slave mart, pen, and auction-block, with their clanking fetters for human limbs, will disappear from the land they have brutalized, and the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. * * * Then the wronged victim of the slave system, the poor white man, the sand-hiller, the clay-eater of the wasted fields of Carolina, impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of man a crime, will lift his abashed forehead to the skies and begin to run the race of improvement, progress, and elevation. Globe, p. 1324.)

On March 30, 1864, the debate continued. Senator Davis of Kentucky, speaking against the amendment, argued that slavery had not caused the war, and that its abolition by federal action would be a serious violation of state sovereignty, and would have a "potency * * * for large and permanent mischief" (Globe, Appendix, pp. 104, 108). On the following day, March 31, he offered an amendment that no Negro could ever hold citizenship or public office in the United States. This was defeated overwhelmingly by a vote of 28 to 6. (Globe, p. 1370.) On that day, Senators Saulsbury of Delaware and Clark of New Hampshire engaged in an extended debate over the constitutional authority of Congress to propose an amend-

ment at a time when several of the states were out of the Union. (Globe, pp. 1364–1370.)

On April 4, Senator Howe of Wisconsin spoke in favor of the joint resolution. (Globe, Appendix, p. 111.) He pointed to the many degrading economic, moral and intellectual effects of the slave system. His speech concluded:

> I think your amendment should go further than as I understand it does. I think that when the American people command that these persons shall be free, they should command that they be educated, or at least that there be no laws enacted in any State to prevent their education * * * the state which enfranchises its people and does not educate them shall be doubly damned. * * *. (Globe, Appendix, p. 118.)

On April 5, 1864, Senator Reverdy Johnson of Maryland declared that the proposed amendment was proper and necessary. "The only practical mischief of the measure is the condition of the slaves. They are uneducated." (Globe, p. 1424.) That ignorance, he asserted, was deliberate, for education would have meant revolt against the "wicked" institution of slavery. (*Ibid.*). On the same day, Senators Davis and Powell of Kentucky each offered amendments imposing conditions upon the emancipation of the slaves. All these amendments were defeated. (Globe, pp. 1424–1425.)

Senator Harlan of Iowa reviewed the incidents of slavery in a speech on April 6, 1864. (Globe, p. 1437.) He pointed out that slavery necessarily resulted in the abolition of the relation between husband and wife and parent and child; it precluded the relation of person to property, because

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a slave was declared incapable of acquiring and holding property; it deprived slaves of status in court, and of the right to testify. Nor were the effects of slavery harmful only to the slaves:

> And then another incident of this institution is the suppression of the freedom of speech and of the press, not only among these down-trodden people themselves but among the white race. Slavery cannot exist where its merits can be freely discussed; hence in the slave States it becomes a crime to discuss its claims for protection or the wisdom of its continuance. Its continuance also requires the perpetuity of the ignorance of its victims. It is therefore made a felony to teach slaves to read and write.
>
> It also precludes the practical possibility of maintaining schools for the education of those of the white race who have not the means to provide for their own mental culture. It consequently degrades the white as well as African race. (Globe, p. 1439.)

Senator Saulsbury rose to rebut Harlan. Quoting Biblical authorities, he stated that slavery had existed almost since the flood, and was a fact of nature:

> The theory now common seems to be that the law of God's providence is equality and uniformity. Such a law never did pervade or regulate the works of God's providence to man; but the law of His providence is inequality and diversity. I treat of this inequality of races, of human beings, precisely as I treat of the inequality which I see in inanimate and physical nature all around me. (Globe, p. 1442.)

Senator Saulsbury concluded, therefore, that the Congress should leave the institution of slavery as it was, and not tamper with the will of God. (*Ibid.*) However, after some further debate, the Committee of the Whole agreed to the Judiciary Committee amendment. (Globe, p. 1447.)

On April 7, 1864, Senator Hendricks of Indiana echoed Saulsbury's views of the natural inferiority of the Negro race. No constitutional amendment could change that, for

> * * * they will never associate with the white people of this country upon terms of equality. It may be preached; it may be legislated for; it may be prayed for; but there is that difference between the two races that renders it impossible. If they are among us as a free people, they are among us as an inferior people. (Globe, p. 1457.)

Then Senator Henderson, author of the resolution, spoke for its passage. It must be done, he said, to save the Union. He also said:

> I will not be intimidated by the fears of negro equality. The negro may possess mental qualities entitling him to a position beyond our present belief. If so, I shall put no obstacle in the way of his elevation. * * * Whether he shall be a citizen of any one of the States is a question for that State to determine. If New York or Massachusetts or Louisiana shall confer on him the elective franchise, it is a matter of policy with which I have nothing to do. The qualifications of voters for members of Congress is a question under the exclusive control of the respective States. * * * So in passing this amendment we do not confer

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> upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States. (Globe, p. 1465.)

On April 8, 1864, the last day of the Senate debate, Senator Charles Sumner took the floor to speak in favor of the Constitutional amendment. It would give completeness and permanence to emancipation, and bring the Constitution into avowed harmony with the Declaration of Independence. However, he preferred that it be phrased differently. He offered the following substitute:

> All persons are equal before the law, so that no person can hold another as a slave; and the Congress may make all laws necessary and proper to carry this article into effect everywhere within the United States and the jurisdiction thereof. (Globe, p. 1843).[4]

Sumner disclaimed any intention of changing the effect of the original resolution; he only wished to express its purpose more forcefully, by explicitly stating the doctrine of equality before the law. He believed that that expression gave precision to the principle of protecting human rights enunciated in the Declaration of Independence. Acknowledging that the language was new in this country, he pointed out that it was already well known in France, and all of Europe, as an overriding principle of human rights. (*Ibid.*)

---

[4] This amendment in the nature of a substitute was originally offered on February 17, 1864, but had not been discussed prior to this time. (Globe, p. 694.) Sumner had also offered a joint resolution (S. J. Res. 24) on February 8, 1864 (Globe, p. 521), to the same effect.

However, when Senator Trumbull insisted on the Committee version, Sumner withdrew his amendment. Remarking on this decision, Senator Howard of Michigan stated that the Committee version was derived from the "revered" Jeffersonian Ordinance of 1787, whereas Sumner's amendment was of foreign origin. (Globe, p. 1489.) To Senator Howard, the "equality" language might mean that

> A wife would be equal to her husband and as free as her husband before the law. (Globe, p. 1488.)

Senators Davis, Saulsbury and McDougall of California delivered final speeches against the resolution. Saulsbury offered a lenthy substitute amendment, but it was rejected. The final vote was then taken, resulting in passage of the resolution by a vote of 38 to 6. (Globe, p. 1490.)

In the House, the proceedings were more extended. When the resolution was taken up on May 31, 1864, an immediate motion by Representative Holman of Indiana for rejection was defeated by a vote of 76 to 55. (Globe, p. 2612.) Representative Morris of New York then opened the debate, citing the evils of slavery which had led the country away from the principles of equality embodied in the Declaration of Independence. In his opinion, the amendment was necessary to conform the Constitution to those principles. (Globe, p. 2613.) At an evening session that day, Representative Herrick, also from New York, attacked the amendment as a tampering with the Constitution of the fathers which would promote "eternal disunion." (Globe, p. 2615.) Furthermore,

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it would abolish "the right of the States to control their domestic affairs, and to fix each for itself the status, not only of the negro, but of all other people who dwell within their borders." (Globe, p. 2616.) After a speech by another New Yorker, Representative Kellogg, which is of no significance here, the House adjourned. (Globe, p. 2621.)

After a series of postponements caused by the absence of the many members attending the Republican (Union) presidential convention, which had opened on June 7th, the House resumed consideration of the proposed amendment on June 14, 1864. Representative Pruyn, Wood and Kalbfleisch, all of New York, argued that the amendment was an invasion of the reserved rights of the States. (Globe, pp. 2939, 2940, 2945.) On the other side, Representative Higby of California denied that there was no power under the Constitution to amend it in this respect. (Globe, p. 2943.)

In an evening session that day, Mr. Wheeler of Wisconsin offered a proviso to the amendment, that emancipation should not take place in the loyal border states until ten years after ratification. (Globe, Appendix, p. 124.)[5] Representative Shannon of California declared that slavery was inconsistent with the spirit of the institutions of the nation. Not only the slave, but also the non-slaveholding class of white men was harmed by its evils. He noted that

---

[5] On June 15, 1864, just before the final vote was taken on the resolution, Wheeler's amendment was defeated. (Globe, p. 2995.)

> This institution necessarily establishes three conditions of society where it prevails: the master, the slave, and that most degraded condition of all, the middle-man, or the poor white trash, whose vocation is pander and pimp to the vices of both master and slave, and ultimately dependent on both, having no recognized condition, and enjoying none of the privileges of the governing or governed class, but an outcast from both and despised by both.
>
> Now let it never be forgotten that our mission also is to elevate and disinthrall that most injured and dependent class of our fellow white men from their downtrodden and degraded condition, that they too may be men, and enjoy the independence and rights of manhood. (Globe, p. 2948.)

Mr. Shannon concluded with an argument against Wheeler's proviso, insisting that Congress "must not only emancipate the slaves in the seceded States, but we must include the slaves of the border States, leaving no root of the accursed tree to spring up for the future to the peril of the country." (Globe, p. 2949.)

Mr. Marcy of New Hampshire, speaking against emancipation, stated that the resolution was an attempt to overthrow the Constitution, and declared that his constituents did not believe "the black man is equal to the white." (Globe, p. 2950.) However, the "conservative party" will win the impending election and "the Government instituted for white men will again become popular." (Globe, p. 2951.)

Representative Kellogg of Michigan believed that the words "all men are created equal" in the Declaration of Independence were implicit in the

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Constitution, and that the proposed amendment merely carried out their purpose. (Globe, p. 2954.)

Representative Ross of Illinois indicated his belief that the amendment was part of the administration's policy to "place the negro as to civil and political rights on an equality with the whites * * *" (Globe, p. 2957.) This was the "negro-equality doctrine tendered by the party in power." (Globe, p. 2959.) Mr. Holman of Indiana was also against freeing the Negro, characterizing the amendment as an invasion of "the domestic policies of States so solemnly guarantied by the Constitution." (Globe, p. 2961.) He presented his interpretation of its scope:

> It confers on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir; in the language of America it means the right to participate in government, the freedom for which our fathers resisted the British empire. Mere exemption from servitude is a miserable idea of freedom. A pariah in the State, a subject, but not a citizen, holding any right at the will of the governing power. What is this but slavery? It exists in my own noble state. (Globe, p. 2962.)

On June 15, 1864, the last day of House debate on the amendment, Representative Farnsworth of Illinois deprecated the opposition fears of Negro equality and miscegenation. (Globe, p. 2979.) Mr. Mallory of Kentucky asserted that

passage of the amendment would lead the states to abject submission and slavery:

> Give up our right to have slavery if we choose, submit to have that right wrested from us, and in what right are we secure? One after another will be usurped by the President and Congress, until all State rights will be gone, and perhaps State limits obliterated, and a grand imperial despotism erected on the ruins of our rights and liberties. (Globe, p. 2981.)

Mr. Edgerton of Indiana charged that the object, in part, of the party in power was, by means of this proposed amendment, to make the Negro population of the South an active basis for representation in the Federal Government. He declared:

> First, the negro a citizen of the United States; secondly, the negro a free citizen of the United States, protected everywhere, in defiance of existing State constitutions and laws, as such citizen; and thirdly, the negro a voting citizen of the United States, are all propositions logically involved in the proposed amendment. (Globe, p. 2987.)

His speech concluded with this accusation against the majority in Congress:

> You desire no peace, and you do not intend, if you can help it, to accept peace until you have abolished slavery; deprived if not robbed by confiscation the property-holders of the South of their rightful inheritance; made negroes socially and politically the equal of white men; and remodeled the Constitution to suit your own political purposes. (Globe, p. 2988.)

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Representative Ingersoll of Illinois, who was in favor of the amendment, gave some idea of his definition of freedom:

> I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. He has the right to live and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. (Globe, p. 2990.)

However, in his view, freedom, in a broad sense, would not be given to the slave alone:

> I am in favor of the adoption of this amendment to the Constitution for the sake of the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood by reason of this thrice-accursed institution of slavery. Slavery has kept them in ignorance, in poverty, and in degradation. Abolish slavery, and school-houses will rise upon the ruins of the slave mart, intelligence will take the place of ignorance, wealth of poverty, and honor of degradation * * * (*Ibid.*).

A vote was taken on June 15, 1864: yeas 93, nays 65, not voting 23. Since the required two-thirds majority had not been obtained, the resolution failed. However, Congressman Ashley of Ohio, originally voting in favor of the Amendment, changed his vote for the declared purpose of enabling him, under the rules, to bring on a motion to reconsider. (Globe, p. 2995.) No

further action was taken at that session of the House.

In the second session of the 38th Congress, the "lame duck" session, President Lincoln's message on the state of the Union referred to the victory of the Republican party at the polls on the antislavery issue. He recommended the reconsideration and passage of the resolution at that session, pointing out that the next Congress would almost certainly pass the measure if this one did not. (Globe, 38th Cong., 2d Session, App., p. 3.)

Representative Ashley, the floor leader for the measure in the House, opened the discussion on reconsideration on January 6, 1865, again urging that the resolution be passed, and reiterating the harmful effects of slavery upon the non-slaveholding population of the South. (Globe, 38th Cong., 2d Sess., p. 138).[6] Representative Orth of Indiana declared that an amendment prohibiting slavery in the United States would effect a practical application of the self-evident truths embodied in the Declaration of Independence. (Globe, p. 142.)

Representative Bliss of Ohio, in his speech on January 7, 1865, continued his opposition. Even the Negro had sense enough to know, he said,

> * * * that politicians cannot reverse the decree of Almighty God and make their race equal, socially or politically, with white men. (Globe, p. 150.)

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[6] The remaining references to the Congressional Globe in this section are to the 38th Congress, 2d Session.

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Mr. Rogers of New Jersey denied the assertion that the amendment would have the effect of conforming our institutions to the principles of the Declaration of Independence. In his view, the Declaration had nothing to do with the slaves, for "neither the persons who had been imported as slaves nor their descendants, whether they had then become free or not, were then included in the general words of the Declaration of Independence or acknowledged as a part of the people. They had for more than a century before been regarded as an inferior race and not fit to associate with whites, socially or politically * * *" (Globe, p. 152.)

Mr. Davis of New York then rose to observe that the definition of civil liberty, as indicated in Mr. Rogers' speech, apparently consisted in the right of one people to enslave another people to whom nature had given equal rights of freedom. He declared that such was not his own interpretation:

> Nature made all men free, and entitled them to equal rights before the law; and this Government of ours must stand upon this principle, which, sooner or later, will be recognized throughout the civilized world. (Globe, p. 154.)

His speech concluded with the plea that

> when we speak of civil liberty let it not be that which represents only the blood of a particular race; let it be that which represents man, no matter what land may have given him birth, no matter what may have been his political condition.

> I am not, sir, one of those who believe that the emancipation of the black race is of itself to elevate them to an equality with the white race. I believe in the distinction of races as existing in the providence of God for his wise and beneficient designs to man; but I would make every race free and equal before the law, permitting to each the elevation to which its own capacity and culture should entitle it * * *. (Globe, p. 155.)

On January 9, 1865, consideration was resumed. Congressman Yeaman of Kentucky, Morrill of Vermont and Odell of New York all spoke in favor of the Amendment. (Globe, pp. 168, 172, 174.) On the other hand, Mr. Ward of New York remained against it; he observed that

> * * * we are now called upon to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law, without regard to color, and so that no person shall hereafter be held in bondage * * *
>
> Sir, it would seem to me that the sum total of the wisdom of the ruling party is contained in the dogma that the negro is exactly like the white man. (Globe, p. 177.)

Nor could Representative Mallory of Kentucky assent to such a proposition, because he foresaw its result would be to give to the Negro "an equality with the white man, socially, civilly, politically." (Globe, p. 179.) He also feared that section 2, giving Congress enforcement powers, would be used to require enfranchisement of the Negro. (Globe, p. 180.)

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On the following day, January 10, 1865, after remarks by various members, which repeated previous arguments (Globe, pp. 189, 193, 195, 199, 200), Congressman McBride of Oregon undertook to rebut the argument that emancipation meant enfranchisement:

> A recognition of natural rights is one thing, a grant of political franchises is quite another. * * * If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves. This illustration alone reduces the conclusion to an absurdity. Sir, let the rights and status of the negro settle themselves as they will and must upon their own just basis. If, as a race, they shall prove themselves worthy the elective franchise, I tell gentlemen they will enjoy the right; they will demand and they will win it, and they ought to have it. If, on the contrary, as a race, they are so far inferior to those with whom they must compete as to be unequal to the high and responsible position of free electors, any attempt to elevate them to that standard will be a signal failure. I have no faith in their ability to contend in the race before them successfully, and no fear of degrading my own race by contact with them, for, sir, there is an antagonism between the races which will prevent anything like a complete blending of them, and I leave all questions of the consequences of emancipation to be settled by justice and expediency as experience shall dictate. (Globe, p. 202.)

On January 13, 1865,[7] Mr. Rollins of Missouri, who had voted against the measure in the spring, now changed his vote, stating:

> I am a believer in the Declaration of Independence wherein it is asserted that "all men are created equal." I believe that when it says *"all men"* it means every man * * * without regard to race, color, or any other accidental circumstances by which he may be surrounded. (Globe, p. 260.)

After additional speeches in favor of the Amendment by Representatives Garfield of Ohio, Stevens of Pennsylvania[8] and Baldwin of Massachusetts (Globe, pp. 263, 265, 266), the House adjourned for the day.

Consideration of the resolution was postponed, and not resumed until January 28, 1865. On that day, the debate consisted of a number of short addresses which added little to the discussion. (Globe, pp. 478, 480, 481, 482, 485, 487.) However, in the course of one speech, Representative Patterson of New Hampshire indicated that all

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[7] On January 12, 1865, Representatives Smith of Kentucky, Cox of Ohio, Woodbridge of Vermont, and Thayer of Pennsylvania debated the question of state rights. (Globe, pp. 235–246.) However, the discussion is not particularly relevant.

[8] This was the speech in which Thaddeus Stevens declared what he hoped would be his epitaph after his death:

> Here lies one who never rose to any eminence, and who only courted the low ambition to have it said that he had striven to ameliorate the condition of the poor, the lowly, the downtrodden of every race and language and color. (Globe, p. 266.)

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the previous remarks about "negro equality" were irrelevant to the discussion of the resolution. He pointed out that

> In seeking to purge our institutions of the mortal taint of slavery, in seeking to rescue our liberties by an organic change from the fatal *imperium in imperio,* it is not necessary to fix the ethnological position of the African or to prove his equality with the white races. (Globe, p. 484.)

When debate opened on January 31, 1865, the day on which the final vote was to be taken, Representatives McAllister and Coffroth of Pennsylvania, and Herrick of New York, who had all voted against the resolution in the first session, rose to announce that they had changed their minds and would now support the proposed amendment. (Globe, pp. 523, 524.) Congressman Brown of Wisconsin, however, remained opposed, on the ground, *inter alia,* that immediate emancipation

> * * * utterly ignores the greatest evil of slavery; [which] extends through generations its effect in completely debasing the subject of it and making him unfit either to be a good citizen or a good man. (Globe, p. 527.)

After Mr. Ashley's pending motion to reconsider had been agreed to, the final vote was taken on the resolution. It passed by a vote of 119 to 56, slightly more than the required two-thirds, and the House immediately adjourned, "in honor of this immortal and sublime event." (Globe, p. 531.)

B. THE FREEDMEN'S BUREAU BILL

The first bill to enlarge the powers of the Freedmen's Bureau (S. 60, 39th Cong., 1st Sess.) [9] originated, in part, from an earlier bill introduced by Senator Henry Wilson to maintain the freedom of the inhabitants in the rebelling states (S. 9), and, in part, on the basis of a report by Major General Carl Schurz on conditions in the South (S. Ex. Doc. No. 2).

1. The Wilson bill (S. 9)

On December 4, 1865, the opening day of the first session of the 39th Congress, Senator Wilson of Massachusetts introduced in the Senate a bill (S. 9) providing for the nullification of all laws of the Southern States which recognized, authorized, or maintained any inequality of civil rights or immunities because of color, race or previous servitude. (Globe, pp. 2, 39.) On December 13, he moved to take up the bill without committee reference. In urging immediate adoption of his measure, Wilson noted that "whatever differences of opinion may exist in regard to the right of suffrage, I am sure there can be no difference of opinion among honest and just men in regard to maintaining the civil rights and immunities of these freedmen; they should stand at any rate like the non-voting white population of those States." (Globe, p. 39.) Wilson added that not only did the "old slave codes still exist," in many of the Southern States, but that "four or five of those States are passing other codes inhuman, un-

[9] All references to bill numbers, executive documents and the Congressional Globe in this section are to the 39th Congress, 1st Session.

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christian, and inconsistent with the idea that these freedmen have rights." (Globe, p. 41.)

Senator Johnson of Maryland, although in favor of the general proposition, thought that the bill raised several serious questions. He believed, therefore, that it should be referred to committee for further study. (Globe, p. 40.) Senator Cowan of Pennsylvania expressed himself as "exceedingly desirous that by some means or other the natural rights of all people in the country shall be secured to them, no matter what their color or complexion may be, and may be secured to them in such a way as that States themselves cannot hereafter wrest them away from them." (Globe, p. 40.) However, he thought that this aim could only be attained by means of an amendment to the Constitution. (Globe, p. 41.) Senator Wilson rose to state his understanding that the Thirteenth Amendment had already been adopted,[10] and that under its second section, "we have the power to pass not only a bill that shall apply these provisions to the rebel States, but to Kentucky, to Maryland, to Delaware, and to all the loyal States." (Globe, p. 41.)

Senator Sherman of Ohio felt that the measure ought to be postponed until the amendment was finally ratified. There would then be no doubt of the power of Congress to pass the bill, and to make it definite and general in its terms, and applicable throughout the United States. However, he objected that the bill did not specify

[10] This statement was made on December 13, 1865. The Thirteenth Amendment was actually declared to have been adopted on December 18, 1865, by a proclamation of the Secretary of State, 13 Stat. 774.

what rights were to be protected. He wished it to be more specific, for there was "scarcely a State in the Union that does not make distinctions on account of color." (Globe, p. 41.) He preferred that

> when we legislate on this subject we should secure to the freedmen of the southern States certain rights, naming them, defining precisely that they should be. For instance, we could agree that every man should have the right to sue and be sued in any court of justice * * *. So with the right to testify, * * * the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. These are among the natural rights of free men." (Globe, p. 42.)

Senator Saulsbury of Delaware indicated his doubts that the proposals just mentioned were authorized, or even necessary. He believed that such measures could not be authorized under the second section of the Thirteenth Amendment. (Globe, p. 43.) On the other hand, Senator Trumbull of Illinois declared that that section was inserted for the very purpose "of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." (Globe, p. 43.) He thought it was idle to say that a man was free who could not go and come at pleasure, who could not buy and sell property, and who could not enforce his rights. Trumbull then gave notice of his intention to introduce a bill that would secure to the former slaves every one of those rights. (*Ibid.*)

On December 20, 1865, Senator Sumner of

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Massachusetts declared that the bill "proposes nothing less than to establish Equality before the Law, at least so far as civil rights are concerned, in the rebel States." (Globe, p. 91.) He referred to the emancipation of serfs in Russia as a model for imitation, cataloging the rights there granted—the rights of family, contract, and property; equality in the courts; and equality in political rights. He continued:

> By still another section the freedman is secured *Equality at schools and in Education;* thus:
>
> "He may place his children in the establishments for public education, to embrace the career of instruction, or the scientific career, or to take service in the corps of surveyors."
>
> Surely here again is an example for us. (Globe, p. 91.)

On the following day, December 21, 1865, Senator Stewart of Nevada opened the debate. He was against the bill, as being too radical a measure. (Globe, p. 109.) However, he avowed that he was "in favor of legislation on this subject, and such legislation as shall secure the freedom of those who were formerly slaves, and their equality before the law * * *." But, he maintained, these rights could be fully secured without holding the Southern states in subjugation. (Globe, p. 111.)

Senator Wilson rose to declare, on behalf of his bill, that the Black Codes must be annulled, so that the

> man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that

> he can go where the pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. (Globe, p. 111.)

The policy of emancipation "that carries with it equality of civil rights and immunities" was, he said, preferable to "that other policy that makes the enfranchised bondman a serf or peon, the slave of society, its soulless laws and customs." (*Ibid.*) However, he noted that the bill would be postponed over the Christmas recess. Possibly, he said, it would not be acted upon at all, now that the constitutional amendment had been declared adopted. After the holidays, the Congress would "probably enter on the discussion of the broader question of annulling all the black laws in the country and putting these people under the protection of humane, equal, and just laws." (*Ibid.*) After the adjournment on this day, the bill was not brought up again.

2. The Schurz Report

On December 12, 1865, during the consideration of the Wilson bill, the Senate passed a resolution requesting the President to submit "information of the state of that portion of the Union lately in rebellion," the information to include the report to the President made by Major General Carl Schurz, which was based on a lengthy tour of the South. (Globe, p. 30.) The requested informa-

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tion was submitted by the President, and ordered printed, on December 19, 1865. (Globe, pp. 78–80.)

The data was prefaced by a brief message from the President to the effect that the Southern states were civilly tranquil, local government was being quickly restored, and effective measures were being taken by those states "to confer upon freedmen rights and privileges which are essential to their comfort, protection and security." (S. Ex. Doc. No. 2, p. 1.) The Schurz report, however, indicated that the Southern states were not tranquil, and that Union soldiers, people from the North, and loyal Unionists in those states went abroad at peril of their lives. (*Id.*, pp. 7, 8.) The measures taken by the Southern states relating to the freedmen were not to be mistaken for real measures of protection, for

> ordinances abolishing slavery passed by the conventions under the pressure of circumstances, will not be looked upon as barring the establishment of a new form of servitude. (*Id.*, p. 45.)

Although the emancipation of the slaves would be submitted to so long as no alternative was possible, the freedman was

> considered the slave of society, and all independent State legislation will share the tendency to make him such. (*Ibid.*)

Since the war had come from the conflicts over slavery and the status of the Negro, the position of the Negro was to be considered as an integral part of any plan of reconstruction. (*Id.*, p. 15.) Special consideration had to be given to the need for educating the freedman, to be promoted as an

integral part of the educational systems of the states. (*Id.*, p. 25.) This would be a difficult task, for the prevailing temper of the South would not allow even rudimentary education of the Negro, since it would spoil him for work. (*Ibid.*) Schoolhouses were being burned in unsettled areas; and even in more stabilized areas of the South the white population was unwilling to permit use of tax funds for colored schools, even though the colored population contributed to the tax. (*Id.*, p. 26.)

3. The Freedmen's Bureau bill (S. 60)

The first "reconstruction" action following the submission of the Schurz report was consideration of the bill to extend the Freedmen's Bureau (S. 60). Senator Trumbull, its sponsor, reported it from the Judiciary Committee, of which he was chairman, on January 12, 1866. (Globe, p. 209.) The bill provided for the broadening of the administrative establishment and powers of the Freedmen's Bureau, created by the preceding Congress. Act of March 3, 1865, 13 Stat. 507. The measure contained an express provision requiring the President to extend protection through the Freedmen's Bureau whenever it appeared that any of the civil rights or immunities of white persons were being refused or denied to freedmen on the basis of color. (Globe, p. 209.)[11]

[11] The provision read as follows:

SEC. 7. Whenever, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the

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After certain committee amendments were agreed to, none of which is of importance here, a date was set for debate on the bill.

On January 18, 1866, consideration of the measure began. Senator Stewart of Nevada remarked that

> * * * here is a practical measure before the Senate for the benefit of the freedman, carrying out the constitutional provision to protect him in his civil rights. I am in favor of this bill. It goes to the utmost extent that I think we are entitled to go under the constitutional amendment. There is another bill introduced by the Senator from Illinois which must go along with it, which

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right to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offense than are prescribed for white persons committing like acts or offenses, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against. (Globe, p. 318.)

The following section provided criminal penalties for anyone depriving such a person of these civil rights. It also declared that the jurisdiction of the Freedmen's Bureau should cease in a Southern state after it "shall have been fully restored in all its constitutional relations to the United States." (Globe, p. 320.)

> provides civil jurisdiction for the protection of the freedman. Under this constitutional amendment we can protect the freedman and accomplish something for his real benefit. (Globe, p. 297.)

However, Stewart was opposed to the movement to grant suffrage to the Negro. While he was "in favor of legislation under the constitutional amendment that shall secure to him a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man" (Globe, p. 298), still he thought that Negro suffrage was not one of the issues of the war. If pushed, it would result in further conflict in the South. "Let no mere theory of the equality of races deprive us of peace and union." (*Ibid.*)

On the following day, January 19, 1866, Senator Hendricks of Indiana, a member of the Judiciary Committee, delivered a lengthy speech in opposition to the bill. Referring to the comprehensive language of section 7 of the bill, the civil rights section (*supra,* footnote 11), he questioned whether it might not even include Indiana, which had seen some fighting, and where some court proceedings might have been interrupted. If so, then anyone who attempted to execute the constitution and laws of the State would be liable for a violation of this measure, for

> We do not allow to colored people there many civil rights and immunities which are enjoyed by the white people. It became the policy of the State in 1852 to prohibit the immigration of colored people into that State * * * Under that constitutional provision, and the laws enacted in pursuance

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> of it, a colored man coming into the State since 1852 cannot acquire a title to real estate, cannot make certain contracts, and no negro man is allowed to intermarry with a white woman. These are civil rights that are denied, and yet this bill proposes if they are still denied in any State whose courts have been interrupted by the rebellion, the military protection of the Government shall be extended over the person who is thus denied such civil rights or immunities. (Globe, p. 318.)

Senator Hendricks asserted that the Thirteenth Amendment, under which Congress purported to derive its power to enact such legislation, merely abolished the personal relation between master and slave. The law of the State authorizing this relation was annulled, but no new rights were conferred upon the freedman. (*Ibid.*) He offered his interpretation of section two of the Thirteenth Amendment:

> If a man has been, by this provision of the Constitution, made free from his master, and that master undertakes to make him a slave again, we may pass such laws as are sufficient in our judgment to prevent that act; but if the Legislature of the State denies to the citizen as he is now called, the freedman, equal privileges with the white man, I want to know if that Legislature, and each member of that Legislature, is responsible to the penalties prescribed in this bill? It is not an act of the old master; it is an act of the State government, which defines and regulates the civil rights of the people. (Globe, p. 319.)

Senator Trumbull rose to defend his measure from this attack. The purpose of the legislation,

he stated, was to secure the rights of the freedman, as guaranteed by the Constitution. Congress was authorized to do so, not only under the war powers and the Thirteenth Amendment, but also under the Constitutional provisions relating to the privileges and immunities of citizens and to the guaranty of a republican form of government to the States. (Globe, p. 319.) To be sure, the measure was to be based on the Thirteenth Amendment, for its purpose was to prevent enforcement of the Black Codes and of any laws restraining the liberty of the free Negro, all of which had been enacted in the interests of slavery and were abolished when slavery was abolished. (Globe, p. 322.) The bill would also permit the Negro to be made an independent man, for it is "to educate, improve, enlighten, and Christianize the negro * * *." (*Ibid.*)

> I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted * * *. (*Ibid.*)

As for Hendricks' remarks about the Indiana miscegenation laws, Senator Trumbull thought that those laws would not be affected at all. One of the purposes of the bill was to secure the same civil rights and subject to the same punishment persons of all races and colors. Since the miscegenation laws operated alike on both races, without discrimination against either in this respect that did not apply to both, he believed that this bill would not interfere with them. (*Ibid.*)

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A brief debate occurred on January 20, 1866. Both Senators Cowan of Pennsylvania and Guthrie of Kentucky objected to the possibility that the bill might apply to their states. Cowan proposed an amendment restricting its coverage exclusively to states lately in rebellion. Both Senators claimed that Negroes already received equal protection of the laws in their states. (Globe, pp. 334, 335.) However, Senator Pomeroy of Kansas pointed out that it could not be true that the civil rights of persons of color in Kentucky were the same as those of white men, for he had never known a state that had permitted slavery which admitted testimony of colored persons to be received against white men. While Senator Guthrie conceded that that was still true in Kentucky, he said that the legislature was presently working on the problem. (Globe, p. 337.)

When debate resumed on January 22, Senator Creswell of Maryland voiced opposition to Cowan's amendment. He welcomed the operation of the measure in his own state, because "combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating mostly cruelly, and in some cases actually murdering the returned colored soldiers of the Republic. In certain sections of my State the civil law affords no remedy at all. It is impossible there to enforce against these people so violating the law the penalties which the law has prescribed for these offenses." (Globe, p. 339.)

Senator Cowan protested the necessity of these new laws. The present Constitution, he asserted, was sufficient to protect everyone in his rights.

If these so-called Black Codes were a thinly-disguised form of slavery, then, he said, they were clearly unconstitutional, and

> there is no possible difficulty in obtaining a remedy for it anywhere and everywhere. The Supreme Court of the United States is sitting here for that purpose today, and the freedman is just as much entitled to the benefit of its protection, as I read the laws, as if he were a man of the fairest complexion and of the brightest Saxon mold. (Globe, p. 342.)

Cowan confessed an inability to understand, from the generalities used, just what was the equality the proponents were aiming for. What was meant by equality, as he understood it, was "in the language of the Declaration of Independence, * * * that each man shall have the right to pursue in his own way life, liberty, and happiness. That is the whole of it." (*Ibid.*)

Senator Wilson rose to answer that the equality which was to be enforced by this bill was not a matter of uniformity of person, "that all men shall be six feet high," as Cowan had suggested, but it did mean that the "poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land." (Globe, p. 343.) Cowan's amendment was then defeated by a vote of 33 to 11. (Globe, p. 347.) Senator Davis of Kentucky proposed an amendment to make the Freedmen's Bureau subject to the jurisdiction of the state courts. It was dedefeated by a vote of 31 to 8. (Globe, p. 348.) Before the Senate adjourned for the day, various

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other amendments on details of the bill were offered and disposed of. (Globe, pp. 348–349.)

On January 23, 1866, Senator Saulsbury of Delaware expressed his opposition to the bill. (Globe, p. 362.) From a practical point of view the measure would require too great an expenditure of money, and the patronage possibilities were too great. Besides, he claimed, the power to pass such a measure could not be derived from the Thirteenth Amendment, which only abolished the status of slavery. That Amendment could be carried into effect, and the status of freedom established, he asserted, without the exercise of such broad power, which encroached upon the fundamental rights of the states. (*Ibid.*)

These views were echoed by Senators McDougall, Hendricks and Davis. (Globe, pp. 367, 368, 370.) Senator Reverdy Johnson of Maryland announced that he would have liked to vote for the measure because he was very anxious to provide for the Negroes to a certain extent; unfortunately, he, too, had doubts as to the constitutionality of some of its provisions. (Globe, p. 372.)

Consideration on January 24, 1866, was largely devoted to the proposal of a series of amendments by various members of the opposition. They were all decisively defeated. (Globe, pp. 392–402.) On January 25, 1866, the final vote on the passage of the bill was taken. The measure passed by a vote of 37 to 10, and the Senate turned immediately to the consideration of Trumbull's Civil Rights bill. (Globe, p. 421.) (See *infra,* p. 40.)

In the House, a substitute bill was reported from the Select Committee on Freedmen by its

Chairman, Representative Eliot of Massachusetts, on January 30, 1866. (Globe, p. 512.) The substitute was the same as the Senate bill, except for some minor differences in details. The basic part of the bill relating to civil rights was left unchanged. Representative Donnelly of Minnesota immediately offered an amendment to empower the Bureau to provide "a common-school education for all refugees or freedmen who shall apply therefor." [12] (Globe, p. 513.)

The debate on the measure the following day, January 31, 1866, was confined largely to a long speech against Reconstruction policies generally by Mr. Dawson of Pennsylvania, in which he accused the majority of seeking to enforce absolute equality for the Negroes, so that

> negroes should be received on an equality in white families, should be admitted to the same tables at hotels, should be permitted to occupy the same seats in railroad cars and the same pews in churches; that they should be allowed to hold offices, to sit on juries, to vote, to be eligible to seats in the State and national Legislatures, and to be judges, or to make and expound laws for the government of white men. Their children are to attend the same schools with white children, and to sit side by side with them. (Globe, p. 541.)

On February 1, 1866, Representative Donnelly took the floor for the bill and his amendment. He discussed the general reconstruction policies of

[12] On the final day of consideration of the bill, this amendment became ensnarled in procedural difficulties, and did not become a part of the measure. See *infra*, p. 39.

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the majority, but asserted the need to go further and provide for the education of the freedman. (Globe, p. 585.) Admittedly, this would be a revolutionary attempt, he said, but the Union had won the war and could dictate the terms. Those terms should provide for sweeping changes, for

> He is indeed fearfully cramped by the old technicalities who can see in this enormous struggle only the suppression of a riot and the dispersion of a mob. This struggle has been as organic in its great meanings as the Constitution itself. (Globe, p. 586.)

The care of the freedman could not be left to the Southern states, for that would mean "the reenslavement of the freedman or his reduction to a condition of peonage * * *. [The] indignation of the world would once more isolate the South; and they would meet that indignation as they met it in the old days of slavery, with dark and defiant brows." (Globe, p. 585.)

Mr. Donnelly turned then to the field of education:

> The one great error of our country has been that education was not from the very first made a matter of the State, and as essential to the citizen as liberty itself. Education means the intelligent exercise of liberty, and surely without this liberty is a calamity, since it means simply the unlimited right to err. (Globe, p. 586.)

He cited the 1860 statistics of illiteracy in the nation, and particularly in the South, an illiteracy which he analyzed by comparison with the vote for Breckenridge in 1860, as being largely

responsible for secession. Therefore, since the Congress was already "interfering in behalf of the negro," let it "interfere to educate him." By this, he said,

> We thus strike out at one blow a large proportion of the ignorance of the South; we shame the whites into an effort to educate themselves, and we prepare thus both classes for the proper exercise of the right of suffrage. (Globe, p. 587.)

However, if the bill was not passed, Donnelly asked, what would be the fate of the black man in the South? He turned to a consideration of the Black Codes, observing that a Negro "may be oppressed by a convocation of masters called a Legislature as fully as by a single master." (Globe, p. 588.) In the course of his review, he noted that the Black Code of Tennessee provided that "colored children shall not be admitted into the same schools with white children, while it makes no provision for their education in separate schools." (Globe, p. 589.) His conclusion was that these codes represented "slavery, less the protection which the master formerly afforded his chattel. The slave now has a mob for his master." (*Ibid.*)

Mr. Garfield of Ohio then spoke at length in favor of the bill. He declared that the Thirteenth Amendment did more than merely break off the chains of the slaves. It added four million citizens to the Republic. (Globe, Appendix, p. 66). And it must be declared that in this country the humblest, the lowest, the meanest of our citizens shall not be prevented from passing to the highest place he is worthy to attain; and

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> we must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty, and property shall be guarantied to the citizen in reality as they now are in the words of the Constitution, and no longer left to the caprice of mobs or the contingencies of local legislation. If our Constitution does not now afford all the powers necessary to that end, we must ask the people to add them. We must give full force and effect to the provision that "no citizen shall be deprived of life, liberty, or property without due process of law." We must make it as true in fact as it is in law, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." We must make American citizenship the shield that protects every citizen, on every foot of our soil. The bill now before the House is one of the means for reaching this desirable result. (Globe, Appendix, p. 67.)

Consideration of the bill on February 2, 1866, was given over to a long speech in opposition by Representative Kerr of Indiana. (Globe, p. 618.) He believed that the Thirteenth Amendment did not confer the power for such an encroachment upon the rights of the states. In addition, the measure opened the way for patronage abuses.

On February 3, 1866, Representative Rousseau of Kentucky voiced his opposition to the bill, to the Donnelly amendment, and particularly to the Freedmen's Bureau efforts at educating the Negro. To him, the Bureau had been too high-handed in this matter, as evidenced by its taking over of the four white public schools in Charles-

ton, S. C., for colored students because the trustees had refused to permit the colored children to share in the facilities:

> Here are four schoolhouses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. (Globe, Appendix, p. 71.)

Representative Chanler, also of Kentucky, also referred to the same example of "usurpation and unlawfulness" of the Bureau in seizing the "only public schools of Charleston formerly used for the poor white children." (Globe, Appendix, p. 82.) It was his position that the "preemptive right in the soil is in the white race. The sovereignty of this Government springs from and belongs to the white race exclusively." (Globe, Appendix, p. 85.)

On February 5, 1866, Congressman Grinnell of Iowa responded that education of the freedman was essential, but that the opposition within the South was so strong that "loyal teachers" were closing their schools. (Globe, p. 651.) Even in Maryland, the resistance to Negro education was great:

> Their schoolhouses have been burned since the sitting of this Congress, and so near to us that the very flames of the conflagration might have lighted up this Capitol. (Globe, p. 652.)

Mr. McKee of Kentucky observed that the Negroes had been emancipated as one of the natural results of the war; they could never be reenslaved: "As freedmen they must have the civil rights of freemen." (Globe, p. 654.)

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At this time Representative Eliot withdrew the Committee bill, and offered another as a substitute. By this action, Mr. Donnelly's school amendment also was lost. (Globe, p. 654.) However, that proposal was incorporated in an amendment by Thaddeus Stevens to the substitute bill, which was in the nature of another substitute bill. (Globe, p. 655.) Both of these substitute bills made changes in details in the original Senate bill, but left the basic civil rights provisions untouched. Representative Smith of Kentucky also offered an amendment to exclude the State of Kentucky from the operation of the bill. (Globe, p. 659.)

On the following day, February 6, 1866, the House vote was to be taken. At that time, the Smith and Stevens amendments were both decisively defeated, while the Committee bill passed the House by a vote of 136 to 33. (Globe, p. 688.)

The House substitute bill was returned to the Senate for its concurrence. It was reported from the Judiciary Committee by Senator Trumbull on February 8, 1866, with additional amendments (Globe, p. 742), which are of no relevance here. The House bill, as amended, was concurred in, and the measure was returned to the House. (Globe, p. 748.) Final concurrence by the House took place on the following day, February 9, 1866, without discussion. (Globe, p. 775.)

The President vetoed the bill on February 19, 1866. His message echoed the arguments made by the opponents to the bill: The bill contained provisions which were not warranted by the Constitution; the bill would provide too much patronage; and the States would adequately protect the

rights of the freedmen. (Globe, p. 915.) By a vote of 30 to 18, the Senate failed to override the veto. (Globe, p. 943.) No further action was taken on this bill in either House.

C. CIVIL RIGHTS ACT OF 1866

The Civil Rights Act of 1866, 14 Stat. 27, originated in a bill (S. 61)[13] "to protect all persons in the United States in their civil rights and furnish the means of their vindication," offered by Senator Trumbull of Illinois as complementary legislation to his Freedmen's Bureau bill (S. 60). The measures were introduced together on January 5, 1866 (Globe, p. 129); both were reported favorably from the Judiciary Committee on January 11, 1866 (Globe, p. 184), and were explained by Senator Trumbull together, on the following day (Globe, pp. 209, 211).

The Freedmen's Bureau bill was considered first by the Senate.[14] On January 25, 1866, immediately after the final vote was taken on that measure, Senator Trumbull moved to take up the Civil Rights bill, and it was made the order of the day (Globe, pp. 421–422).

As reported, the bill provided that

> There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary

[13] All references to bill numbers and the Congressional Globe in this section are to the 39th Congress, 1st Session.

[14] See *supra*, p. 26.

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> servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. (Globe, p. 474.)

Should any person deprive an inhabitant of any right secured or protected by the bill, acting under color of law, statute, ordinance, or custom, he was subject to criminal proceedings in the Federal courts; and all civil suits involving the rights protected by the bill were removable to the Federal courts. (Globe, p. 475.) Section 3 of the bill, which provided additional facilities to the Federal courts for arrest and examination of alleged offenders, specifically declared that its purpose was to afford

> reasonable protection to all persons in their constitutional rights of equality before the law without distinction of race or color * * *. (Globe p. 211.)

Consideration of the bill began on January 29, 1866. Before proceeding with his opening argument on behalf of the bill, Senator Trumbull offered an amendment to the first section of the bill, inserting a clause that

> all persons of African descent born in the United States are hereby declared to be citizens of the United States * * *. (Globe, p. 474.)

Mr. Trumbull then reviewed the importance and necessity of providing national machinery to enforce the freedom which the Thirteenth Amendment guaranteed all persons:

> There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themserves of their benefits. (*Ibid.*)

The affirmation, he said, of the abstract truth of equality and freedom in the Declaration of Independence had been of no value to the enslaved Negro; the "privileges and immunities of citizens" had been of no aid to Mr. Hoar of Massachusetts some years before when he sought to enforce a constitutional right in the courts of South Carolina; and the emancipation of the Negro was of no benefit if the laws of the Southern States, then being enacted and enforced, deprived a freedman of the "privileges which are essential to freemen." (*Ibid.*) With the promulgation of the Thirteenth Amendment, he said, the Black Codes, which made distinctions on account of color, became null and void as a part of slavery; but since they had been reenacted to discriminate against freedmen, it was necessary to enact the bill to carry the Amendment into effect, for

> any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. (*Ibid.*)

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These Black Codes, in many instances, he continued, were founded upon a misunderstanding of the concept of citizenship:

> The people of those States have not regarded the colored race as citizens, and on that principle many of their laws making discrimination between the whites and the colored people are based * * *. (Globe, p. 475.)

Therefore, it was necessary to declare Negroes citizens, in order to entitle them to equality of treatment with all other citizens, and to have the means of enforcing their equal rights. When it would be fully understood

> in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment * * *,

such acts would cease. (*Ibid.*)

Senator Saulsbury asserted that this was one of the most dangerous bills ever introduced into the Senate of the United States. He denied that there was any power under the Constitution to enact such a measure. The Thirteenth Amendment only broke the bonds of slavery, making it impossible for one man to own another, and it placed the former slaves upon a par with the free Negro population. But that Amendment conferred no power to elevate the whole race to an equality with the white race (Globe, p. 476); for a man "may be a free man and not possess the same civil rights as other men." (Globe, p. 477.) If the proponents of the Thirteenth Amendment had "intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in

your constitutional amendment, and provided that * * * there should be no inequality in civil rights." (*Ibid.*)

In examining the bill itself, Senator Saulsbury inquired as to the meaning of the broad term "civil rights," which were to be guaranteed to the freedmen. Although Senator Trumbull had denied that he had intended to confer the political right of suffrage by this bill, Saulsbury thought that the bill could be so interpreted:

> A civil right I define to be a right belonging to the citizen, and which he possesses only by virtue of citizenship * * * the rights which I have by reason of the law of the State under which I live, whether they be rights secured by the fundamental law, the constitution of the State, or be secured by enactments of the Legislature.
>
> The right to vote is not a natural right; I did not possess it by nature, I only possess it by virtue of law. * * * it is a civil right, and is a right of no other class or character. (Globe, pp. 477–478.)

To Senator Saulsbury, such legislation invaded the field reserved to the operation of state laws and he could not support it. (Globe, p. 478.)

Consideration of the bill was resumed on January 30, 1866, with a speech by Senator Van Winkle of West Virginia. (Globe, p. 497.) He doubted that the Negroes were presently citizens of the United States, or that they could become citizens other than by a constitutional amendment. But if they should be made citizens, "I should feel that they were entitled to the right of suffrage." (*Ibid.*) In any event, he did not

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believe citizenship could be established by this clause in Trumbull's bill, even under the naturalization power of Congress. (Globe, p. 498.)

At this point Senator Trumbull withdrew his earlier amendment to the bill, and moved to insert the following clause:

> All persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color * * *. (*Ibid.*)[15]

Senator Cowan objected to this clause, pointing out that it would make citizens of Indians and Asiatics as well as Negroes. (*Ibid.*) To him, the Thirteenth Amendment conferred no such power. It merely broke the bond by which the Negro slave was held by his master. It was not intended "to overturn this Government and to revolutionize all the laws of the various States everywhere." (Globe, p. 499.) As for the bill as a whole,

> * * * as I understand the meaning and intent of this bill, it is that there shall be no discrimination made between the inhabitants of the several States of this Union, none in any way. In Pennsylvania, for the greater convenience of the people, and for the greater convenience, I may say, of

[15] With this amendment, the first section read:

> That all persons born in the United States, and not subject to any foreign Power, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery * * *.

> both classes of the people, in certain districts the Legislature has provided schools for colored children, has discriminated as between the two classes of children. We put the African children in this school-house and the white children over in that school-house, and educate them there as we best can. Is this amendment to the Constitution of the United States abolishing slavery to break up that system which Pennsylvania has adopted for the education of her white and colored children? Are the school directors who carry out that law and who make this distinction between these classes of children to be punished for a violation of this statute of the United States? To me it is monstrous. How anybody desiring to be fair, desiring to construe the Constitution according to its fair intent and meaning, can drag out of it such a conclusion, such a monstrous conclusion as this, I cannot see. (Globe, p. 500.)

Cowan stated that he was perfectly willing to vote for an amendment to the Constitution "which will secure to all men of every color and of every race and of every condition their natural rights, the rights which God has given them, the right to life, the right to liberty, the right to property." But this bill was an attempt to do the same thing without any constitutional authorization. (*Ibid.*)

Senator Howard, a member of the Judiciary Committee at that time, took occasion to point out that in drafting the Thirteenth Amendment

> it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and

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> the freedmen which is proposed to be exercised by the bill now under our consideration. (Globe, p. 503.)

The intention had been to make the Negro the opposite of a slave, to make him a freeman, entitled to "those rights which we concede to a man who is free," so that

> in respect to all civil rights * * * there is to be hereafter no distinction between the white race and the black race. (Globe, p. 504.)

Senator Reverdy Johnson, counsel for the defendant in the *Dred Scott* Case, argued that under that decision Congress could not by statute naturalize a native-born Negro. (Globe, p. 504.) His opinion was that the citizenship of the Negro could "only be safely and surely attained by an amendment of the Constitution." (*Ibid.*)

On January 31, 1866, Senator Garrett Davis rose to speak against Trumbull's amendment. (Globe, p. 522.) He denied the power of Congress to make citizens in this manner. (Globe, p. 523.) It was his contention that Negroes were not citizens when the Constitution was adopted (Globe, p. 524); that the free Negroes were not citizens before the adoption of the Thirteenth Amendment (Globe, p. 525); and that they could not now become citizens, even under the naturalization power of Congress. (Globe, p. 529.) Senator Johnson interposed to state that, but for the *Dred Scott* decision, Congress could legislate directly to make citizens of the Negroes. Even in the face of that decision, he conceded that, since the point was argumentative,

it was not unreasonable to suppose that the present Supreme Court might sustain the authority of Congress in this regard. (Globe, p. 530.) Senator Davis, however, remained of the view that it was a principle of this Government that "nobody but white people are or can be parties to it." (*Ibid.*)

On February 1, 1866, Senator Morrill of Maine spoke in favor of the citizenship clause. (Globe, p. 570.) He stated that it was an extraordinary act, unparalleled in the history of this or any country; however, he found Senator Davis' assertion that the proposition was revolutionary as furnishing no reason for its rejection:

> I freely concede that it is revolutionary. I admit that this species of legislation is absolutely revolutionary. But are we not in the midst of revolution? * * * Are we not in the midst of a civil and political revolution which has changed the fundamental principles of our Government in some respects? (*Ibid.*)

Senator Morrill denied a previous assertion by Senator Cowan that American society had been established upon the principle of exclusion of inferior races. To the contrary, American society, either civil or political, was not formed in the interest of any race or class. America had, since the earliest days, been held up as a land of refuge, an asylum for the oppressed of all nations and all races. He denied that our Government

> was organized in the interest of any race or color, and there is neither "race" nor "color" in our history politically or civilly—not a bit of it. Is there any "color" or "race" in the Declaration of Independ-

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> ence, allow me to ask? "All men are created equal" excludes the idea of race or color or caste. There never was in the history of this country any other distinction than that of condition, and it was all founded on condition. (Globe, pp. 570–571.)

The speech concluded with an examination of the *Dred Scott* decision, and the assertion that the Negro had been denied citizenship there, not on account of his race or color, but only because of his enslaved condition. (Globe, p. 571.)

A discussion then arose over the inclusion of Indians in Senator Trumbull's citizenship clause (Globe, pp. 571–574), and concerning the phrase "without distinction of color" (Globe, p. 573). Senator Trumbull stated that the words of the Declaration of Independence applied to the black as well as the white man. He agreed that the meaning of the clause would be the same without the phrase, but pointed out that he wished to place the matter beyond any question. (Globe, pp. 573–574.) Senator Hendricks of Indiana dissented entirely from this construction of the Declaration of Independence, but agreed that

> in defining the right of citizenship there should be no room for doubt. The question that is before this Congress, and that must now go to the country, is that which was started by the Senator from Massachusetts [Mr. Sumner], whether all persons living in this country are to be equal before the law without distinction of color. * * * I am perfectly content that that question shall go to the country. If the people agree to the proposition, I am content; if it is satisfactory to the white

> men of this country to admit into the political community Indians and other colored people, I shall no longer object; but I am gratified that the Senator from Illinois makes it in plain words, so that the issue shall be distinctly before the people. (Globe, p. 574.)

The citizenship clause was revised by Senator Trumbull to read as follows:

> All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, without distinction of color.

In this form Senator Trumbull's amendment to section one of the bill was agreed to by the Senate, by a vote of 31 to 10. (Globe, p. 575.)

On February 2, 1866, the day set for the final vote, Senator Davis of Kentucky renewed his opposition to the measure. (Globe, p. 595.) He held that there was no power to pass any law connected with the subject of this bill except what was contained in the "privileges and immunities" clause in the Constitution. Since Senator Trumbull had declared that his measure was merely declaratory of the principles of the Constitution, he (Davis) offered an amendment, as a substitute for the entire bill. Section one of Senator Davis' substitute merely repeated the language of the "privileges and immunities" clause, while section two provided for civil and criminal penalties against anyone who would deprive "a citizen of any of the United States * * * of any privilege or immunity in any other State to which such citizen is

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entitled under the Constitution and laws of the United States * * *." (*Ibid.*) This substitute, he asserted, would preserve the integrity of the states, leaving them free to determine their own citizens. Under it, the United States could enforce their citizens' rights in other states. (*Ibid.*) On the other hand, Senator Trumbull's measure, if enacted, would be "centralizing with a vengeance and by wholesale." (Globe, p. 598.) It "breaks down all the domestic systems of law that prevail in all the States, so far not only as the negro, but as any man without regard to color is concerned, and [it] breaks down all the penal laws that inflict punishment or penalty upon all the people of the States except so far as those laws shall be entirely uniform in their application." (*Ibid.*)

Senator Trumbull repeated that his measure was merely a bill providing that all people shall have equal rights. It was not deserving, he said, of the epithets Senator Davis had applied to it. He denied that it was for the sole benefit of Negroes:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights * * *. With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?
>
> Now sir, what becomes of all the Senator's denunciation? The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of indi-

> viduals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights. (Globe, p. 599.)

Believing that all the laws authorizing slavery had fallen, Senator Guthrie of Kentucky claimed that he had advised the people of his state

> to put these Africans upon the same footing that the whites are in relation to civil rights. They have all the rights that were formerly accorded to the free colored population in all the States just as fully this day as they will have after this bill has passed, and they will continue to have them. (Globe, p. 600.)

He asserted that, in carrying out the amendment to the Constitution, he was determined to do as equal justice to the black man as to the white man in all respects. But he did not believe that

> there is any authority under it to overturn the State governments, and permitting the Federal Government to run into the States to make laws on this subject when it enters into the States for nothing else. (Globe, p. 601.)

Senator Hendricks observed that the bill provides "that the civil rights of all men, without regard to color, shall be equal * * *" in order to "place all men upon an equality before the law * * *." (Globe, p. 601.) But, "in the State of Indiana we do not recognize the civil equality of the races." (Globe, p. 602.) He was opposed to the measure, therefore, because of the conflicts to which it would lead between the state and national governments. Concluding, he suggested

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an amendment to strike out some of the enforcement provisions of the bill. (*Ibid.*)

Senator Lane of Indiana, favoring the bill, said that its object was to secure the freedmen in the possession of all the rights, privileges, and immunities of free men. In other words, he asserted, Congress was merely giving effect to the proclamation of emancipation and the Thirteenth Amendment. (*Ibid.*) Senator Wilson of Massachusetts claimed that the measure was necessary because the new Southern legislatures, "in defiance of the rights of the freedmen and the will of the nation embodied in the amendment to the Constitution, have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days." (Globe, p. 603.)

However, Senator Cowan of Pennsylvania expressed the objection that

> This is a proposition to repeal by act of Congress all State laws, all State legislation, which in any way create distinctions between black men and white men in so far as their civil rights and immunities extend. It is not to repeal legislation in regard to slaves. (*Ibid.*)

Finally, the time set aside for the vote was reached. The Hendricks and Davis amendments were rejected, and the bill itself was passed by the Senate on February 2, 1866, by a vote of 33 to 12. (Globe, p. 606.)

In the House, on March 1, 1866, Representative James A. Wilson of Iowa, Chairman of the Judiciary Committee, reported the bill favorably, but with amendments. (Globe, p. 1115.) The only relevant amendment, which consisted of replacing

the term "inhabitants of" by "citizens of the United States in," in the first section, was

> intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several States, as there seems to be some doubt concerning the power of Congress to extend this protection to such inhabitants as are not citizens. (*Ibid.*) [16]

After all the Committee amendments had been agreed to, Wilson moved to recommit the bill, as a procedural device explicitly intended to cut off further amendments. In his opening speech, he admitted that the questions raised by the bill were difficult, and the precedents in sharp conflict. (Globe, p. 1115.) It was, however, plain to him that Negroes freed under the Thirteenth Amendment were citizens, even without the declaration in the bill, a conclusion which he bolstered by citations of administrative precedents and by

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[16] Another amendment, added, as asserted by Wilson, to conform the rest of the section to the change made by this amendment, was the insertion of the phrase "as is enjoyed by white citizens," so that the section read:

> * * * shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens, * * * (*Ibid.*)

The place where this phrase was inserted was the wrong one, either through an error in the Congressional Globe or an inadvertence by Mr. Wilson. The later debates, see *infra*, p. 62, and the final Act itself, 14 Stat. 27, show that the phrase was intended to be inserted after the clause "and to full and equal benefit of all laws and proceedings for security of person and property," and not just before that clause.

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castigation of the *Dred Scott* case for holding otherwise. (Globe, p. 1116.) It was competent, he said, for the Congress, and not a matter for the states, to declare who were citizens of the United States. As for the remainder of the first section, it provided for the equality of citizens in the enjoyment of certain "civil rights and immunities":

> What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. (Globe, p. 1117.)

On the other hand, civil rights did include, he asserted, those rights included in the definition of the term in Bouvier's Law Dictionary, those rights which "have no relation to the establishment, support, or management of government." Wilson concluded

> that it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic. (*Ibid.*)

The term "immunities" was clearer in its meaning—in this regard the bill merely "secures to citizens of the United States equality in the exemptions of the law." (*Ibid.*)

There was no question, Mr. Wilson said, in his mind that Congress could enact the measure, for

> this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. (*Ibid.*)

The rights to be protected already belong to every citizen, as part of the "privileges and immunities" of United States citizenship under Article 4 of the Constitution. (*Ibid.*) If every state acknowledged and guaranteed this protection, this measure would not be necessary. But the practice of the states forced the Federal Government to supply the protection which the states denied:

> Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men. (Globe, p. 1118.)

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As to those citizens in danger of involuntary servitude through deprivation of civil rights, power rested also in the Thirteenth Amendment. (*Ibid.*) For all others, it rested on the general powers to protect national citizens:

> If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family. (*Ibid.*)

Representative Raymond of New York offered, as a possible amendment, striking the words "free white" from the naturalization laws, and declaring everyone born in the United States to be a citizen. (Globe, p. 1120.) An amendment was also offered by Representative Shanklin of Kentucky to declare that nothing in the bill would confer the right to vote on Negroes, mulattoes and Indians. (*Ibid.*)

Representative Rogers of New Jersey, a member of the Judiciary Committee, objected to the bill on constitutional grounds. There was, he said, no authorization under the Constitution for such a measure. As a matter of fact, Representative Bingham's current proposal to amend the Constitution in order to confer this very power [17] implied an opinion by the majority of the Joint Committee on Reconstruction that there was no

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[17] This reference was to Bingham's "equal rights" amendment, see *infra*, p. 83.

such power at present. (*Ibid.*) If Congress had the power to pass this bill, then it had the right

> not only to extend all the rights and privileges to colored men that are enjoyed by white men, but has the right to take [them] away. (*Ibid.*)

Under this view, Mr. Rogers concluded that a fair interpretation of the bill would mean that Congress could enter a State, and supersede its normal domestic regulations:

> In the State of Pennsylvania there is a discrimination made between the schools for white children and the schools for black. The laws there provide that certain schools shall be set apart for black persons, and certain schools shall be set apart for white persons. Now, if this Congress has a right, by such a bill as this, to enter the sovereign domain of a State and interfere with these statutes and the local regulations of a State, then, by parity of reasoning, it has a right to enter the domain of that State, and inflict upon the people there, without their consent, the right of the negro to enjoy the elective franchise to the same extent that it is accorded to the white men in that State, * * *. (Globe, p. 1121.)

Mr. Cook of Illinois expressed surprise at Rogers' apprehension that the bill was designed to deprive somebody in some state of the Union of some right which he had previously enjoyed. It was his belief that the bill was constitutional and would deprive no one, black or white, of any rights. (Globe, p. 1123.) "It is said," he remarked, "that this measure is unconstitutional. Then let us amend the Constitution so as to

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render such legislation proper." (Globe, p. 1125.)

At the opening of debate on March 2, 1866, Representative Thayer of Pennsylvania contended that under statutory rules of construction the bill could not be construed to alter state laws on suffrage, as Rogers had feared, for,

> the words themselves are "civil rights and immunities," not political privileges; and nobody can successfully contend that a bill guarantying simply civil rights and immunities is a bill under which you could extend the right of suffrage, which is a political privilege and not a civil right.
>
> Then, again, the matter is put beyond all doubt by the subsequent particular definition of the general language which has been just used; and when those civil rights which are first referred to in general terms in the bill are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated. (Globe, p. 1151.)

Thayer also was concerned with the issue of power to declare a freedman a citizen. It was his view that

> by virtue of the second section of the amendment of the Constitution Congress has express power to pass laws which will guaranty and insure these great rights and immunities of citizenship to those who, by the act of emancipation and the amendment of the Constitution, were made freemen, and who in becoming freemen became citizens. (Globe, p. 1152.)

If there should be any doubt as to the status of the Negro, the Congress had "ample authority to confer the rights of citizenship upon this class of persons" under the naturalization power. (Globe, pp. 1152, 1153.) He concluded by stating his approval of Bingham's proposition to put the protection of equal rights into the Constitution, although he doubted the necessity of such action. Still, "in order to make things doubly secure," he would vote for Bingham's proposal. (Globe, p. 1153.)

Representative Eldridge of Wisconsin pointed out that when the Bingham joint resolution to amend the Constitution had been proposed, Mr. Thayer had supported it on the ground, advanced by Bingham, that under the present Constitution there was no warrant to enter a state to protect a citizen in his rights of life, liberty, and property. Now, he observed, Mr. Thayer seemed to differ in all his claims from Mr. Bingham. (Globe, p. 1155.)

Although Representative Thornton of Illinois was opposed to the bill, he conceded that the Thirteenth Amendment necessarily made the Negro a citizen in the act of making him a free man. (Globe, p. 1157.) Representative Windom of Minnesota expressed the belief that the bill was in strict conformity with the spirit and design of the original architects of the Republic. Had this design been followed by those who built the superstructure, he felt that the country might have been spared the horror of the war. For,

> A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.

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> Upon this, the only foundation which can permanently endure, we professed to build our Republic; but at the same time we not only denied to a large portion of the people equality of rights, but we robbed them of every right known to human nature. (Globe, p. 1159.)

At this point, Mr. Wilson withdrew his motion to recommit the bill, and proceeded to offer some amendments. Most were technical, and not material here; one, however, was an express proviso excluding the right of suffrage from the rights protected by the bill. Wilson stated that this addition did not change his construction of the bill, since he did not believe the term "civil rights" included the right of suffrage. After all of these amendments were adopted, he renewed his motion to recommit, and the House moved on to the consideration of other measures. (Globe, pp. 1161–1162.)

Debate on the Civil Rights bill was not resumed until March 8, 1866. At that time Representative Broomall of Pennsylvania argued that the evils which the bill would correct were not limited in their scope to the black man. He contended that white men, citizens of the United States, had been and were then being punished under color of state laws for having refused to commit treason; that soldiers of the Republic had been arraigned in state courts, under state laws, for the crime of shooting traitors on the field of battle by command of military superiors, and had been saved from punishment only by the interposition of the Freedmen's Bureau. He maintained, further, that

> white men, citizens of the United States, have been driven from their homes, and

> have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country, and that now they are begging in vain for a redress of wrongs in the courts of the reconstructed South. (Globe, p. 1263.)

Representative Raymond of New York spoke in behalf of his substitute bill.[18] He declared that the pending measure had worthy objects, and that he would gladly vote for any such bill if convinced of its constitutionality. Unfortunately, he had doubts as to the constitutionality of section two, the penal section. (Globe, pp. 1266–1267.)

Mr. Delano of Ohio stated his belief that no law was necessary to make the emancipated people citizens. In his opinion, they were already citizens. (Globe, Appendix, p. 156.) However, as for the rest of the bill he had doubts as to the power of Congress under the existing Constitution to pass such a measure. Despite Mr. Wilson's disclaimer that the bill conferred the right to act as a juror, Delano felt that section one necessarily conferred that right in the clause, "to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." (Globe, Appendix, p. 157.) Wilson replied that those words had not been in the original bill, but were inserted by an amendment offered by himself:[19] "It was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be ex-

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[18] See, *supra*, p. 57.

[19] See, *supra*, note 16.

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tended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension * * *." (*Ibid.*) Delano continued his objections by pointing to the phrase in the same section, "That there shall be no discrimination in civil rights or immunities among the citizens of the United States in any State or Territory." He supposed that the enumeration of specific rights following this general declaration operated as a limitation upon it. But then the phrase to which he had previously referred followed after this enumeration, and, in his view, seemed to be an enlargement or extension of the specific rights enumerated in the bill. Under this construction, he asserted, the question whether the right to be a juror was conferred by the measure was still a debatable one. (*Ibid.*) Delano thought, therefore, that the bill could be interpreted to encroach upon the reserved rights of the state under the Constitution. It appeared to him that "the authority assumed as the warrant for this bill would enable Congress to exercise almost any power over a State." (Globe, Appendix, p. 158.) He expressed strong doubts as to the authority of Congress

> to go into the States and manage and legislate with regard to all the personal rights of the citizen * * *. (*Ibid.*)

Mentioning, as examples, state laws defining who would be entitled to testify in court, Mr. Delano continued,

> we once had in the State of Ohio a law excluding the black population from any participation in the public schools or in the

> funds raised for the support of those schools. That law did not place, of course, the black population upon an equal footing with the white, and would, therefore, under the terms of this bill be void, and those attempting to execute it would be subjected to punishment by fine or imprisonment. (*Ibid.*)

While the extreme assertion of state rights was a contributing cause of the war, to him

> it is just as important that we should not swing back into the assertion of powers in this Government that do not belong to it * * *. (Globe, Appendix, p. 159.)

He concluded, therefore, that since authority for this bill was not conferred by the Thirteenth Amendment, Congress should first take up and submit for ratification the amendment to the Constitution offered by Mr. Bingham. When that amendment had become part of the fundamental law, then Congress could proceed "to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land." (*Ibid.*)

Upon the conclusion of this speech, Representative Kerr of Indiana rose to present his objections to the measure. In his view, the declaration of citizenship was wholly unauthorized, for the naturalization power did not permit Congress to declare native-born non-citizens to be citizens. (Globe, p. 1267.) The Thirteenth Amendment did not grant that authority, nor did it authorize civil rights legislation to enlarge

> the rights and privileges of negroes, not as subjects of the Federal Government, but

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> as subjects or citizens of the several States." (Globe, p. 1268.)

All that amendment had done was to sever the relation of master and slave, and to prevent involuntary servitude. He asked:

> Is it slavery or involuntary servitude to forbid a free negro, on account of race and color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business in a State in which white men may engage, such as retailing spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men? * * * It will require a most vigorous exercise of the imagination to give affirmative answers to those questions. (*Ibid.*)

Mr. Kerr then elaborated on the problems of the differing character of State and national citizenship:

> We should not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. (*Ibid.*)

Before the adoption of the Constitution, he asserted, a State could confer on whomsoever it pleased the character and rights of citizenship. (*Ibid.*) Moreover:

> The States have not surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of per-

> sons; yet they would not be citizens in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in its courts, nor to the privileges and immunities of citizens in the other States. (*Ibid.*)

The naturalization power of Congress extended only to confer a "general citizenship" in the Union, which had nothing whatever to do with conferring the rights inherent in State citizenship. (*Ibid.*) All the privileges and immunities clause of Article 4 conferred was the negative right of a citizen of the Union, domiciled in one State and sojourning in another, to be free from discrimination on account of his "foreign" residence. (Globe, p. 1269.) He was not, however, specially protected against being accorded the treatment ordinarily due to others of the same general class in which he fell, apart from residence. (*Ibid.*) Consequently, Congress could not claim to be empowered, in protecting its own citizens, to invade the States in order to prescribe what rights the States should accord to State citizens, and others sojourning there. (Globe, p. 1270.)

Moreover, Mr. Kerr did not agree with any narrow definition of the term "civil rights and immunities," and pointed to the confused definitions offered by the proponents of the bill. (*Ibid.*) He referred to the statutes of Indiana, forbidding licenses to sell spirituous liquors to any but white males, a discrimination of both color and race. The right to the license was probably to be deemed a civil right; but even if it were not,

> yet a license is a contract, and this bill says the negro shall have "the same right to make

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> and enforce contracts" as the white man. * * * Again, the constitution of Indiana has dedicated a munificent fund to the support of common schools for the education of the children of the State. But negro and mulatto children are by law excluded from those schools. Negroes and mulattoes are exempt by law from school tax. They are denied a civil right, on account of race and color, and are granted an immunity, (from school taxation) but are taxed for all other purposes. Now, a negro or mulatto takes his child to the common schoolhouse and demands of the teacher that it be admitted to the school and taught as the white children are, which is refused. The teacher then becomes a wrong-doer and is liable to the same punishments, to be administered in the same way; because all the persons referred to would be acting under *color* of some law, statute, ordinance, regulation, or custom. (Globe, p. 1271.)

After Mr. Kerr had concluded his speech, Representative Bingham offered an amendment to the motion to recommit, to instruct the Committee to strike out the broad language relating to "civil rights and immunities." He also wished stricken all the penal provisions of the bill, substituting therefor a provision granting the remedy of a civil action for damages to one whose rights had been violated. (*Ibid.*) [20]

The following day, March 9, 1866, Bingham was allowed thirty minutes to speak on behalf of his amendment. (Globe, p. 1290.) He stated, at the

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[20] This proposal by Bingham had already been endorsed, in advance of its offer, in preceding speeches by Representatives Raymond (Globe, p. 1267), and Delano. (Globe, App., p. 156.)

outset, that even if his proposed changes were adopted, the Congress had no authority to pass the bill; but by striking out the broad language of the bill, and removing its criminal penalties, he asserted, its "oppressive" effects would be eliminated. (*Ibid.*)

To Bingham, there was no objection to the declaration of the citizenship of the Negro, for that was a fully authorized exercise of power by Congress; but,

> in view of the text of the Constitution of my country, in view of all of its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserved powers of the States, to be enforced by State tribunals and by State officials acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States. (Globe, p. 1291.)

In discussing the general language of the first section of the bill, Mr. Bingham referred to Representative Wilson's views. He pointed out that the latter had privately said that he did not regard the "clause in the first section as an obligatory requirement." (Globe, p. 1291.) To Mr. Bingham, however, that clause was "as obligatory as any other clause of the section." Consequently, since "civil rights" was a very broad term, including every right of the citizen, not excepting suffrage,

> * * * what, then, is proposed by the provision of the first section? Simply to strike down by congressional enactment

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> every State constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. (*Ibid.*)

Most states did have such discriminatory laws. With the objective of eliminating such laws, Bingham agreed entirely, but that should be achieved by the law and voluntary act of each State:

> The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. (*Ibid.*)

In limiting the operation of the bill to "citizens," he claimed, the House revisers of the bill had discriminated against aliens; to reach all equally with protection, it was necessary to use "persons," for, while

> the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of States and prohibit such gross injustice by States, it does limit the power of Congress and prohibit any such legislation by Congress. (Globe, p. 1292.)

The Freedman's Bureau bill he distinguished by reason of its application only to the insurrectionary States, and only so long as the courts were "stopped in the peaceable course of justice" by civil unrest. (*Ibid.*) But when peace should be restored and the courts opened, the ordinary

limitations of the Constitution would apply, under which

> the care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. (*Ibid.*)

Mr. Bingham asserted that even his proposed constitutional amendment did not seek to disturb that traditional limitation. It sought

> to affect no change in that respect in the Constitution of the country. (*Ibid.*)

On the contrary, it sought only to provide power in Congress to punish all violations by State officers of their obligations to uphold the Constitution and the bill of rights,

> * * * but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. (*Ibid.*)

Borrowing de Tocqueville's phrase, this would continue "centralized government, decentralized administration" (*Ibid.*), which is the strength of this country:

> I have always believed that the protection in time of peace within the States of all of the rights of person and citizen was of the powers reserved to the States. And so I still believe. (Globe, p. 1293.)

Representative Shellabarger of Ohio echoed Bingham's constitutional doubts, but, in view of the great need for such protection, he resolved his doubts in favor of the bill. "Its whole effect," he said, "is not to confer or regulate rights, but to require that whatever of these enumerated

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rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery." (Globe, p. 1293.)

Wilson again took the floor to rebut these objections, many of which had come from members of his own party. (Globe, p. 1294.) To him, it was wholly beyond reason that the United States, which

> can draw the citizen by the strong bond of allegiance to the battle-field, has no power to intervene and set aside a State law, and give the citizen protection under the laws of Congress in the courts of the United States * * *. (*Ibid.*)

Wilson stated that the term "civil rights and immunities" as used in this bill, and as properly construed, did not comprise all civil rights and immunities. Mr. Bingham had tried to tell the House, he asserted, that in the terms of this bill,

> are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. (*Ibid.*)

Mr. Wilson, however, observed that the "gentleman from Ohio" was too able a lawyer to put forth seriously such a construction of the bill; for

> when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill now under consideration, he steps beyond what he must know to be the rule of construction which must apply here, and as the result of which this bill can only relate to matters within the control of Congress. (*Ibid.*)

Four days later, on March 13, 1866, the bill was reported again with amendments, as urged by Representatives Delano and Bingham, striking out the general language relating to "civil rights or immunities", and leaving only the individual rights specified. (Globe, p. 1366.) Mr. Wilson explained that the elimination of the general language did not materially change the bill, for, he still maintained, under accepted rules of construction, the specific language had limited the general. However,

> some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended. (*Ibid.*)

A few other amendments, not relevant here, were also reported. All the amendments were adopted by the House. In answer to an inquiry on the omission from the final bill of the proviso explicitly excluding the right of suffrage from the operation of the bill, Wilson replied that

> Some members of the House thought, in the general words of the first section in relation to civil rights, it might be held by the courts that the right of suffrage was included in those rights. To obviate that difficulty and the difficulty growing out of any other construction beyond the specific

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> rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section. Therefore the amendment referred to by the gentleman is unnecessary. (Globe, p. 1367.)

With these changes, on March 13, 1866, the bill then passed the House by a vote of 111 to 38, although Bingham still voted against it. (*Ibid.*) The Senate, after a brief and largely immaterial discussion on March 15, 1866, concurred in all the House amendments, and sent the measure to the President. (Globe, pp. 1413–1416.)

On March 27, the President returned the bill without approval. (Globe, pp. 1679–1681.) His message was in large part a repetition of the arguments in the Congress against the bill. The former slaves, he asserted, did not possess as yet the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States. Moreover, the President believed that Congress did not have the authority to destroy the federative system by such a centralization of power as that required to provide the proposed safeguards for the colored race, which went beyond anything that the General Government had ever provided for the white race. (*Ibid.*)

The veto did not come up for discussion until April 4, 1866, when Senator Trumbull reviewed what he claimed to be the inadequacies and errors of the message, point by point. (Globe, pp. 1755–1761.) He regretted that the President should have thus alienated himself "from those who elevated him to power." (Globe, p. 1755.) On April 5, 1866, Senator Reverdy Johnson, who sup-

ported the veto, again reviewed the *Dred Scott* case, noting that under that decision the Congress might be able to make a Negro a citizen of the United States but not a citizen of a State. (Globe, p. 1776.) Since this legislation related to rights inherent in State citizenship, it was an unconstitutional attempt to invade the powers reserved to the States. (Globe, pp. 1777, 1778.) For the most part, the few remaining Senate speeches were devoted to repetition of previous arguments or to general Reconstruction matters. (Globe, pp. 1781–1786; 1801–1809.) On April 6, the vote was taken, and the veto was overridden by 33 to 15. (Globe, p. 1809.) In the House, on April 9, 1866, there was no discussion at all. After some dilatory tactics by the opposition, Representative Wilson called the previous question, and the House overrode the veto by a vote of 122 to 41. (Globe, p. 1861.)

D. THE FOURTEENTH AMENDMENT

INTRODUCTORY NOTE

The legislative history of the Fourteenth Amendment itself is preceded by summaries of two other proposals for constitutional amendments introduced earlier in the first session of the Thirty-ninth Congress. These proposals were: a constitutional amendment reducing the congressional representation of any state which denied citizens suffrage on the basis of race or color (the Stevens "apportionment" amendment); and a constitutional amendment empowering Congress to enact legislation to guarantee equal rights to all persons (the Bingham "equal rights" amendment).

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These proposals were the immediate precursors of sections one and two of the Fourteenth Amendment.

1. The Stevens "Apportionment" Amendment

On December 5, 1865, Representative Thaddeus Stevens introduced in the House a joint resolution proposing an amendment to the Constitution, providing for apportionment of representatives among the States on the basis of their respective legally-qualified voters. It was referred to the Judiciary Committee. (Congressional Globe, 39th Cong., 1st Sess., p. 10.)[21]

At the second meeting of the Joint Committee on Reconstruction, on January 9, 1866, Stevens submitted the same resolution to that body.[22] On January 12, 1866, it was referred, along with other proposals, to a subcommittee consisting of Messrs. Fessenden, Stevens, Howard, Conkling and Bingham. (Committee Journal, pp. 9–10.) On January 20, 1866, the subcommittee reported, and, after further amendments, the Joint Committee approved, by vote of 13 to 1, the following proposed article of amendment:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed; provided that whenever the elective fran-

[21] All references to the Congressional Globe in this section are to the 39th Congress, 1st Session.

[22] Journal of the Joint Committee on Reconstruction, S. Doc. No. 711, 63d Cong., 3d Sess., p. 7, hereafter cited as "Committee Journal."

> chise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation. (Committee Journal, p. 13.)

Representative Stevens introduced this proposed amendment, embodied in a joint resolution (H. J. Res. 51), on January 22, 1866. (Globe, p. 351.) He indicated that he wished to have it passed "before the sun goes down." However, after objections by Representatives Rogers of New Jersey and Chanler of New York indicating a minority view, Stevens agreed to postpone the vote, and debate commenced. (Globe, pp. 352–353.)

Representative Rogers, a member of the Joint Committee, presented the minority report of that body on the proposed amendment. He stated that the amendment contemplated a change in the fundamental principle that taxation and representation should always go together. Its object, he asserted, was to force Negro suffrage, in this indirect way, upon an unwilling population in order to prevent deprivation of its rightful representation. Whereas formerly, a state was entitled to three-fifths representation for its Negro slaves, now, under this amendment, the state would receive no representation at all for that class of population, if any kind of suffrage qualification were imposed on even one Negro. (Globe, pp. 353–356.)

Mr. Conkling, also on the Joint Committee, spoke in favor of the amendment. (Globe, p. 356.) He pointed out that the former slaves would now receive full representation under the

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Constitution although not enfranchised at all. This would enable the Southern states to claim 28 more representatives in Congress. In effect, there would be, he said,

> Twenty-eight votes, to be more or less controlled by those who once betrayed the Government, and for those so destitute, we are assured, of intelligent instinct as not to be fit for free agency. (Globe, p. 357.)

To remedy this situation, Conkling stated, the Committee had considered the possibility of a proposal to deprive the states of the power to disqualify or discriminate politically on account of race or color. However, this plan had been rejected because it trenched upon the principle of state sovereignty, denying to the people of the several states the right to regulate their own affairs in their own way. (Globe, p. 358.) The pending proposal had been adopted because it left every state free to extend or withhold the elective franchise on such terms as it pleased, and this without losing anything in representation if the terms were impartial as to all. But if any race "is so vile or worthless that to belong to it is alone cause of exclusion from political action, the race is not to be counted here in Congress." (*Ibid.*)

On January 23, 1866, Representative Blaine of Maine suggested that the amendment should be rephrased so that if Negroes were removed from the basis of representation, they should also be excluded from the basis of direct taxation. (Globe, p. 377.) Chanler of New York, reviewing the action of the Constitutional Convention on

this subject, remarked at the different spirit there prevailing:

> All differences were compromised in a spirit of patriotism and justice. How different is all this from the hasty partisan legislation on this very suffrage question by the present Congress.
>
> A caucus met before Congress organized and chalked out a line of policy and action for the Republican party on the floor of Congress. The whole matter of reconstruction was referred to a grinding committee, whose dictation should govern Congress in every measure brought before it for consideration. (Globe, p. 382.)

Representative Jenckes of Rhode Island objected to the amendment because an essential element of injustice was infused in it. By this express constiutional authorization,

> We yield to States the power to exclude an entire race living among them, which has hitherto been a class by themselves, but who must now be counted as citizens. They may exclude not only that race, but people of other races who immigrate to this country, and thus contravene the long-settled policy upon which we open our ports to immigrants from all climes, and of all nations and races, and seek here to build up a nation which will not rest upon the basis of any narrow or clannish origin, but which will embrace the best blood of the whole human race. (Globe, p. 386.)

On January 24, 1866, Mr. Lawrence of Ohio expressed a desire that the Constitution be amended to apportion representation on the basis of citizens of the United States who were male

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adult voters. (Globe, p. 404.) He believed that if any class

> is unfit to be an element of political strength, it is unjust to clothe a favored class with political power on its behalf. Whatever protection it demands should be entrusted equally to all the Representatives of the people. (*Ibid.*)

Representative Shellabarger of Ohio objected to the amendment because it would be a declaration sanctioning the deprivation of political rights from a whole race of men, providing only that they be not represented in the government. As such, it would violate the basic principle of our government, require different constructions of other Constitutional clauses, and spoil the free spirit and sense of the Constitution. (Globe, p. 405.) Representative Kelley of Pennsylvania echoed this objection, and urged that the Congress follow

> a rule of action which, if adhered to, will settle all our difficulties and establish the fact that there is on earth a Republic founded upon the imprescriptible rights of man, in which the humblest man, when he recounts his political rights, sets forth all that the strongest, the wisest, and the proudest may claim. Social inequalities there will be, and natural inequalities are ordained of God; but when our fathers gave us the Constitution they meant that within the wide limits of our country the measure of one man's political rights should ascertain the extent of those of every other man dwelling beneath that dome which is the fit canopy of a continent, the Constitution of the United States. (Globe, pp. 408–409.)

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On January 25, 1866, Representative Bingham of Ohio expressed his belief that the proposed amendment was desirable, and reminded those who found various faults with it, that it was not the only amendment under consideration. Others would bolster this one, and remedy its defects. He informed the House that the Joint Committee

> has under consideration another general amendment to the Constitution which looks to the grant of express power to the Congress of the United States to enforce in behalf of every citizen of every State and of every Territory in the Union the rights which were guarantied to him from the beginning,[23] but which guarantee has unhappily been disregarded by more than one State of this Union, defiantly disregarded, simply because of a want of power in Congress to enforce that guarantee. (Globe, p. 429.)

It was Bingham's belief that every slave when emancipated became a "free citizen" in the words of the old Articles of Confederation, and a "free person," a term which embraced all citizens, in the words of the Constitution. He thus became equal before the law with every other citizen of the United States. (Globe, p. 430.) Therefore, Bingham asserted,

> I want the American people by adopting such amendments to declare their purpose to stand by the foundation principle of their own institutions, the absolute equality of all citizens of the United States politically and civilly before their own laws.

[23] Bingham was referring to his own "equal rights" amendment. See *infra*, p. 83.

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> That is the issue involved in the amendment presented by the committee. (Globe, p. 431.)

Congressman Raymond of New York, on January 29, 1866, spoke at length on the nature of the constitutional relation of the Southern states to the Union. (Globe, p. 483.) In the course of his remarks he stated that he "put no great faith in these so-called guarantees of the Constitution for objects which can only rest upon the public conscience and the public will." (Globe, p. 491.) Representative Julian of Indiana urged the adoption of an amendment which would directly prohibit the disfranchisement of anyone on account of race or color. (Globe, Appendix, pp. 56–58.)

On January 30, 1866, the joint resolution was recommitted without instructions to the Joint Committee on Reconstruction. (Globe, p. 508.) At a meeting of the Committee on the following day, Thaddeus Stevens moved to amend it by striking out the reference to direct taxes. This motion was agreed to, and in that amended form the joint resolution was ordered to be reported back to the House. (Committee Journal, pp. 15–16.)

Stevens reported the resolution to the House on the same day, January 31, 1866, and urged its passage. (Globe, p. 535.) The joint resolution was then passed by a vote of 120 to 46, more than the necessary two-thirds. (Globe, p. 538.)

Consideration of the joint resolution in the Senate began on February 6, 1866, with a speech in opposition by Senate Sumner. (Globe, p. 673.) He regarded it as "another Compromise of

Human Rights," introducing "discord and defilement" into the Constitution (*ibid.*), and a renunciation of all power under the Constitution to apply a remedy for a grievous wrong, when the remedy was available. (Globe, p. 674.) He felt that Congress had ample power to establish the right of suffrage for the Negro, even without any further constitutional amendment. Enfranchisement in his view was the complement to Emancipation, and was justifiable under the constitutional amendment which ordained the latter. (Globe, p. 675.)

> But the Senate has already by solemn vote asserted this very jurisdiction. You have, sir, decreed that colored persons shall enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color. And this great decree you have made as "appropriate legislation" under the Constitutional Amendment "to enforce" the abolition of slavery. Surely you have not erred in this act. Beyond all question the protection of colored persons in civil rights is essential to complete the abolition of slavery; but the protection of colored persons in political rights is not less essential; and the power is as ample in one case as in the other. (Globe, p. 684.)

Senator Fessenden, Chairman of the Joint Committee, opposed Sumner on February 7, 1866, arguing the necessity of the proposed apportionment amendment, although he admitted that he himself would prefer

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> a distinct proposition that all provisions in the constitution or laws of any State making any distinction in civil or political rights, or privileges, or immunities whatever, should be held unconstitutional, inoperative, and void, or words to that effect. (Globe, p. 704.)

But any such proposition was probably too extreme to secure the concurrence of the states. (*Ibid.*)

On February 14, 1866, Senator Clark of New Hampshire agreed that the real question was the guaranty of political rights—suffrage—for the Negro (Globe, p. 831), since enfranchisement was one of the basic rights of every free man. (Globe, p. 832.) A similar analysis was presented by Senator Yates of Illinois, on February 19, 1866. He stated that the rights granted by the Thirteenth Amendment included both the civil and political rights of every free man. (Globe, Appendix, p. 100–101.) By the Amendment, the Negro "became a part of the people" and, as such, "entitled to the same rights and privileges with all the other citizens of the United States." (Globe, Appendix, p. 101.)

The vote on the joint resolution was taken on March 9, 1866. The constitutional amendment was defeated, for, although it received a majority vote of 25 to 22, it lacked the constitutional two-thirds. (Globe, p. 1289.)

2. The Bingham "Equal Rights" Amendment

On January 12, 1866, the Joint Committee on Reconstruction received two proposals for amend-

ment of the Constitution. (Committee Journal, p. 9.) The first, by Bingham, provided:

> The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property.

The second, by Thaddeus Stevens, Chairman of the House group of the Committee, was a simpler declaration:

> All laws, State or national, shall operate impartially and equally on all persons without regard to race or color.

Both were referred to the subcommittee on the apportionment of representatives in Congress, which included both Bingham and Stevens. (*Ibid.*)

A week later, on January 20, 1866, the subcommittee reported a proposal which, although obviously patterned after Bingham's insofar as civil rights were concerned, also contained language to insure equal political rights, *i. e.,* suffrage:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property. (Committee Journal, p. 12.)

This proposal was held in the Committee until after the apportionment proposal had passed the House, although the Committee continued to consider it actively. (Committee Journal, pp. 14–15.) After disagreement on the proposed termi-

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nology, it was referred, on January 24, 1866, to a special subcommittee consisting of Bingham, Boutwell of Massachusetts, and Andrew Jackson Rogers of New Jersey. (Committee Journal, p. 14.) This subcommittee reported the proposal back on January 27, 1866, in a form more closely akin to Bingham's original proposal:

> Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges. (Committee Journal, pp. 14–15.)

This form, however, did not meet with the Committee's entire approval (*ibid.*), so Bingham proposed a substitute on February 3, 1866:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment). (Committee Journal, p. 17.)

This was adopted by a narrow margin, and agreed on for report to Congress. (*Ibid.*)

The "equal rights" amendment proposal (H. J. Res. 63) was reported to the House on February 26, 1866. (Globe, pp. 813, 1033.) Bingham's report stated that the language of the proposal "stands in the very words of the Constitution." (Globe, p. 1034.) It was intended to remedy "the

want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." (*Ibid.*) Had there been such a power in the Congress to enforce the privileges and immunities and due-process clauses, the "immortal bill of rights embodied in the Constitution," instead of resting them on the fidelity of the States, there would have been no rebellion. (*Ibid.*)

Representative Rogers of New Jersey answered that the addition of Congressional enforcement power to Article IV of the Constitution, such as proposed, would be the "embodiment of centralization" and the "disfranchisement" of "sacred and immutable State rights." (Globe, Appendix, p. 133.) If this amendment were necessary, Rogers asked, what authorized the enactment of the Civil Rights Act? (*Ibid.*) While he expressly favored the "protection, security, advancement, and improvement, physically and intellectually, of all classes," that end should be accomplished by State legislation:

> Negroes should have the channels of education opened to them by the States, and by the States they should be protected in life, liberty, and property * * *. (Globe, Appendix, p. 134.)

They should be permitted by the States to do everything a white man could do, except to vote and hold office. (*Ibid.*) However, according to him, the proposed amendment would take from

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the states the power to regulate such personal rights as education:

> In the State of Pennsylvania there are laws which make a distinction with regard to the schooling of white children and the schooling of black children. It is provided that certain schools shall be designated and set apart for white children, and certain other schools designated and set apart for black children. Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school, upon the principle that all the people in the several States shall have equal protection in all the rights of life, liberty, and property, and all the privileges and immunities of citizens in the several States." (Globe, Appendix, p. 134.)

The proposed amendment would operate

> under this broad principle of equality which during the last five years has been proclaimed throughout the land to empower the Federal Government to exercise an absolute, despotic, uncontrollable power of entering the domain of the States and saying to them, "Your State laws must be repealed wherever they do not give to the colored population of the country the same rights and privileges to which your white citizens are entitled." (Globe, Appendix, p. 135.)

On February 27, 1866, Representative Higby of California expressed himself in favor of Reconstruction and equality for the Negro, agreeing with Bingham that the purpose of the amendment was to supply a power of enforcement to provisions of the Constitution that lacked vitality

without it. (Globe, p. 1054.) Congressman Kelley of Pennsylvania felt that the existing provisions of the Constitution, guaranteeing the "privileges and immunities" of citizens, included a right to have a republican form of government; that is, one in which all citizens were equal. Therefore, he felt, the proposal was really unnecessary, although its adoption would serve to allay the doubts of the unreasonable. (Globe, pp. 1057–1059.)

Representative Hale of New York objected to the proposal for the reason that

> it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. (Globe, p. 1063.)

Thaddeus Stevens inquired rhetorically if Hale really meant that under the amendment, "Congress could interfere in any case where the legislation of a State was equal, impartial to all?" (*Ibid.*) Hale replied that the provision was not, as Stevens suggested, one

> that when the States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation. (Globe, pp. 1063–1064.)

He maintained that the present Constitution offered ample safeguards. However, Bingham interrupted to inquire whether he knew of any de-

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cision in which a person within a state had been able to sustain a suit for "vindication of a right or the redress of a wrong" when the organic law of that state forbade such a suit. (Globe, p. 1064.) Hale replied that not having briefed the question, he could not recall any such case. (*Ibid.*) Bingham also denied Hale's statement that the proposed amendment would apply only to the Negro in the South, for it was "to apply to other States also that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution." (Globe, p. 1065.)

Representative Hale closed his remarks with a plea for the necessity of maintaining a reasonable balance between the national government and the states—asking

> whether we ought not now to seek to strengthen the liberties of the States and the rights of the States as well as the liberties of the citizens. (Globe, p. 1065.)

On the following day, February 28, 1866, Representative Davis of New York also expressed concern over the upset of the federal-state balance. (Globe, p. 1083.) The Thirteenth Amendment, while freeing the Negro,

> gives to Congress full power to enact all laws which shall be essential to their protection. They must be made equal before the law, and be permitted to enjoy life, liberty, and the pursuit of happiness. (Globe, p. 1085.)

The new proposal, however, would authorize Congress to legislate not merely to ensure equality of

protection but to set the measure of equality. (Globe, p. 1087.)

Mr. Bingham then took the floor again for his proposal. To him,

> The proposition pending before the House is simply a proposition to arm the Congress * * * with the power to enforce the bill of rights as it stands in the Constitution today. (Globe, p. 1088.)

The proposal did not invade reserved State rights, for no State could claim to have reserved the authority to withhold privileges or impose burdens on a citizen contrary to the provisions of the Constitution. (Globe, p. 1089.) While he conceded the bill of rights was in terms only a limitation on national powers, it was nonetheless a recognition that the rights enumerated were a part of the rights of a citizen. (Globe, p. 1090.) If a State official denied rights therein declared, he invaded the privileges and immunities of a citizen and thereby violated his oath to uphold and preserve the Constitution. (Globe, p. 1094.) The Constitution, moreover, provided or declared:

> that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice * * *. (*Ibid.*)

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To make it possible that every man in the country would be secure in the "equal protection of his personal rights" through the medium of national law, the proposed amendment was required. (*Ibid.*) This end the amendment would reach, for by the term "equal protection" it would confer "upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons." (*Ibid.*)

Congressman Hotchkiss of New York expressed dissatisfaction with the measure because it did not accord sufficient protection for the equal rights of citizens. To him, the provision that Congress should guarantee the equality of protection would mean that the protection given would depend upon the caprice of a majority of the Congress. (Globe, p. 1095.) Equal protection should instead be made a

> constitutional right that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation. (*Ibid.*)

He expressed instead the desire that

> the very privileges for which the gentleman is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. (*Ibid.*)

At that point, a motion to postpone consideration was agreed to by a vote of 110 to 37. (Globe, p. 1095.) No further action was taken thereafter on this separate proposal.

3. The Fourteenth Amendment

On April 21, 1866, Thaddeus Stevens laid before the Joint Committee on Reconstruction an overall plan for reconstruction. (Committee Journal, p. 28.) He stated that the plan was not original with him, but was one which he would support. Included in the plan was a constitutional amendment, combining the principal proposals for amendment previously introduced. It contained a guarantee of civil rights and suffrage, and provisions for apportionment revision, repudiation of the Confederate debt, and congressional enforcement power.

Section 1 of the proposed amendment read:

> No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude. (*Ibid.*)

Representative Bingham moved to amend this section by adding:

> Nor shall any State deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation. (Committee Journal, p. 29.)

The committee rejected this amendment, and accepted the original language. (*Ibid.*) Later, Bingham obtained Committee approval of a new section, in addition to the section 1 already in the proposal, in these words:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

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> life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Committee Journal, p. 30.)

On April 25, this section was deleted from the proposal, but at the next meeting, on the 28th, it was voted back in to replace the original section 1. (Committee Journal, pp. 35, 39.) That same day, April 28, 1866, a final draft of the proposed amendment, containing Bingham's section 1, was adopted for formal report to both Houses. (Committee Journal, pp. 43, 44.) The proposal was received in both Houses on April 30, 1866, without written report, and, in the House, as H. J. Res. 127, it was made a special order for May 8. (Globe, pp. 2265, 2286.)

On that day, the discussion of section 1 commenced with some brief remarks by Stevens on behalf of the Joint Committee. He stated that the provisions of the section

> are all asserted, in some form or another, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man

> to testify in court shall allow the man of color to do the same. (Globe, p. 2459.)

He referred to state laws which imposed on Negroes disqualifications from testifying in courts, or imposed different methods of trial or different punishment, but said he would not "enumerate these partial and oppressive laws." (*Ibid.*) However,

> Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. (*Ibid.*)

Representative Stevens stated that he anticipated that objections would be made that the "civil rights bill secures the same things." (*Ibid.*) But that was only "partly true;" besides,

> a law is repealable by a majority. * * * This amendment once adopted cannot be annulled without two thirds of Congress. That they will hardly get. (*Ibid.*)

Representative Finck of Ohio was opposed to the amendment, but his only remark about section 1 was that

> if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional. (Globe, p. 2461.)

James A. Garfield of Ohio replied to Mr. Finck, as follows:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the

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> law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. (Globe, p. 2462.)

The first section proposed to hold

> over every American citizen, without regard to color, the protecting shield of law. (*Ibid.*)

Representative Thayer also stated that, while this section contained the "principle of the civil rights bill," it was included not because "that law cannot be sustained as constitutional," but to insure that

> that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States. (Globe, p. 2465.)

The next day, May 9, 1866, Representative Broomall of Pennsylvania stated his impatience with those who believed that the civil rights bill was unconstitutional, but on "so vital a point I wish to make assurance doubly sure." (Globe, p. 2498.) Mr. Raymond of New York commented on the "somewhat curious history" of the "principle" of the first section, "which secures an equality of rights among all the citizens of the United States":

> It was first embodied in a proposition introduced by the distinguished gentleman from Ohio [Mr. Bingham], in the form of an amendment to the Constitution, giving to Congress power to secure an absolute equality of civil rights in every State in the Union. It was discussed somewhat in that form, but encountering considerable opposition from both sides of the House, it was finally postponed, and is still pending. Next it came before us in the form of a bill, by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. (Globe, p. 2502.)

Even though the new proposal would amend the Constitution to confer on Congress the power to pass the bill he had twice voted against, he favored the proposal, for he was "heartily in favor of the main object which that bill was intended to secure." That object, he said, was to secure "an equality of rights to all citizens of the United States." All that he had sought was to have this done by constitutional means. (*Ibid.*)

Section 1 was briefly referred to by Representative Miller of Pennsylvania. In his view,

> it is so just * * * and so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it. (Globe, p. 2510.)

Representative Eliot of Massachusetts supported the first section "because the doctrine it declares is right," even as he had supported the civil rights bill; but while he was of the view that the bill

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was amply authorized, he would gladly "incorporate into the Constitution provisions which will settle" any doubt on that question. (Globe, p. 2511.)

On the following day, May 10, 1866, the debate in the House was concluded. Representative Randall of Pennsylvania was the first speaker. Arguing in opposition to section 1, he claimed:

> The first section proposes to make an equality in every respect between the two races, notwithstanding the policy of discrimination which has heretofore been exclusively exercised by the States, which in my judgment should remain and continue. They relate to matters appertaining to State citizenship, and there is no occasion whatever for the Federal power to be exercised between the two races at variance with the wishes of the people of the States. (Globe, p. 2530.)

Another Pennsylvanian, Representative Strouse, continued the opposition, inquiring what necessity there was at the present time that demanded the change which this Amendment called for:

> I am answered that the necessity grows out of the war, that the South is vanquished, the negroes are liberated, and that therefore the organic law must be so amended that the emancipated slave shall in all respects be the equal of the white man. (Globe, p. 2531.)

Representative Rogers of New Jersey asserted that "the first section of this programme of disunion is the most dangerous to liberty." (Globe, p. 2538.) This section, he said,

> is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which * * * was vetoed by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation. (*Ibid.*)

The breadth of the term "privileges and immunities" guaranteed by the first section would, he claimed, "prevent any State from refusing to allow anything to anybody." The whole purpose of this was the "negro again," but this "Government was made for white men and white women." (*Ibid.*)

Representative Farnsworth of Illinois, stated that most of the first section was harmless surplusage, except for the provision that no person should be denied the equal protection of the laws. (Globe, p. 2539.) As for that provision, was it not, he asked, "the very foundation of a republican government?" Enjoyment of equal rights of "life, liberty and the pursuit of happiness" required, he thought, the "equal protection of the laws." (*Ibid.*)

To Bingham, the necessity of the first section was "one of the lessons that have been taught * * * by the history of the past four years of terrific conflict." (Globe, p. 2542.) It would supply the want in the Constitution of a

> power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never

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> even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State. (*Ibid.*)

This proposition would not involve taking any rights from the states, for

> No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. (*Ibid.*)

Finally, he asserted, the section would satisfy the great want of the Constitution in protecting citizen and stranger, "protection by national law from unconstitutional state enactments." (Globe, p. 2543.)

After Stevens' final speech dealing generally with reconstruction, the vote was taken, and on May 10, 1866, the Amendment passed the House by a vote of 128 to 37, more than the necessary two-thirds. (Globe, p. 2545.)

In the Senate, the proposal was first brought up on May 23, 1866, nearly two weeks after the House action. (*Ibid.,* p. 2763.) Senator Howard of Michigan made the report for the Committee, in lieu of the Chairman, Senator Fessenden, who was unable to do so because of illness. (Globe, p. 2764.) Howard commented on section one in great detail, particularly with reference to the privileges and immunities of

United States citizenship. (Globe, p. 2765.) Among those privileges and immunities he included the rights enumerated in the Bill of Rights. Because they were expressed as limitations only on the Federal government, they could not, he said, be enforced formerly against the States by the national government. (*Ibid.*) With respect to the last two clauses of that section, he stated that they applied, not merely to citizens of the United States, but to "any person, whoever he may be"; and that

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. (Globe, p. 2766.)

This would protect

> the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. (*Ibid.*)

To Senator Howard, the first section was only a "restriction upon the States", and did not "confer any power upon Congress." The necessary enforcement power was derived from the fifth section of the proposal, giving Congress authority "to pass laws which are appropriate to the attainment of the great object of the amendment." These two sections were very important, he thought, for, if the amendment was adopted by the states, they would

> forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their

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> jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government. Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining. (*Ibid.*)

The fifth section of the proposal, Howard repeated, would enable

> Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment. (Globe, p. 2768.)

Senator Wade of Ohio followed Howard to propose an amendment. (Globe, 2768.) He commented upon the lack of any exact definition of the term "citizen of the United States." While he had "always believed that every person, of whatever race or color, who was born within the United States was a citizen of the United States," and felt that any real doubt on the subject had been settled by the civil rights bill, still

> by the decisions of the courts there has been a doubt thrown over that subject; and if the Government should fall into the hands of those who are opposed to the views that some of us maintain, * * * they may construe the provision in such a way as we do not think it liable to construction at this

> time, unless we fortify and make it very strong and clear. (*Ibid.*)

He therefore proposed to fortify section 1 by inserting in the first clause, in lieu of "citizens of the United States", the words "persons born in the United States or naturalized by the laws thereof." (*Ibid.*)

On May 24, 1866, Senator Stewart of Nevada spoke more generally on the proposal as a plan of reconstruction. (Globe, p. 2798.) However, he referred to the purposes of section one in his discussion of the principal point of difference between the Congress and the President. In his view, the President's restoration plan "ignored the rights and excluded from constitutional liberty four million loyal citizens guilty of no offense"—the freedmen. (*Ibid.*) The difficulty, as Stewart saw it, was that mere restoration of the Southern states would permit the people of those states to continue "to apply the theories of slavery to a condition of freedom," a dangerous evil; yet

> They were educated to believe that a negro was a slave, possessing no rights that a white man was bound to respect, and they believed it still, and they are astonished at the inconsistencies of the world and its tendency to recognize the rights of man. (Globe, p. 2799.)

Senator Stewart said that Negro suffrage was the only final answer to "slavery and the inequality of human rights," rather than the guarantees afforded by the proposal. (*Ibid.*)

Following Senator Stewart's speech, further debate was postponed. (Globe, p. 2804.) Con-

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sideration of the constitutional amendment was not resumed until five days later, on May 29, 1866. (Globe, p. 2868.) At that time Senator Howard offered various amendments to the proposal, as he stated, "after consultation with some of the friends of this measure." (Globe, p. 2869.) All but the enforcement section were to be amended. In section one the following declaration of citizenship was to be inserted as an opening sentence:

> All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. (*Ibid.*)

On the following day, Senator Howard began the discussion on these new amendments. He asserted that the purpose of the first amendment, a "great desideratum," was to settle the "great question of citizenship" and to remove "all doubt as to what persons are or are not citizens of the United States." (Globe, p. 2890.) After objections from Senators Cowan of Pennsylvania and Doolittle of Wisconsin that this phraseology would include, within the group classified as citizens, Gypsies, Chinese and Indians not taxed (Globe, pp. 2890, 2892), the amendment to section 1 was agreed to without a roll call (Globe, p. 2897).

Consideration of section 1 was resumed on June 4, 1866. (Globe, p. 2938.) Senator Hendricks of Indiana called the proposed amendment a matter of party politics, a mere "party programme." (*Ibid.*) He thought it unthinkable that United States citizenship should be degraded by application to a "mixed population, made up of races that ought not to mingle." (Globe, p.

2939.) The whole proposal, in his view, was merely a centralization of "absolute and despotic power." (Globe, p. 2940.)

On the following day, June 5, 1866, Senator Luke Poland of Vermont spoke in favor of the proposal. (Globe, p. 2961.) He asserted that the privileges and immunities clause of section one of the proposal was largely a restatement of the provision in the original Constitution. The restatement was necessary, he said, because, "by and for the protection of the peculiar system of the South," there had been a "practical repudiation of the existing provision on this subject." (*Ibid.*) The war and the Thirteenth Amendment, however, made it "eminently proper and necessary that Congress should be invested "with enforcement powers with respect to this provision. (*Ibid.*) Poland thought that the remainder of section 1 was unobjectionable, for "the whole people of the nation stand upon the basis of freedom", and it was merely in keeping with the very spirit and inspiration of our system of government," as "declared in the Declaration of Independence." However, he said,

> we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at

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> the very foundation of all republican government if they be denied or violated by the States * * *. (*Ibid.*)

Senator Timothy Howe of Wisconsin, after stating the need for radical reconstruction policies, replied to Senator Hendricks' contention that state rights were invaded by the proposal. (Globe, Appendix, pp. 217, 219.) He felt that no state had a right to have "an appetite so diseased as seeks to abridge these privileges and these immunities, which seeks to deny to all classes of its citizens the protection of equal laws." (Globe, Appendix, p. 219.) It was a known fact, he asserted, that, except for federal authority, the Southern states would have "denied to a large portion of their respective populations the plainest and most necessary rights of citizenship," the right to own land, to collect wages by legal process, to appear in courts, to give testimony. (*Ibid.*) Most of these states had abandoned their attempts to deny these basic rights, but

> these are not the only rights that can be denied; these are not the only particulars in which unequal laws can be imposed. (*Ibid.*)

He stated that he did not wish to delay the Senate by referring to more than a single instance of unequal laws—"a statute enacted by the Legislature of Florida for the education of her colored people." He asserted that this was reputedly the first Southern state to attempt the work of educating the children of her colored population:

> And now, sir, I ask the attention of the Senate to the provision which that

Legislature made for the education of their colored population. They make provision for the education of their white children also, and everybody who has any property there is taxed for the education of the white children. Black and white are taxed alike for that purpose; but for the education of colored children a fund is raised only from colored men. It amounts to one dollar a head upon all colored males between the ages of twenty-one and fifty-five years. There were in 1860 between twelve thousand three hundred and twelve thousand four hundred colored males between the ages of twenty and fifty-five in Florida, so that that fund would yield about twelve thousand dollars dedicated to the work of educating the colored children of Florida—not a magnificent endowment, one would think. But how is it to be expended? First, there is to be a superintendent of colored schools for the State to be paid out of it, and he is to receive a salary of $2000. That reduces it essentially. Next, there is to be an assistant superintendent of colored schools for each county at $200 a year. There are in the State of Florida, I believe, thirty-nine counties, which would give $7800 to the assistant superintendents. Add that to the salary of the State superintendent, and it takes $9800 from the school fund to pay the superintendents, leaving $2200 to pay the teachers. But the fund is not left quite so destitute as that; they require each one of the teachers to pay five dollars to the fund to get a license to teach. They are to be examined, their fitness ascertained, and if permission is given them to teach they are to pay five dollars, and that goes to the fund. That swells it; when that license is purchased they can set up a school.

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> Into that school, however, it is worthy of remark that no child can go without permission of the superintendent or his assistant, and no child can stay a day without the permission of the superintendent or his assistant, and the teacher who has paid five dollars for the permission to teach cannot hold that permission a day longer than the superintendent or assistant superintendent sees fit to allow, for the statute expressly authorizes the superintendent or assistant superintendent to vacate or annul the certificate whenever he shall see fit for incompetency or 'other good cause'—any cause which seems good to the superintendent or assistant superintendent." (Globe, Appendix, p. 219.)

Senator Howe then asked if, in view of this statute, touching "one of the great interests not only of this colored population but of the State itself," there could be any hesitation in putting into the Constitution a "positive inhibition upon exercising this power of local government to sanction such a crime as I have just portrayed." (*Ibid.*)

On June 7, 1866, when consideration of section 1 was resumed, Senator Garrett Davis of Kentucky stated that the majority were playing a "bold and desperate political game," (Globe, Appendix, p. 238), and that he was opposed not merely to the language of the proposal, but to the whole spirit and purpose of such an amendment. (*Ibid.*) As for the citizenship amendment to the first section, its

> real and only object * * * is to make negroes citizens, to prop the civil rights bill, and give them a more plausible, if not a

> valid, claim to its provisions, and to press them forward to a full community of civil and political rights with the white race, for which its authors are struggling and mean to continue to struggle. (Globe, Appendix, p. 240)

To Senator Davis, the "perpetual howl for justice and protection to 'the loyal citizens of African descent' * * *" was mere machinery of the radicals for "their continuance in office and power." (Globe, Appendix, p. 243.)

On June 8, 1866, the last day of the Senate debate, consideration of the proposed amendment commenced with a speech by Senator Henderson of Missouri. (Globe, p. 3031.) Speaking in favor of the proposal, he stated:

> The South saw its opportunity and promptly collected together all the elements of prejudice and hatred against the negro for purposes of future party power. They denied him the right to hold real or personal property, excluded him from their courts as a witness, denied him the means of education, and forced upon him unequal burdens. Though nominally free, so far as discriminating legislation could make him so he was yet a slave. (Globe, p. 3034.)

The Southern argument that the Negro was "inferior to the white man" when it came into conflict with the "opposite idea of man's equality * * *, carrying with it equal rights and equal privileges" had been the cause of the war. (*Ibid.*) It was necessary therefore "to consider whether the cause of disease should be removed entirely or be left in the system to fester again." (*Ibid.*)

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Henderson stated that section 1 of the proposed amendment, in its declaration of citizenship of the United States, and of the States as well, was really unnecessary to overrule the *Dred Scott* case. (Globe, p. 3032.) By the reasoning used in that case itself, the Thirteenth Amendment had made the freed slaves an indistinguishable part of the "people of the United States." (*Ibid.*) This section, however, in leaving "citizenship where it now is," made plain "what has been rendered doubtful by the past action of the Government." (Globe, p. 3031.) This being clear, he said, there was no further need to discuss the remaining parts of section one, "for they merely secure the rights that attach to citizenship in all free Governments." (*Ibid.*)

Senator Yates also stated that, under the Thirteenth Amendment, the Negro was a citizen already, for

> that amendment did not confer freedom upon the slave, or upon anybody, without conferring upon him the muniments of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term. (Globe, p. 3037.)

By virtue of that amendment, the freed slave became "one of the people, one of the body-politic, and entitled to be protected in all his rights and privileges as one of the citizens of the United States." (*Ibid.*) Since the Negro was "like any other man, and not unlike him in any respect," he had "the same right, the same inherent, if you choose, God-given right * * *." (*Ibid.*)

Senator Yates referred to the possibility that adoption of the proposed amendment might conceivably be held to restrict the broad operation of the Thirteenth Amendment. He felt that the proposal should contain a declaration that it should not be construed to impair or in any wise affect the rights, privileges or franchise conferred by the Thirteenth Amendment. (Globe, p. 3037.) This was not propounded, he stated, from a belief that it was really necessary, but merely

> so that there shall not be even a color for any judicial decision proposing to deprive men of rights which are already guaranteed by the recognized law. (*Ibid.*)

Senator Fessenden then moved to insert the phrase "or naturalized" in the first sentence of the first section, so that it should read: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside." The amendment was adopted. (Globe, p. 3040.)

After an attempt to have the sections of the proposal submitted as separate articles (Globe, p. 3040), and to strike out the privileges and immunities clause for vagueness (Globe, p. 3041), the final vote was taken. (Globe, p. 3042.) The amendment then passed the Senate, on June 8, 1866, by a vote of 33 to 11, more than the necessary two-thirds. (*Ibid.*)

In the House, the proposal was called up by Stevens on June 13, 1866. He pointed out that since the Senate amendments were slight, there was no purpose in discussing the proposal again at length. Therefore, he stated that he would

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call the previous question at three o'clock. (Globe, p. 3144.) The brief discussion that ensued was without specific application to any particular part of the proposal. (Globe, pp. 3144–3148.) Finally, at three, the House concurred in the Senate amendments by a vote of 120 to 32, and the proposed Fourteenth Amendment was declared passed by the Thirty-ninth Congress. (Globe, p. 3149.)

E. THE READMISSION OF THE SOUTHERN STATES

The Reconstruction Act of March 2, 1867 (14 Stat. 428), set conditions upon the readmission of the Southern states (all of the Confederate states except Tennessee) to representation in Congress. The first sections provided for military government in these States. Section 5 provided:

> * * * That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disenfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the

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> question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution shall have adopted the amendment to the Constitution of the United States proposed by the Thirty-Ninth Congress, and known as Article fourteen and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided,* That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such conventions.

In compliance with this Act and with supplementary acts of March 23, 1867 (15 Stat. 2), and July 19, 1867 (15 Stat. 14), constitutional conventions were elected in these states, constitutions drawn up and submitted to popular vote, legislatures elected which ratified the Fourteenth Amendment, and the constitutions submitted to Congress for examination and approval.

Two of these constitutions specifically provided for mixed schools (South Carolina, Art. X, sec. 10; Louisiana, Art. 135). The constitutions of

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the other eight states were silent on the question, but all contained provisions making it the duty of the legislature to provide for education.

1. Congressional debates on the admission of the Southern states in 1868.

(a) *Alabama.* The first debates took place in 1868 in the Fortieth Congress, Second Session, on bills for the admission of Alabama. H. R. 904 was discussed in the House on March 11 (Congressional Globe, 40th Cong., 2d Sess., pp. 1818–28)[24] and March 17 (Globe, pp. 1934–38), and then recommitted to the Committee on Reconstruction.

The bill provided for the admission of Alabama "as one of the States of the United States" as soon as its legislature ratified the Fourteenth Amendment and "upon the following fundamental condition":

> That the right of suffrage of citizens of the United States shall never be denied or abridged in said State on account of race, color, or previous condition of slavery; and Congress shall have power to annul any act of said State in violation or in derogation of the provisions of this act. (Globe, p. 1822.)

In debate, Representative Beck of Kentucky objected to the equal rights provision of the Alabama constitution, Article I, Sec. 2, providing

> That all persons resident in this State, born in the United States or naturalized, or who shall have legally declared their intention to become citizens of the United States,

[24] All references to the Congressional Globe in this section are to the 40th Congress, 2d Session.

> are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges.

He remarked that

> No white man in Boston, Philadelphia, or New York, no Radical member of this House, would today consent to such a provision being incorporated into the constitution of the State in which he resides—that the hotels, the bedrooms, the dinner tables at which his wife and daughters were guests should be used and occupied by negroes of all grades indiscriminately with them * * * (Globe, p. 1824.)

Later, for himself and Representative Brooks of New York, he read a statement setting out eleven reasons why a majority of the Alabama electorate had not ratified the constitution, among them

> 7. Because it makes no provision for and does not make it the duty of the Legislature to appropriate the money raised by law for common schools, equally and separately, for the benefit of the white and black children in the State. (Globe, p. 1937.)

The bill was recommitted for consideration by the Committee on Reconstruction (Globe, p. 1938).

The Committee reported an amended bill as H. R. 970 on March 26 (Globe, p. 2138). In the debate on this bill, Representative Kelley, in arguing for the admission of Alabama, referred to the fact that its constitution provides "for the right of every freeman to hold land and enjoy common schools * * *" (Globe, p. 2141). Later, in objecting to various "scandalous provisions"

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(Globe, p. 2197) in the constitution, Representative Kerr, of Indiana, called attention to its provisions for education:

> Mr. Speaker, I next invite attention to the provisions of this remarkable instrument on the subject of taxation for the maintenance of schools. Now, I desire it to be distinctly understood that I and, so far as I know, every gentleman on this side of the House, entertain as sincere a devotion to the interests and advancement of education everywhere as any men in this country; but we want those interests so advanced, so promoted, as not to make them the very engines of tyranny for the oppression, demoralization, and destruction of social and civil government. This constitution provides for the levying of most onerous taxes for the support of education in the State of Alabama. Those taxes must be nearly all paid by the white men of Alabama. Yet every dollar (and I assert this without the fear of successful contradiction)—every dollar that shall be so raised will go to the education of the negroes of Alabama and to the support of radical officers connected with its expenditure, not to the support and education of white children. Why? Because by your fundamental law you make it a perpetual obligation upon the people of Alabama that they shall educate all their children in the same schools; that they shall practically amalgamate; that they shall educate the white children in debasing, personal association with the black children under the control of your Freedmen's Bureau and the agents of your military despotism, or such other machinery as shall succeed them. Yet we are told that this is a government "repub-

lican in form." These white men of Alabama, in order to maintain their self-respect, their manhood, the integrity of their blood and race, will be compelled from their own impoverished pockets to draw whatever they may for the education of their own people, independently of any provisions that may be made by the State under this constitution. Why did you not suffer your political allies in the convention of that State to secure to the negroes their just proportion, or one half, or even more, of the school fund, and give to the white men the balance, so that the races might be educated apart? Would it have been anti-republican to make so just an adjustment? It would have secured justice and equality to both races in the enjoyment of the school funds. The refusal to do it is a disgrace to the convention and to the Radical party, and an outrage upon the white people.

Then this constitution gives to what it calls a school board legislative power, making them a sort of *imperium in imperio*. They may make laws; they may enforce those laws, no matter how rigid, how cruel, how exacting they may be, they must be obeyed until by the Legislature of Alabama they may be repealed. (Globe, p. 2197.)

Further debate made no reference to this question. (Globe, pp. 2197–2217.) The bill passed the House on March 28 (Globe, p. 2217), but was indefinitely postponed by the Senate (Globe, p. 3266, June 18, 1868).

(b) *Arkansas.* H. R. 1039, to admit the State of Arkansas to representation in Congress, was reported from the Committee on Reconstruction on May 8, 1868 (Globe, p. 2390).

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In opposition to the bill, Representative Beck, of Kentucky, questioned the validity of the popular vote ratifying the constitution, and also objected to its provisions:

> Now, sir, I have not time to discuss the provisions of the constitution itself. Upon the question of education, upon the question of taxation, upon the power given to the commissioners appointed to control the election, and upon a variety of other questions, the constitution is, perhaps, the most objectionable that you ever saw. While they resolve in the ordinance attached to the constitution as follows:
>
> > "That this convention is utterly opposed to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate.
> >
> > "We would therefore recommend that the next General Assembly enact such laws as may effectually prevent the same;"
>
> they require that the school fund, of perhaps $1,000,000, shall be kept for schools to which blacks and whites shall go together, and it compels a white man, if he is unable to educate his children otherwise, to send to the negro schools their sons and daughters between the ages of five and eighteen years for at least three years. The constitution requires the Legislature to pass such laws as will compel them to go. Of course it will be a penal offense if they do not go. That part of the constitution reads thus:
>
> > "The General Assembly shall require by law that every child of sufficient mental and physical ability shall attend the public schools during the period between the ages of five and eighteen years for a term equivalent to three years, unless educated by other means."

> Now, sir, I think this House, even now, after the previous question is seconded, in justice to itself, in justice to the truth of history, should postpone this matter and look into it, and I assert you will find the facts to be as I have stated them, and that there are in this constitution provisions more obnoxious than are contained in any other constitution that has been sent up from these southern States; provisions that no one can, with proper respect for himself, submit to as the fundamental law of the State in which he lives. (Globe, p. 2395.)

Representative Pile, of Missouri, asked to have read the Bill of Rights, the article on the subject of franchise, and the article on the subject of education. (Globe, p. 2397.) After they were read, he stated in support of the bill:

> Mr. Speaker, I think, sir, that these provisions of this constitution are the best answer to the arguments against it. I only wish to say in addition that it is a little remarkable to find the gentlemen who have for two years been clamoring for the admission of the unreconstructed States and abusing this side of the House because we were unwilling to admit them to representation on this floor, on what was alleged to be purely partisan grounds, should now oppose their admission for the simple reason that their constitution secures equal rights to all men, and that their State governments are in the hands of loyal instead of disloyal men. (Globe, p. 2398.)

The debates in the House contained no other reference to education (Globe, pp. 2390–2399), and the bill was passed. (Globe, p. 2399.)

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The bill was discussed in the Senate on May 13, and referred to the Judiciary Committee. (Globe, pp. 2436–2440.) It was reported back on May 16 (Globe, p. 2487), and debate began on May 27 (Globe, p. 2600).

Senator Drake, of Missouri, proposed in lieu of the House bill, an amendment whereby Arkansas should not be admitted until its legislature agreed to certain fundamental conditions, among them

> that the third section of the first article of said constitution, in the words following, to wit: "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty, on account of race, color, or previous condition," shall never be repealed or changed * * * (Globe, p. 2600.)

Later he modified the amendment to provide the "fundamental condition" of admission

> that within the said State there shall be no denial of the elective franchise in all elections by the people or of any other rights to any person by reason of race or color, excepting Indians not taxed * * * (Globe, p. 2608.)

He modified this language slightly on the following day, May 28, to read:

> that there shall never be in said State any denial or abridgment of the elective franchise or of any other right to any person by reason or on account of race or color, excepting Indians not taxed * * * (Globe, p. 2628.)

On May 30, Senator Henderson of Missouri announced that he was contemplating offering an amendment to the amendment of his colleague, Senator Drake:

> Now, Mr. President, if the proposition of the Senator [Ferry] from Connecticut prevails [a proposal to strike out all the bill except that part that states that Arkansas be readmitted into the Union], I desire to offer an amendment to be incorporated into the bill upon which I am willing to stand and it is a provision which I think the Senate ought to be willing to make. I would strike out the condition of the bill and insert one I propose to offer. I differ with gentlemen when they say they would insert no provision for security. I think we ought to do so. But what ought we to require? Is it that every negro in the southern States shall vote, whether he is qualified to vote for all time to come? I think not. What shall we do? We should say that the suffrage of the negroes shall be on an equal term with the suffrage of the white men. If the white man is to be excluded for a certain cause, let the negro also be excluded for the same cause; let us not declare, as this provision declares, that every negro, because every negro in Arkansas is entitled to vote under this constitution, shall vote for all time to come. But put him upon terms of equality with the white man; that is going far enough; and let both black and white be excluded from the polls for the same reason, as, for example, for want of sufficient intelligence to vote or for pauperism. Having stricken out the condition in the

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bill, I would insert a proposition of this character:

> "Upon the fundamental condition that said State, in fixing the qualifications of electors therein, shall not be authorized to discriminate against any person on account of race, color, or previous condition; and also upon the further condition that no person on account of race or color shall be excluded from the benefit of education or be deprived of an equal share of the moneys or other funds created or used by public authority to promote education in said State."

Without the second condition of course they could exclude the negroes from any of the benefits of education, and thereby lay a foundation and produce a reason for excluding them from the suffrage; but if both were adopted, of course they are put upon an equality with whites, in reference not only to education, but in reference to the suffrage. (Globe, 2700–1.)

On June 1, Senator Henderson offered his amendment. (Globe, p. 2748.) The following colloquy then ensued:

> The PRESIDENT *pro tempore* put the question on the amendment to the amendment, and declared that the noes appeared to have it.
>
> Mr. HENDERSON. I call for the yeas and nays.
>
> The yeas and nays were ordered.
>
> Mr. FRELINGHUYSEN. I understand that all that is contained in this amendment of the Senator from Missouri [Mr. HENDER-

SON] is contained in the fourteenth amendment of the Constitution.

Mr. HENDERSON. I understand not. To what provision in the fourteenth amendment does the Senator refer?

Mr. FRELINGHUYSEN. That there shall be no discrimination in civil rights on account of race or color; and the only thing we want to provide for now is to prevent that discrimination in political rights, and that the amendment of the Senator from Missouri does.

Mr. HENDERSON. The amendment of the Senator from Missouri does not refer to political rights at all.

Mr. FRELINGHUYSEN. I mean the amendment of your colleague [Mr. DRAKE].

Mr. HENDERSON. It says they shall not be denied any right.

Mr. FRELINGHUYSEN. The exercise of the elective franchise. That is a political right, I believe.

Mr. HENDERSON. I should like to have the amendment of my colleague read again.

The Chief Clerk again read the amendment of Mr. Drake, as follows:

> That there shall never be in said State any denial or abridgment of the elective franchise, or of any other right, to any person by reason or on account of race or color, excepting Indians not taxed.

Mr. HENDERSON. "Any other right." It does not mean a political right. The language is, shall not be denied "the elective franchise or any other right." I think that includes civil rights. I should like to ask the Senator from New Jersey whether, upon the adoption of this amendment of my colleague, in his judgment the State is permitted to provide separate schools for

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whites and blacks, or whether they must not be educated in the same schools?

Mr. FRELINGHUYSEN. I cannot answer that question, for I do not think that either the constitutional amendment or the proposition of the Senator's colleague touches that question, as to what school they shall be educated in; but I think that the amendment as proposed, as well as the constitutional amendment, prevents a discrimination in civil or political rights on account of race or color.

Mr. HENDERSON. Mr. President, I can state in a few words my view in offering this amendment. I desire that the negroes shall have an equal right in the school moneys, but that the State may require them to be educated in different schools from the whites. I propose that their rights shall be the same in the public funds, just as we have provided in the District of Columbia. Further, I do not desire to take away the right from the States to say who shall hold offices in the States. If they desire to say that the whites shall hold the offices, let them do so. I do not fear any provision of that sort ever being adopted in one of the States, provided this is a valid condition, because the negroes being entitled to the suffrage on equal terms with the whites, of course can protect themselves in that behalf. But I would not provide hereby a condition that the States should extend the same rights to the negroes in regard to office-holding, marrying, or anything else, that they do to the whites, and I think if we adopt a condition at all, we had better adopt it in the form in which I have presented it.

> The PRESIDENT *pro tempore*. The question is on the amendment to the amendment, on which the yeas and nays have been ordered.
>
> The question being taken by yeas and nays, resulted—yeas 5, nays 30 * * * *. (Globe, p. 2748.)

Senator Drake's amendment was agreed to (Globe, p. 2748), and the bill was passed with the condition in that form (Globe, p. 2750).

A conference committee recommended that the Senate recede from its amendment to the House bill, and the report of the conference committee was concurred in. (Globe, pp. 2904, 2938; 15 Stat. 72.)

(c) The *omnibus bill*. On May 11, 1868, a bill (H. R. 1058) to admit North Carolina, South Carolina, Louisiana, Georgia, and Alabama to representation in Congress was reported from the Committee on Reconstruction. (Globe, p. 2412.) Debate began on May 13. (Globe, p. 2445.)

Representative Beck of Kentucky objected to the constitutions as drawn up by "men who had no substantial interest in the community * * *." (Globe, p. 2447.) He said:

> Take the case of South Carolina, for example, and I can only state a few prominent points. Of the men composing that constitutional convention seventy were negroes and about fifty white men. Of the men composing the present Legislature of that State seventy-one are colored and fifty-four white. One item of taxation alone in that State—the taxation for the support of free schools—amounts to $1,000,000. It is provided that the white race shall never

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> have any public school exclusively for themselves; that the white and the black children, male and female, shall be playmates and schoolmates together; that if the white citizens do not send their boys and their girls to the schools attended by the negroes they shall suffer such penalties as a negro Legislature may see fit to impose. Who are the men thus imposing these conditions upon the people of that State? (*Ibid.*)

Later he discussed Louisiana:

> Substantially the same provision in regard to education prevails there as in South Carolina. Taxation the most enormous, compulsory education of girls and boys at the same school with the negroes. They are all mixed together. A poor man cannot help himself. It is made a penal offense, or the Legislature has the power, and it is its duty to make it a penal offense, to refuse to allow them to associate together at the common schools. The man who is rich enough may employ a teacher of his own choice, and if he does so the compulsion ceases. But such has been the impoverishment at the South, as gentlemen well know, that few of the most intelligent and respectable people are really able to afford the means of education such as they used to afford, and they will therefore be compelled to send their children, whether they are willing to do so or not, to these mixed schools. I can scarcely conceive of a more despotic, galling, and degrading provision in the fundamental law of a State pretending to be free. (Globe, p. 2449.)

Representative Pruyn the next day made passing reference to this subject:

> The brief time for which I am entitled to the floor does not permit me to enter into any examination of the provisions of the several constitutions. Indeed, no sufficient time has been afforded to us for that purpose, as they were only laid on our tables yesterday. The gentleman from Kentucky [Mr. Beck] called the attention of the House yesterday to several most objectionable provisions which some of them contained, especially as to the compulsory education of whites and blacks together. But I must leave this part of the subject, and content myself with referring to some historical facts connected with the origin of the reconstruction measures. (Globe, p. 2461.)

Representative Bromwell spoke in support of the bill, not disagreeing with this interpretation of the constitutional provisions:

> The gentleman from New York [Mr. Brooks] has assailed these constitutions on account of the provisions they contain * * * The next ground of complaint is that common schools are provided for in this constitution. That, of course, awakens a double measure of wrath in this Democratic orator * * *. (Globe, p. 2464.)

The bill was passed by the House on May 14. (Globe, p. 2465.)

The bill was reported from the Senate Committee on the Judiciary on June 2 as a substitute for S. R. 135. (Globe, p. 2759.) Debate began on

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June 5. Senator Trumbull explained the form of the "fundamental condition:"

> The first part of this fundamental condition is similar to the one which passed the House of Representatives in the Arkansas bill and which the Senate struck out and substituted for it an amendment offered by the Senator from Missouri [Mr. Drake] and the Committee have recommended the striking out of this fundamental condition and inserting the words contained in the amendment which was adopted by the Senate to the Arkansas bill with the exception of the words "or any other rights." These words which were in that amendment offered by the Senator from Missouri are omitted by the Judiciary Committee in reporting this bill, it being thought that there was no necessity for their insertion, and that it might lead to a misunderstanding as to what their true purport was. The citizens of these states are protected in all their civil rights independent of this bill; and it might lead to misconstruction or misapprehension as to what the words "any other right" meant. It might be construed by some persons as applying possibly to social rights, or rights in schools, which the Senator from Missouri did not intend; and as the Committee thought there was no importance in these words they are left out of the amendment. (Globe, p. 2858.)

The Committee on the Judiciary had amended the House bill to omit Alabama (Globe, p. 2858), but subsequently the Senate restored Alabama (Globe, p. 2965) and added Florida (Globe, p. 3018). The debates were concerned primarily

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with the status of Alabama, the authority of Congress to impose conditions on admission, the propriety of insisting no negro suffrage, and a proviso relating to Georgia. (Globe, pp. 2895–2904, 2927–35, 2963–70, 2998–3029.) There were no further references to education.

The House agreed to the Senate amendments on June 12 (Globe, p. 3097) and the bill passed both houses on June 25 over the President's veto (Globe, pp. 3466, 3485). The Act (15 Stat. 73) contained no reference to equal rights or to education.

2. Congressional debates on the admission of Southern states in 1870

An Act of April 10, 1869 (16 Stat. 40), authorized the President to submit to popular vote in each state the constitutions of Virginia, Texas, and Mississippi, with power to submit portions to separate vote. After such vote and after ratification of the Fifteenth Amendment by these states Congress could approve the proceedings and restore the states.

(a) *Virginia.* On January 11, 1870, H. R. 783, to admit the State of Virginia to representation in Congress, was reported from the Committee on Reconstruction (Congressional Globe, 41st Cong., 2d Sess., p. 362).[25] It recited that "the people of Virginia have adopted a constitution republican in form, and by its provisions assuring the equality of right in all citizens of the United States before the law" and declared Virginia entitled to

[25] All references to the Congressional Globe in this section are to the 41st Congress, 2d Session.

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representation in Congress upon certain "fundamental conditions," including the following:

> *Second.* That the constitution of said State shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote or hold office in said State who are entitled to vote or hold office by said constitution, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State, or to prevent any person on account of race, color, or previous condition of servitude from serving as a juror or participating equally in the school fund or school privileges provided for in said constitution: *Provided,* That any alteration of said constitution, equally applicable to all the voters of said State may be made with regard to the time and place of residence of said voters.

The reason for the inclusion of the condition on schools was explained by Representative Paine as follows:

> I am about to give my reasons for supporting the Virginia bill presented by the Committee on Reconstruction with all its fundamental conditions. Why have we inserted in the bill the condition affecting the common schools? I will answer that question first.
>
> The men who elected Governor Walker manifested during the canvass a most intense and bitter hostility to the common-school system and the system of county organization provided for in the new consitution of Virginia. These two systems

are intimately connected together. The fate of the school system hangs on the execution of the provisions relating to the county organization. A vigorous effort was made to induce the President to submit these provisions to a separate vote of the people. Of course the effort failed. It is hard for a northern man able to appreciate the benign influences of common schools upon the fortunes of a free Republic to contemplate this "chivalrous" hostility to the education of the people without unspeakable disgust. Governor Walker was supported and elected by the masses who stood in the ranks of the late rebellion. Outside of those ranks he had not, he has not now, a corporal's guard of supporters. He would have had no Republican votes at all but for a vague impression that the sympathies of the President were in that struggle opposed to the loyal people of Virginia. The Democratic Party abandoned Mr. Withers, the candidate of their choice, because they understood that Governor Walker, although a northern-born man, and a resident of a northern state, had opposed the Government during the Rebellion, and because in his speech at Liberty, in Bedford County, he had given them a pledge in these words, which I read from the address of their State Central Committee:

"If the Constitution expurgated shall be adopted, and you have elected your State ticket and your Legislature, you may proceed at once to propose such amendments to the Constitution as will clear it of all its dangerous characteristics. *The County Organization need never be enforced.* If I am elected with a Legislature not Radical it will never be put in operation."

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> * * * Mr. Speaker, Governor Walker must do one of two things; he must either nullify the county and school systems of Virginia, or he must cheat the people who elected him. * * *
>
> Again, sir, it is admitted on all hands that at the present time colored men, although admitted to juries in the United States Court of Virginia by Chief Justice Chase have been excluded by local judges from all other juries in that State. I am at a loss to understand how the district commander could have permitted such a gross violation of the fourteenth Amendment of the Constitution of the United States. (Globe, pp. 402–3.)

Later Representative Palmer, in speaking of "the evidences of the present disloyal sentiment of the people of Virginia" (Globe, p. 442), referred to education:

> More than this, it is known that the blacks in the States which have been reconstructed are voters, and they ought to be qualified by education to be intelligent voters. What is the spirit of the whites of Virginia toward the blacks in their midst on this subject of education? Sir, after the so-called Conservatives had accepted the aid of the blacks and had gone side by side with them to the polls, it would have been no more than decent on the part of the former to have extended every possible encouragement in the way of education to the latter. What have they done? They have not afforded a single dollar of aid for the establishment of common schools for either the blacks or the whites. On the other hand, you find that a military school in the city of Lexington, where the Federal flag is only

> kept floating by Federal military force, and where the rebel youth of the South are taught to worship the memory of the "lost cause," receives the aid of an annual appropriation of $15,000 for its support from the Virginia treasury. You will find that there is an annuity also from the public treasury for the support of the institution over which presides the head of the rebel army, Robert E. Lee. You will also find a public annuity, and a liberal one, for the support of the university at Charlottesville, all for the benefit of the men who are the ruling class, the rebels of Virginia; but not a dollar, not a farthing for the blacks of that state. (Globe, p. 442.)

Representative Ward referred to the conditions as "simple, just, patriotic" and as necessary to a republican form of government. (Globe, p. 485.) Representative Conger, of Michigan, defended the conditions, asking

> Who desires to prevent any of the people of Virginia from enjoying the privileges of education as provided in this bill? Who would turn her children, of whatever condition, race, or color, away from her free schools, in the enjoyment of which they are guarantied by this bill? (Globe, p. 496.)

Representative Scofield, of Pennsylvania, spoke in support of the conditions:

> Mr. Speaker, this new constitution of Virginia has very wisely provided for equal franchise and equal education in that Commonwealth * * * we admit the State with the qualification that it shall not go back upon those just provisions of its constitution immediately after its admission.

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Now, what great harm is there in that? Is there any member of this House who at this time would say, if he was a member of a convention to frame that constitution that he would vote against putting in the constitution a provision in favor of equal education and equal franchise? It is a part and parcel of the policy of the Republican party adopted ever since after the war began.

* * * * *

Then the next question is reconstruction with us was to educate these blacks so that they could not be restored to slavery; to destroy all hope of the restoration of slavery, and therefore all hope of a separate government. We began first with the civil rights bill, then with the Freedmen's Bureau bill, and then with the fourteenth article of amendment, and now with the fifteenth article of amendment to the Constitution.

And then the people of Virginia, in pursuance of that same policy, have provided in their state constitution for the education and the franchise of the blacks.

* * * * *

I have been somewhat surprised, sir, to see the earnestness with which these fundamental conditions have been advocated and opposed. I do not regard them as of so much importance. I regard the first provision, enjoining upon them to keep up free education and free franchise, as merely advisory. It is an intimation that we look upon those features of their constitution as the features that make it republican in form, and that if they strike them out we will undertake to restore them in some way or other. (Globe, p. 500.)

Representative Bingham's substitute containing no conditions was adopted by the House (Globe, p. 502), and the bill was passed on January 14 in that form. (Globe, p. 503.)

On January 17, the Senate took up the House bill. (Globe, p. 512.) Debate on January 18 was largely on the question whether Governor Walker was against a public school system. (Globe, pp. 539–49.) On January 20, Senator Wilson offered as an amendment a condition

> That the constitution of said State shall never be so amended or changed as * * * to prevent any person on account of race, color, or previous condition of servitude from serving as a juror, or participating equally in the school fund or school privileges provided for in said constitution.

This was rejected. (Globe, p. 597.) After two more days of debate (Globe, pp. 597–614, 634–43) Senator Wilson again offered an amendment

> that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State

which was accepted (Globe, p. 643), and as thus amended the bill was passed (Globe, p. 644).

After brief debate on January 24 (Globe, pp. 715–20) the House concurred in the Senate amendments. Representative Butler, from the Committee on Reconstruction, remarked that

> * * * these amendments of the Senate contain the substance of our reconstruction acts. They contain the substance of the

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> thirteenth and fourteenth amendments to the Constitution of the United States. (Globe, p. 717.)

The act was approved on January 26 (16 Stat. 62).

(b) *Mississippi.* H. R. 1096, to admit the State of Mississippi to representation in Congress, was reported by Representative Butler from the Committee on Reconstruction on February 3, 1870. It contained the following condition, identical to that in the Virginia Act:

> third, that the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said state. (*Globe,* p. 1013.)

The bill was passed immediately. (Globe, p. 1014.) It passed the Senate on February 17, after six days of debate. (Globe, p. 1366.)

As reported from the Senate Committee on the Judiciary, the bill contained no conditions (Globe, p. 1173), but the House conditions were accepted after prolonged debate. In so far as school rights were concerned, the debate did not turn on the Fourteenth Amendment, but in response to the question of Senator Thurman of Ohio

> When did it become essential to a republican form of government that there should be public schools and that everybody should have an equal right in those schools? (Globe, p. 1218.)

Senator Howard of Michigan defended the condition:

> Now, sir, if there be any one proposition more generally admitted than another

> among American citizens, politicians, and statesmen, it is that in order to uphold and maintain a republican form of government such as is understood and practiced on this continent, the diffusion of knowledge by means of primary schools is the greatest, the safest, and the most effectual instrument. Now, if Congress see fit to incorporate in this act for the readmission of Mississippi that she shall never make any discrimination between the races, either in the application of the funds set apart for the enlightenment of the people on whom, and on whom solely, rest the ultimate responsibility and existence of government itself, * * * I am prepared for one to say that Congress are acting justly, constitutionally, and righteously in inserting this condition * * * (Globe, p. 1253.)

In answer to a question from Senator Norton of Minnesota, Senator Howard asserted

> * * * that if my State should become so smitten with judicial blindness as to disregard those high principles of republican government which she has carried out since her birth as a State; * * * if she should so far forget her right and duty to the children of the State as to pervert the school fund, which belongs to them, from inuring to their benefit and confer all its benefits upon a privileged class, refusing to extend them to the mass of the people, I should be the first, sir, to appeal to the Congress of the United States to apply the corrective * * * (Globe, p. 1254.)

Senator Norton denied that Congress had any right to regulate the school system of Minnesota. (*Ibid.*)

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Senator Morton of Indiana answered Senator Thurman's question by saying that "definitions advance," that "if we have now amended the Constitution so that its essential character is changed, that amendment operates upon the definition of a republican form of government as defined in the Constitution as fully as if it had been put there in the beginning." (Globe, p. 1254.) He referred to the three amendments and concluded

> Then, to have a republican form of government now there must be no slavery, there must be equal civil rights, there must be protection to all, there must be no taking of life, liberty, or property without due process of law. (*Ibid.*)

Senator Carpenter disagreed. (Globe, p. 1323.) Senator Stewart of Nevada stated that

> * * * if the State of Mississippi should pass a law which would deprive the colored man of the same rights and privileges of the schools that the white man has, or make any other discrimination which would deny him the equal protection and benefit of the laws, we have direct constitutional power to interfere; but I do not believe we can say in advance that she shall not change a particular provision of her constitution * * * (Globe, p. 1329.)

Further debate added little to these arguments. (Globe, pp. 1331–34, 1365.) The bill as received from the House was passed on February 17. (Globe, p. 1366; 16 Stat. 67.)

(c) *Texas.* The bill to admit Texas, H. R. 1536, containing the same condition, was reported to the House on March 15. (Globe, p. 1969.) It

was passed immediately. (Globe, p. 1970.) It was reported to the Senate and passed on March 29, without debate on this condition. (Globe, pp. 2271–72.) The House concurred in a Senate amendment not relevant to schools. (Globe, pp. 2291–94; 16 Stat. 80.)

(d) *Georgia.* A bill, H. R. 1335, to admit Georgia to representation contained the same conditions as the Virginia bill. (Globe, p. 1701.) Debate began in the House on March 4 and continued to March 8, when the bill was passed. (Globe, pp. 1701–07, 1708–23, 1743–51, 1765–71.) Georgia had previously been admitted in 1868, but had again been placed under military control because of the action of its legislature in expelling colored members. (Globe, pp. 1702–03; 16 Stat. 59.)

In the Senate the bill occupied fourteen days of debate between March 14 and April 19, without reference to the school provisions. (Globe, pp. 1924–30, 1950–61, 1986–96, 2018–26, 2055–68, 2088–93, 2388–2400, 2422–30, 2606–17, 2639–48, 2672–78, 2709–26, 2741–53, 2809–29.) On April 19, the Senate substituted for the House bill admitting Georgia an amendment keeping Georgia under military government. (Globe, pp. 2819, 2821, 2829.)

In the House on June 23, Representative Butler from the Committee on Reconstruction reported the bill in about the same form as originally proposed. (Globe, p. 4749.) He stated that he did not think the conditions important in view of the adoption of the Fifteenth Amendment (Globe, p. 4751), and so did not object to a proposed amendment by Representative Dawes which

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omitted the conditions. Representative Lawrence of Ohio proposed an amendment to the latter amendment to insert the condition relating to school rights and privileges (Globe, p. 4752), which was not agreed to. (Globe, p. 4796.) The Dawes amendment was adopted, and the bill passed by the House on June 24 admitted Georgia without conditions. (Globe, p. 4797.) The bill reported from the Conference Committee and accepted by both houses on July 14 substantially followed the House version, without conditions. (Globe, pp. 5581, 5583, 5621; 16 Stat. 363.)

F. CIVIL RIGHTS ACT OF 1875

INTRODUCTORY NOTE

Whether or not a state should be permitted to segregate its public schools on a racial basis was considered by the Congress in connection with the legislation that became the Civil Rights Act of 1875, 18 Stat. 335. That consideration arose in connection with the Civil Rights bills offered by Senator Sumner and others during the years 1870–1875, bills that were considered in various forms in every session of every Congress between those dates. To simplify the history of that legislation, it is presented on a session-by-session basis.

41st Congress, 2d Session (Dec. 1869–July 1870)

Senator Sumner of Massachusetts introduced his Supplementary Civil Rights bill (S. 916) on May 13, 1870. (Congressional Globe, 41st Cong., 2d Sess., p. 3434.) It provided civil and criminal penalties for any refusal of equal rights "in railroads, steamboats, public conveyances, hotels, li-

censed theatres, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or state authority; also on juries in courts, national and state." (*Ibid.*) Without discussion, this bill was referred to the Senate Judiciary Committee. (*Ibid.*) Three months later, it was reported adversely by Senator Trumbull, Chairman of the Judiciary Committee, and further consideration was indefinitely postponed. (*Id.*, p. 5314.)

41st Congress, 3d Session (Dec. 1870–March 1871)

Senator Sumner introduced an identical bill at the third session of the 41st Congress. (S. 1234, Congressional Globe, 41st Cong., 3d Sess., p. 619.) Like its predecessor, this bill was referred to the Senate Judiciary Committee, reported adversely by that Committee, and postponed. (*Id.*, p. 1263.)

42d Congress, 1st Session (March 1871–April 1871)

Shortly after the opening of the 42d Congress, Sumner reintroduced his civil rights bill (S. 99), and, as before, it was referred to the Judiciary Committee. (Globe, 42d Cong., 1st Sess., p. 832.) It was, however, never reported.

42d Congress, 2d Session (Dec. 1871–June 1872)

(1) *Senate*

The bill, S. 99, which Senator Sumner had introduced in the first session of the 42d Congress, came up for consideration in the second session of that Congress, twice as an amendment attached to amnesty legislation that had already passed the House, and once directly in an amended form.

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(a) *The first Amnesty Bill.* The preceding session the House had passed a bill (H. R. 380) to remove political disabilities imposed under section 3 of the Fourteenth Amendment upon certain persons who had aided the Confederacy during the war. This bill came up for consideration in the Senate shortly after the opening of the second session of the 42d Congress in December 1871. (Congressional Globe, 42d Cong., 2d sess., p. 237.)[26] Senator Sumner almost immediately moved to amend the amnesty bill to add his supplementary civil rights bill to it. (Globe, p. 240.) After some discussion, Senator Frelinghuysen suggested certain amendments, among others, to permit churches, schools, cemeteries and institutions of learning, which had been privately established for the exclusive benefit of one race, to continue under the terms of their original establishment. (Globe, p. 435.) Sumner agreed to this modification (Globe, p. 453), and the Senate adopted his civil rights amendment, as thus modified, by a vote of 29 to 28. (Globe, p. 919.) However, when the bill itself as amended was put to a vote, it failed of the two-thirds majority required by section 3 of the Fourteenth Amendment, although a majority voted for passage. (Globe, p. 929.)

In the debate Senator Sumner stated that his civil rights bill was intended to enforce the principle of "equality before the Law" declared both by the Thirteenth and Fourteenth Amendments. To him, the term "separate but equal" was a contradiction and the separation of the races was an "indignity to the colored race" that

[26] Until further noted all references to the Congressional Globe are to the 42d Congress, 2d Session.

was "Slavery in its last appearance." (Globe, p. 383.) Particularly, he regarded separate schools as unequal:

> The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. This is plain oppression, which you, sir, would feel keenly were it directed against you or your child. Surely the race enslaved for generations has suffered enough without being compelled to bear this prolonged proscription. Will not the Republic, redeemed by most costly sacrifice, insist upon justice to the children of the land, making the common school the benign example of republican institutions where merit is the only ground of favor. (Globe, p. 384.)

To him, the Thirteenth, Fourteenth and Fifteenth Amendments had clearly established as a constitutional principle that

> all persons without distinction of color shall be equal before the law. Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. Notoriously, the hotel is a legal institution, originally established by the common law, subject to minute pro-

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> visions and regulations; notoriously, public conveyances are in the nature of common carriers subject to a law of their own; notoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color. (Globe, p. 242.)

Senator Frelinghuysen agreed in principle with Sumner's views, but sought to amend his proposal to make it clear that schools and churches privately

> established exclusively for either of the races, shall not be taken from their control, but remain devoted to their use. That provision modifies to some degree the law, but it does not affect the main subjects of the law, to wit, common carriers, innkeepers, schools, &c., but does perpetuate to the colored people their own institutions. (Globe, p. 435.)

As noted, Sumner consented to this exception of private schools. (Globe, p. 453.)

The general argument of the opponents of the bill was that it was unnecessary and an unconstitutional interference with state affairs. (*E. g.,* Senator Thurman of Ohio, Globe, p. 496.) But the special argument against the school provision, as made by Senator Thurman, the minority leader, was that the mere separation of races in school did not mean inequality:

> All that can be claimed is this, that in regard to the schools supported by the public money, that money shall be so applied as that each citizen shall have an equal advantage from its application.

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> Therefore, preserving that equality, the State in the exercise of its power of regulation may apply a part of it to support a school for boys, a part of it to support a school for girls, a part of it to support a school for white children, a part of it to support a school for colored children. That is not denying them the equal protection of the laws in any sense whatsoever. * * * In no sense is it denying their equality before the law. (Globe, Appendix, pp. 26–27.)

Senator Hill of Georgia expressed the same general view:

> Nor do I hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that. (Globe, p. 241.)

(b) *The second Amnesty Bill.* Meanwhile, the House had passed a slightly different form of amnesty legislation (H. R. 1050), and, when that bill was brought up for Senate consideration, in Committee of the Whole, on May 8, 1872, Senator Sumner moved to substitute his civil rights proposal in lieu of the amnesty provisions. (Globe, p. 3181.) After some discussion, Senator Ferry moved to amend Sumner's proposal to eliminate its prohibitions against racial segregation in public schools. (Globe, p. 3256.) This amendment was rejected. (Globe, p. 3263.) Senator Blair of Missouri offered an amendment to leave the question of mixed schools to the option of local school authorities. (Globe, p. 3258.) This amendment was also defeated. (Globe, p.

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3262.) After several other amendments were considered, a vote was taken on Sumner's proposal to substitute his civil rights bill for the amnesty bill, and it was defeated. (Globe, p. 3268.) Immediately Senator Sumner moved to add his bill to the amnesty bill, and that proposal was adopted, the Vice President voting to break a tie. (*Ibid.*) The second amnesty bill, as thus amended, then received majority approval (32 to 22), but this was short of the necessary two-thirds for amnesty. (Globe, p. 3270.)

The debate added, to the points of view previously expressed in the consideration of the first amnesty bill, two thoughts. The first, expressed by Senator Trumbull, was that "the right to go to school is not a civil right and never was." (Globe, p. 3189.) Rather, he said, that was a "social right" and beyond proper regulation by the Federal government. (*Ibid.*) The second additional view was expressed by Senator Ferry of Connecticut. To him, so long as facilities given both races were equal, separation would not as a practical matter at that time violate any rights of either race. (Globe, p. 3190.) Separate schools would provide better educational facilities. He stated that mixed schools in the District of Columbia, for example, would "utterly destroy the school system" in the District, because

> there are continually pouring into this District of Columbia colored laboring classes from Virginia, from Maryland, and from the surrounding country; the population of that class is increasing, as statistics show, with unparalleled rapidity every year; and their children, just emerged from the influences of slavery, naturally are felt by the

> parents and guardians of those who have been long educated and cultured in schools as having a tendency, at any rate, to endanger those who are thrown into association with them in the common daily life of the common school. It may be true, or may be untrue, but the fact exists; and the tendency of compelling the two races to assemble in the same building is to drive out the very class of the community whom you wish to attach to your schools, by whom the schools are to be built up and fostered; whereas, what you need is to have the entire community interested in their support and preservation. (Globe, p. 3257.)

These views were taken up by Senators Edmunds and Morton. Senator Edmunds said:

> * * * if there is anything in that equality of right under the law, if it be admitted or established that a public school is a part of governmental regulation, designed for the benefit of the whole people, then you cannot get out by saying that there is an equality of right when you declare that you will put the black sheep in one place and the white sheep in another. Globe, p. 3190.)

Senator Morton answered Trumbull's contention, by stating

> * * * that where schools are maintained and supported by money collected by taxation upon everybody, there is an equal right to participate in those schools. You may call it a civil right or a political right; and if there be a distinction, if a right to participate in these schools is to be governed by color or any other distinction, I say that is a fraud upon those who pay the taxes. (Globe, p. 3191.)

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(c) *The Sumner Bill (S. 99).* In the latter part of the session, Sumner's bill, which he had introduced in the preceding session, was taken up in his absence. (Globe, p. 3734.) It was amended to exclude reference to schools, among other things, and passed the Senate in that form. (Globe, p. 3736.) The Senate then reconsidered the second amnesty proposal. (*Ibid.*) Sumner, who was present by that time, again urged his bill as an amendment to the amnesty proposal, claiming that "without any notice" the Senate had adopted a civil rights bill "emasculated" by the removal of safeguards concerning schools and juries. (Globe, p. 3738.) He was unsuccessful in this attempt (*ibid.*) and Senator Conkling stated that this was because of the general view of the majority that the bill as passed was the "largest civil rights bill we can get." (Globe, p. 3738.)

(2) *The House*

A House bill (H. R. 1647) that was identical to Senator Sumner's could not be brought up for consideration because of the dilatory tactics of its opponents. (See Globe, pp. 1117, 1956, 2074.) Attempts to suspend the rules to bring up the bill gained majority approval, but not the two-thirds required to amend the rules. (Globe, pp. 1956, 3383.) Later, attempts were made to bring up the Sumner bill, in the amended form the Senate had adopted; again motions for suspension of the rules for that purpose failed to secure the necessary two-thirds. (Globe, pp. 3932, 4321–4322.) No further action was taken in the House during that session.

42d Congress 3d Session (Dec. 1872–March 1873)

During the third session of the 42d Congress, the Sumner bill (S. 99), as it passed the Senate in the form excluding reference to schools, was taken up by the House on March 3, 1873, and amended to add an amnesty proposal. (Congressional Globe, 42d Cong., 3d Sess., p. 2110.) However, although the bill received majority approval, it did not get the necessary two-thirds. (*Id.*, p. 2111.) No further action was taken.

43d Congress, 1st Session (Dec. 1873–June 1874)

(1) *Senate*

Senator Sumner's bill prohibiting school segregation, was the first bill introduced. (S. 1; 2 Cong. Rec. 2.) After brief discussion, it was referred to the Judiciary Committee, and reported favorably by that Committee April 14, 1874.[27] (2 Cong. Rec. 12, 3053.) In the form reported it contained a prohibition against segregation in public schools. (2 Cong. Rec. 3451.)

The bill was taken up by the Senate on April 29, 1874 (2 Cong. Rec. 3450), postponed for a period, and finally passed May 22, 1874, after an all-night session (2 Cong. Rec. 4176). During the course of its consideration, several amendments were offered with respect to schools. Senator Sargent of California sought an amendment specifically to permit "separate schools for persons of different sex or color, where such separate schools are equal in all respects * * *." This was defeated. (2 Cong. Rec. 4167.) An amendment

[27] Sumner died March 11, 1874.

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proposed by Senator Gordon of Georgia to strike out all reference to schools was also defeated. (2 Cong. Rec. 4170.) On the other side, an amendment by Senator Boutwell to prohibit voluntary segregation in schools was also defeated. (2 Cong. Rec. 4170.) The bill, as passed, was substantially as introduced, with a prohibition against segregated schools. (2 Cong. Rec. 4175–4176.)

Senator Frelinghuysen, in reporting the bill, stated its purpose to be the removal of racial discriminations so as to give to all persons in the United States "the equal protection of the laws." With reference to public schools, he stated

> The bill does not permit the exclusion of one from a public school on account of his nationality alone.
>
> The object of the bill is to destroy, not to recognize, the distinctions of race. (2 Cong. Rec. 3452.)

This prohibition, he said, was authorized by "the thirteenth, fourteenth and fifteenth amendments, considered together and in connection with the contemporaneous history * * *." (2 Cong. Rec. 3453.)

Senator Pratt of Indiana stated that the bill would permit voluntary segregation, for "where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves * * *." (2 Cong. Rec. 4082.) The minority leader, Senator Thurman of Ohio, replied:

> * * * I know that the first section of the bill may to a careless reader seem ambiguous, but I do not think there is one member of the majority of the Judiciary Committee

> who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools. (2 Cong Rec. 4088.)

While the most of Senator Thurman's speech was directed toward the general objection that the bill as a whole exceeded Federal powers, he did voice the objection to the school provision on the grounds that not only was it like the rest of the bill, unconstitutional, but that it would destroy the public school system in the South. (2 Cong. Rec. 4089–4090.)

Senator Stockton of New Jersey, noting that the Republican caucus had agreed to pass the bill and that he was helpless to alter that decision, objected that Equality did not mean Identity. (2 Cong. Rec. 4145.) Senator Howe of Wisconsin spoke in favor of the bill. (2 Cong. Rec. 4147–4152.)

Senator Pease, of Mississippi, summed up the position of the bill's proponents:

> Gentlemen say that if equal advantages in separate schools are provided the law is met so far as privileges and immunities are concerned. I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that "because you are a black man you shall have a separate school," he looks upon that, and justly, as tending to degrade him. There is no equality in that. (2 Cong. Rec. 4154.)

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Senator Cooper of Tennessee, opposing the bill, objected to applying it to his home state, for it would

> upset the whole common-school system of the State of Tennessee, because the whites are in a decided majority in the State; the colored people are in a minority but a very large minority, forming a large part of the people. Now by this one act of legislation you sweep out of existence the whole common-school system of the State. Whom have you benefited? You have benefited no one. You have injured the colored man as well as the poorer classes of the white race—those who are dependent for the education of their children upon the common schools. You have stripped them of all opportunity to give to their children any education whatever. (2 Cong. Rec. 4155.)

After further general opposition, by Senators Kelly (2 Cong. Rec. 4163–4164) and Merrimon (2 Cong. Rec. 4164–4166), Senator Boutwell offered his amendment to make it clear that segregation was unlawful even if voluntary. (2 Cong. Rec. 4167.) Senator Stewart opposed this amendment on the ground of "expediency," that the practical problem was "whether or not by this legislation you will aid to educate the colored man beyond what he would otherwise get." (2 Cong. Rec. 4167.) He believed that it "ought to be left optional to have schools mixed or separate as the people themselves desire." (*Ibid.*) Senator Frelinghuysen agreed. (2 Cong. Rec. 4168.) He particularly thought that the bill as drafted would permit such a "voluntary division" of races in the

public schools, although he was clear that segregation could not be enforced by law. (2 Cong. Rec. 3452.)

Senator Sargent, who sought a more explicit provision for segregated schools, gave his summary of the problem:

> We ought to legislate here as statesmen, having in view not merely abstract ideas or theoretical principles or sublimated ideas, but to observe the condition of the times and know whether by any law which we may pass here we inflict an injury upon the country; whether we retard its prosperity; whether we overthrow its educational systems; whether we entail ignorance upon the coming generations; whether we destroy institutions which have proved their value, and which no man in his good senses, unbiased by bigotry, can deny are of inestimable value, ay, indispensable to the country. (2 Cong. Rec. 4172.)

His proposal was, however, rejected (2 Cong. Rec. 4175) and, as noted above, the bill passed the Senate with a provision against segregated schools.

(2) *House*

(a) *S. 1.* In the House, the Sumner bill (S. 1), after Senate passage, never formally came up for consideration during the remainder of the session. Attempts to bring it up were defeated. (2 Cong. Rec. 4242, 4439, 4691, 5162.) During one such attempt to suspend the rules to facilitate consideration of the bill, Representative Butler, Chairman of the House Judiciary Committee, accompanied a motion to suspend with a statement that the suspension would permit a test vote to be taken on the school clause; but the opposition refused to

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agree to the rules suspension unless the school clause was stricken out. (2 Cong. Rec. 4439.)

(b) *H. R. 796.* A House bill identical to the Sumner bill, had been referred to the Judiciary Committee early in the session. (H. R. 473; 2 Cong. Rec. 97, 98.) The Judiciary Committee, however, introduced its own bill, H. R. 796, containing a prohibition against racial segregation in public schools maintained in whole or in part at public expense, or by "endowment for public use." (2 Cong. Rec. 318.) This bill came up for consideration December 19, 1873, at which time attempts were made to arrange speaking time in order to prevent a filibuster. (2 Cong. Rec. 337, 338.) At that time, several amendments were offered relating to the school clause: Representative Eldredge offered an amendment permitting "separate but equal" accommodations; Representatives Potter and Whitehead moved to strike out all reference to schools. (2 Cong. Rec. 339.) After several days of debate, the Chairman of the Judiciary Committee, Representative Butler, moved to recommit the bill for reconsideration of the question of "mixed schools." (2 Cong. Rec. 455–458.) The bill not was not brought up again at this session.

Representative Mills of Texas stated that, if the school clause were passed, the Negro would be worse off than before, for

> The Legislatures of every State where the white people have control will repeal the common-school laws. Who, then, will take him by the hand and lead him to the schoolroom and pay for his tuition? (2 Cong. Rec. 385.)

Representative Durham of Kentucky agreed with Mills:

> I believe the passage of this bill will so embitter the white people of Kentucky that it will retard, rather than forward, the educational advantages of the blacks. I believe it will destroy our whole common-school system. (2 Cong. Rec. 406.)

Representative Blount of Georgia stated that enactment of the bill with the school clause would cause the white Southerners to withdraw support from the schools, so that

> The common schools will be abandoned, and the only hope for the moral and intellectual elevation of the negro will sink below the horizon forever. (2 Cong. Rec. 411.)

In answer, Representative Lawrence of Ohio refused to discuss the "expediency" of the bill, for

> It is always expedient to do right. Equality of civil and political rights, of all rights which exist under law, is simple justice. (2 Cong. Rec. 414.)

He supported the bill as drawn, since

> The fourteenth amendment was designed to secure this equality of rights; and we have no discretion to say that we will not enforce its provisions. There is no question of discretion involved, except as to the means we may employ. (*Ibid.*)

However, others of the majority did desire to give careful consideration to the effect of the bill on schools. Thus, in moving for recommittal, Representative Butler stated that "this question of mixed schools should be very carefully considered." (2 Cong. Rec. 456.) To him, the fact that the

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"negroes * * * have never, till the last few years, had any opportunity for education," and the probability that the current feelings as to the "difference in the races" would disappear "in the next generation", justified careful reconsideration and perhaps modification of the mixed school provision. (2 Cong. Rec. 456–457.)

43rd Congress, 2d Session (Dec. 1874–March 1875)

During the second session of the 43rd Congress, nearly all the relevant discussion and action occurred in the House. Attempts were there made to bring up the Sumner bill (S. 1), which had passed the Senate the previous session with a prohibition of segregated schools. (3 Cong. Rec. 704. See *supra,* p. 149.) These were defeated, and, except for subsequent unsuccessful attempts to substitute its text for the House bill, the Sumner bill was not acted upon. (3 Cong. Rec. 704, 938, 1010.)

The House bill (H. R. 796) which had been recommitted to the Judiciary Committee the previous session, *supra,* p. 153, was again reported to the House December 16, 1874. (3 Cong. Rec. 116.) However, as reported, it contained an amendment expressly approving the maintenance by a state of "separate schools * * * giving equal advantages in all respects, for different classes of persons * * *." (*Ibid.*)

Attempts to bring the bill up were unsuccessful because of the dilatory tactics of its opponents, who kept the House from action for one continuous session of over 46 hours by motions to adjourn. (3 Cong. Rec. 786–828.) After amendment of the House rules to prevent a recurrence

of this, the House bill was brought up for final consideration. (3 Cong. Rec. 890–902, 938.) After three days of debate, the bill was passed; but, just before passage, an amendment was adopted which struck from the bill all reference to schools, including the provision which permitted "separate but equal" facilities to be maintained. (3 Cong. Rec. 1010, 1011.) In that form, the Senate concurred, and the bill became law March 1, 1875, 18 Stat. 335.

The views expressed on the school issue on final House passage of the bill were mainly repetitive of those expressed in previous sessions. The floor leader for the bill, Representative Butler, stated that he had been given explicit instructions by his Committee:

> As instructed by the Committee on the Judiciary, I propose to yield for a motion to substitute for this bill the provisions of the Senate bill on the same subject.[28] I am instructed by the committee then to yield to an amendment to be moved by the gentleman from Alabama [Mr. White]. I will then yield to a motion to amend the bill by striking out all relating to schools. I do this in order that all shades of republican opinion may be voted upon. (3 Cong. Rec. 938.)

The amendment striking out all reference to schools, the only one of the series which was successful, was offered by Representative Kellogg.

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[28]As has been noted, the Senate bill passed with a provision against segregated schools, while the House bill, as reported, contained an express provision for "separate but equal" schools.

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(3 Cong. Rec. 939, 1010.) Mr. Kellogg explained the purpose of his proposal:

> The amendment I have proposed is to strike out of the House bill reported by the Committee on the Judiciary all that part which relates to schools; and I do it, Mr. Speaker, in the interest of education, and especially in the interest of the education of the colored children of the Southern States. As the bill is now drawn, we recognize a distinction in color which we ought not to recognize by any legislation of the Congress of the United States. Sir, in the legislation of this country I recognize no distinction of color, race, or birthplace. All ought to be equal before the law; and the children of all should have an equal right to the best education they can have in the public schools of the country. But this bill proposes to make a distinction by a national law. The proviso to the first section is one that makes a discrimination as to classes of persons attending public schools; and I do not wish to make any such provision in an act of Congress.
>
> But upon this school question we should be careful that we do not inflict upon the several States of the Union an injury that we ought to avoid. A school system in most of the Southern States has been established since the war of the rebellion, by which the colored children of the South have the advantages of an education that they never could have before that time. I believe, from all the information I can obtain, that you will destroy the schools in many of the Southern States if you insist upon this provision of the bill. You will destroy the work of the past ten years and leave them to the mercy of the unfriendly

> legislation of the States where the party opposed to this bill is in power. And besides, this matter of schools is one of the subjects that must be recognized and controlled by State legislation. (3 Cong. Rec. 997.)

Representative Burrows of Michigan stated:

> For the reasons I have urged and many others which might be mentioned I shall not under any consideration give my support to the separate school doctrine. Not only is it pernicious in itself, but it is the beginning of that class legislation which, if once entered upon, will know no end until it has brought to the weaker class of every race subjection and to the country only disaster and ruin. If you cannot legislate free schools, I prefer that the bill should be altogether silent upon the question until other times and other men can do the subject justice. (3 Cong. Rec. 1000.)

Representative Monroe of Ohio stated that the "separate but equal" clause in the bill would be a "dangerous precedent" for the reason that "it introduces formally into the statute law a discrimination" grounded on race. (3 Cong. Rec. 997.) This, he said, could seriously affect the future of the Negro, for

> The representative men of the colored race tell me that they would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privilege of education connected with this discrimination. (*Ibid.*)

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Rather than enact a provision explicitly approving racial segregation, Mr. Monroe stated that he understood the Negroes would

> think their chances for good schools * * * better under the Constitution with the protection of the courts than under a bill containing such provisions as this. (3 Cong. Rec. 998.)

Representative Cain (a Negro) favored the proposed compromise, "for the sake of peace in the republican ranks, if for nothing else—not as a matter of principle—to except the school clause." (3 Cong. Rec. 957.) However, he could not agree to the "invidious discrimination in the laws of this country" involved in the "separate but equal" clause. (3 Cong. Rec. 981.)

The floor leader, Representative Butler, closed, as follows, with respect to the school provisions of the bill:

> There are two kinds of opinion in the republican party on this question. I myself would legislate equal privileges to white and black in the schools, if I had the power, first, to legislate, and, secondly, to enforce the legislation. But the difficulty I find in that is, that there is such a degree of prejudice in the South that I am afraid that the public-school system, which has never yet obtained any special hold in the South, will be broken up if we put that provision into the bill. Then comes the provision of the committee that there shall be separate schools wherever schools are supported by taxation. There are some difficulties with an unwilling people in carrying out that provision, and there is an objection to it on the part of the colored

> people, because they say they desire no legislation which shall establish any class distinction.
>
> Then comes the proposition of my friend from Connecticut [Mr. Kellogg] to strike out all relating to schools. I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools. (3 Cong. Rec. 1005–1006.)

As noted, the Kellogg amendment was adopted, and the bill passed in that form. (3 Cong. Rec. 1010, 1011.)

II. The State Materials

Introductory Note

This portion of the Appendix contains the historical materials concerning the relevant actions of the thirty-seven states to which the Fourteenth Amendment was submitted for ratification.

The materials are arranged alphabetically by states. A brief summary precedes the presentation of the detailed materials for each state. The ratification proceedings are set out first. Then follows a description of the school system in the state in the period immediately preceding and following ratification of the Amendment, and of the legal provisions relating to the status of Negroes. In most instances our research has not extended beyond the year 1880.

In addition to the constitutions, session laws and the reports of court decisions, we have consulted the following state records, all of which are available in the Library of Congress: (1) The printed House and Senate Journals of each state;

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(2) the printed "Documents" submitted to the legislatures, which usually include the periodical reports of the state superintendent of schools; (3) the reports of legislative debates, which at the relevant period were published in only two states, viz. Pennsylvania (*verbatim* reports) and Indiana (summary reports); (4) the records of constitutional conventions which were held in the period immediately preceding or following the ratification of the Amendment. We have also examined the Microfilm Collection of Early State Records, prepared by the Library of Congress in association with the University of North Carolina, and collected and compiled under the direction of Professor William Sumner Jenkins.

ALABAMA

The Alabama Legislature rejected the Fourteenth Amendment in December, 1866. It ratified in July, 1868. The proceedings were perfunctory. On neither occasion was there any reference to the effect of the Amendment on school segregation. Prior to the Civil War there had been no public education for Negroes. The Constitution of 1867 provided for schools for all children; legislation approved in August, 1868, required separate schools for white and colored children.

RATIFICATION

The Alabama Legislature rejected the Fourteenth Amendment in 1866. In his message of November 12, 1866, Governor Patton recommended rejection. He objected to Section 1 of the Amendment because

> It would enlarge the judicial powers of the General Government to such gigantic dimensions as would not only overshadow and weaken the authority and influence of the State courts, but might possibly reduce them to a complete nullity. It would give to the United States courts complete and unlimited jurisdiction over every conceivable case, however important, or however trivial, which could arise under the State laws. Every individual dissatisfied with the decision of a State court, might apply to a Federal tribunal for redress. * * * The granting of such an immense power as this over the State tribunals would, at the very best, subordinate them to a condition of comparative unimportance and insignificance, and might prove utterly destructive of that full security for the enjoyment of all the legal rights of property, and those effective guarantees against arbitrary oppression, which the people have found in our present judicial system, ever since the organization of the Government.[29]

On December 6, 1866, Governor Patton made a contrary recommendation, declaring acceptance of the amendment to be a "necessity" in view of current congressional developments.[30] On December 7, 1866, the Senate, following the adverse report of its Committee on Federal Relations,[31] rejected the amendment by a vote of 28 to 3.[32] On the same day the House defeated a proposal to submit the ques-

[29] Senate Journal, 1866, pp. 32–33; House Journal, 1866, pp. 33–34.

[30] Senate Journal, 1866, p. 176.

[31] Id., pp. 154–5.

[32] Id., p. 183.

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tion to popular vote,[33] and rejected the amendment by a vote of 69 to 8.[34]

A year and a half later, on July 13, 1868, the Legislature ratified.[35] Ratification was perfunctory. In the House a resolution to ratify was introduced. The proceedings on the resolution were reported as follows:

> When Mr. Reeves moved to lay the resolution on the table;
>
> Lost.
>
> The vote was taken on the passage of the resolution;
>
> Which was adopted.[36]

The vote was 67 to 4.[37] The Senate proceedings were as follows:

> On motion of Mr. Foster the constitutional rule was suspended, and the joint resolution was read three times and passed forthwith—yeas 28, nays 0.[38]

SCHOOLS

Prior to the Civil War there had been no public education for Negroes, and it was a criminal offense to attempt to teach a Negro, free or slave, to read or write.[39] In 1854 provision was made for a free public school system for "all the chil-

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[33] House Journal, 1866, p. 210.

[34] House Journal, 1866, p. 213.

[35] Alabama Laws, 1868, p. 138.

[36] House Journal, Extra Session, 1868, p. 9.

[37] *Id.*, p. 10.

[38] Senate Journal, Extra Session, 1868, p. 10.

[39] Section 10 of "An Act to prevent the Introduction of Slaves into Alabama, and for other Purposes," approved January 16, 1832. Alabama Acts 1831, p. 16.

dren of our State."[40] In view of the prohibition against instruction of Negroes this implied only white children.

The Alabama Constitution of 1865 made it the duty of the legislature to encourage schools:

> The General Assembly shall, from time to time, enact necessary and proper laws for the encouragement of schools and the means of education * * *. [Art. IV, § 33]

The Constitution of 1867 was more detailed, saying in part:

> It shall be the duty of the Board [of Education] to establish, throughout the State, in each township or other school-district which it may have created, one or more schools, at which all the children of the State between the ages of five and twenty-one years may attend free of charge. [Art. XI, § 6]

It also gave the Board of Education "legislative power in reference to the public educational institutions of the State," subject to repeal by the General Assembly. Art. XI, § 5.

In the Constitutional Convention of 1867 proposals to require separate schools were defeated,[41] as was a proposal to permit the legislature to provide for separate schools.[42] One member protested the latter action as forbidding separate schools.[43]

The Governor's message of July 14, 1868, recommended that provision be made for education:

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[40] Alabama Acts 1853–54, No. 6, p. 8.
[41] Convention Journal, pp. 153, 237–8.
[42] Convention Journal, p. 238.
[43] Convention Journal, p. 242.

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> A sound and thorough common school system is not only the great want but the only hope of the Commonwealth. We are far behind most of our sister States in this respect. Thirty-seven thousand and six hundred of the adult white population of Alabama in 1860 could not read and write, and the colored people are still more deficient in education. * * * With enlarged freedom and full opportunities for individual development should come the most ample facilities for obtaining that information that makes a man the peer of his fellows, and enables him to protect his own interests, at the same time that he is better fitted to discharge his duties as a citizen. We must see to it that every one in the State shall have an opportunity of acquiring an education. * * * It is true economy for the State to promote the education of all her children, for by no other investment will she so surely and so abundantly be repaid. * * *
>
> It will be for the Board of Education to arrange the details of the school system, subject to your power of revision."[44]

The Board of Education passed "An Act to provide separate schools," approved August 11, 1868:

> *Be it enacted by the Board of Education of the State of Alabama,* That in no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate

[44] Senate Journal, Extra Session, 1868, pp. 14–15.

schools for both white and colored children.[45]

In 1875, the Constitution was amended to incorporate a requirement for separate schools:

> The General Assembly shall establish, organize, and maintain a system of public schools throughout the State, for the equal benefit of the children thereof between the ages of seven and twenty-one years; but separate schools shall be provided for the children of citizens of African descent. (Art. XII, Sec. 1.)

ARKANSAS

Arkansas rejected the Fourteenth Amendment in December, 1866. The legislature objected on the ground that the Amendment gave Congress the power to define the rights of Negroes. In April, 1868 Arkansas ratified the Amendment. The proceedings were perfunctory. No mention was made of the effect of the Amendment on racial segregation in the public schools. Negroes were excluded from the public schools in 1867. The Constitution of 1868 provided public education for all children, without specifying whether schools should be mixed or separate. In the debates on this issue in the Constitutional Convention no reference was made to the Fourteenth Amendment. School legislation enacted in July 1868 provided for separate schools for the two races. School segregation continued thereafter. The Arkansas Civil Rights Act of 1873 called for equal educational accommodations and advantages for all children of school age.

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[45] Alabama Laws 1868, p. 148.

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The Arkansas Legislature in December, 1866, rejected the Fourteenth Amendment, in part because it construed the Amendment as giving Congress the power of "defining" the rights of the Negro. The House Committee on Federal Relations, reporting adversely on the amendment, stated:

> The first section declares who are to be citizens of the United States and of the several States, taking from the latter a power not exercised by them, in determining who shall enjoy that political right. The negro is embraced, and the States prohibited from abridging his immunities as a citizen of the United States; which amendment Congress with authority to define what rights he shall enjoy, and, by legislative enactments, elevate him to a political equality with the white race. It also transfers to Congress jurisdiction of the local and internal affairs of the States, virtually destroying the independence of their courts, and centralizing their reserved power in the Federal Government * * *.
>
> The fifth section would give Congress power to enforce the preceding provisions by appropriate legislation.
>
> Under that clause the sovereignty of the States might be completely subverted, by divesting them of the rights now secured by the Constitution.
>
> The amendment proposes changes to the fundamental law in direct antagonism with our system of government and upon terms dishonoring and degrading to the people of the Southern States.[46]

[46] House Journal, 1866, pp. 288–289.

The House followed this recommendation, rejecting the Amendment by a vote of 62 to 2.[47]

The Senate Committee on Federal Relations also reported adversely, saying in part:

> The great and enormous power sought to be conferred on Congress, under the amendment, which gives that body authority to enforce by appropriate legislation the provisions of the first article of such amendment, in effect, takes from the States all control over all the people in their local and their domestic concerns, and virtually abolishes the States.[48]

Its report was adopted by the Senate by a vote of 24 to 1.[49]

In April, 1868, the Amendment was ratified by a unanimous vote in each house. Governor Murphy's message was of a perfunctory nature:

> On the 16th day of last June, the Secretary of State of the United States transmitted to me an attested copy of an amendment of the Constitution, to become a 14th Article, on which the decision of the Legislature of this State was required. That attested copy was transmitted to the late Legislature, with the message, by whom the amendment was solemnly rejected. As the reconstruction laws require the ratification of this 14th Article before the State will be received and recognized as a State in the Union, it will be unnecessary for me to say more to the present Legislature, composed of loyal citizens of the State, than merely call their attention

[47] *Id.*, p. 291.

[48] Senate Journal, 1866–67, pp. 259–60.

[49] *Id.*, p. 262.

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> to the importance of early attention to the ratification of the same. In my last message, a true copy of the resolution and amendment will be found, to which I refer you.[50]

The House ratified immediately, on April 3, by a unanimous vote. Senate approval, likewise unanimous, followed on April 6.[51]

SCHOOLS

The Arkansas Legislature in 1867 made provision for a system of common schools. These schools were for white children only and they were to be supported by a property tax on the property of white persons only.[52] In an "Act to declare the rights of persons of African descent", the Legislature repealed all prior acts relating specifically to Negroes and mulattoes, except those concerning intermarriage, voting, jury service, and militia duty, but specified

> That no negro or mulatto shall be admitted to attend any public school in this state, except such schools as may be established exclusively for colored persons.[53]

The Constitution framed and adopted in 1868 assured educational opportunity for Negroes:

> ARTICLE IX. Section 1. A general diffusion of knowledge and intelligence among all classes, being essential to the preservation

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[50] Senate Journal, 1868, pp. 18–19; House Journal, 1868, p. 19.

[51] House Journal, 1868, p. 22; Senate Journal, 1868, p. 24.

[52] Arkansas Acts, 1866–67, No. 160, Secs. 1, 3, p. 413, March 18, 1867.

[53] Arkansas Acts, 1866–67, No. 35, Sec. 5, p. 100, February 6, 1867.

> of the rights and liberties of the people; the general assembly shall establish and maintain a system of free schools, for the gratuitous instruction of all persons in this State, between the ages of five and twenty-one years, and the funds appropriated for the support of common schools shall be distributed to the several counties, in proportion to the number of children and youths therein between the ages of five and twenty-one years, in such manner as shall be prescribed by law, but no religious or other sect or sects shall ever have any exclusive right to, or control of any part of the school funds of this State.

It also guaranteed equality:

> ARTICLE I. Sec. 3. The equality of all persons before the law is recognized and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor exempted from any burden or duty on account of race, color, or previous condition.
>
> ARTICLE I. Sec. 18. The General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens.

The Constitution did not specify whether the schools were to be mixed or separate. The debates in the Constitutional Convention are inconclusive. A Negro member of the Committee on Education was interested primarily in obtaining educational opportunities for members of his race, stating:

> In real truth, their interests and ours are united. For their hopes of wealth, intelligence, and influence, for their power, both of those classes must depend on the

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> organic law of the State. If that organic law places within their reach the means of education for their children, the opportunities for the development of their intellect, the opportunity to "work their way up" in the world, they may soon come to take their place among the races of men, and among the leaders of their people.[54]

To another member,

> One of the provisions of this new Constitution which is submitted by the Committee, is, that the Legislature shall provide, by setting apart a sufficient amount of revenue of the State, for the education of the children of the State. Not black children—not white children—but *the children of this State* are to be provided for, so far as regards the attainment of an education.[55]

Mr. Duvall objected to tax-supported free schools:

> This Constitution, sir, proposes to tax me and my children to educate that race, while but few of them are to pay any taxes. I cannot support such a provision.
>
> * * * * *
>
> Mr. JOHNSON. You forget how long we worked for you, in a state of slavery, to give you the means by which you have been educated; and now we want to come upon a level with you.[56]

Others construed the provision as requiring mixed schools and objected on that ground. A group of Democrats opposed the Constitution in part, on the ground that

[54] Convention Debates and Proceedings, p. 500.
[55] *Id.*, p. 649.
[56] *Id.*, p. 645.

> It compels the white citizens of the State to contribute, by taxation, to the support of public schools from which their children will be effectually excluded.[57]

Mr. Matthews was against the Constitution

> because the common-school system it proposes, is an abomination to every white man true to the well-being of his race.[58]

Mr. Bradley had similar sentiments:

> * * * I ask you if you propose to thrust into the same common school with your child and mine, the children of the negro. Will you endorse that monstrous enactment which proposes to take advantage of the necessities of widows, and of poverty-stricken men, who cannot afford to send their children elsewhere, to compel them to thrust those children, for three months in the year, among the offspring of a race whom God, by writing an indelible mark upon their head and foot and brain, has pronounced the social inferiors of your sons and daughters? * * * [59]

There was, however, no reference to the possible applicability or inapplicability of the Fourteenth Amendment to this problem.

The members of the Convention were aware of the applicability of the Amendment to other issues. The Convention adopted a resolution recommending that the next General Assembly enact laws to prevent intermarriage.[60] In debate

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[57] *Id.*, p. 666.
[58] *Id.*, p. 672.
[59] *Id.*, p. 660.
[60] *Id.*, p. 828.

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on this, it was pointed out that adoption of the Fourteenth Amendment

> is a part of the condition precedent to our admission into the Union. Congress will reject any constitution, containing such a provision. Congress has virtually declared that we must allow all men the free exercise of their rights.[61]

A member asserted that a prohibition on intermarriage would

> come in conflict with the Constitution of the United States, with the spirit of the age, and the rights of humanity * * *.[62]

It was also argued that the prohibition on intermarriage would violate the privileges and immunities clause of Article IV, Section 2, of the Federal Constitution and also the Fourteenth Amendment.[63]

On the other hand, a proponent of the resolution argued for its adoption lest similar provisions in the State Bill of Rights be construed as prohibiting laws against intermarriage:

> There is no limitation and distinction, there is no fixed, determined meaning, to "civil rights," and "equality before the law;" and so long as these terms stand undefined and uninterpreted, so long will this remain a vexed question for future generations to fight and war over * * *.[64]

Later, on the question of suffrage, there was a reference to the fact that

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[61] *Id.*, p. 377.
[62] *Id.*, p. 499.
[63] *Id.*, pp. 502–4.
[64] *Id.*, p. 370.

> It was well understood in the late election, that the only need of a Convention was to frame a Constitution in conformance with the requirements of the Reconstruction Acts.[66]

Governor Clayton, in his message to the legislature in 1868, described the situation of public education in Arkansas and asked for its improvement:

> The wicked and shameful manner in which the servants of the people have neglected their educational interests, and appropriated to their own selfish uses and the unhallowed purposes of treason, the magnificent endowments of a generous government, subjects them to the merited condemnation of all true patriots. In regard to the advancement of the common school interests the question heretofore seems to have been, not how to do it, but how not to do it. * * * In 1860, as shown by the message above referred to, but 25 common schools were organized and kept up in this State from the common school fund. I am unable to give you correct information of the number of common schools now in operation, but for practical purposes it would be safe to proceed as though there were none.
>
> From reliable statistics obtained from the lists of registered voters, made last fall, it is shown that thirty per centum of the white, and fifty per centum of the entire voting population were unable to write their own names. Nothing but a due sense of my constitutional obligations, and an earnest desire to promote the educational

[66] *Id.*, pp. 618–19.

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interests of the State, induces me to make this shameful disclosure.

* * * * *

The framers of our present Constitution have placed themselves in enviable comparison with past legislators, and merited the approbation and gratitude of posterity by the one act of far-seeing statesmanship which secures to future generations the inestimable boon of education, and gives life and perpetuity to the State, by providing the means whereby its future supporters and defenders may be prepared for the proper exercise of the duties of American citizenship.

* * * * *

The present condition of our school interests is unprecedented. A large portion of the community are known to be antagonistic to the principles of universal education. The prejudices which exist against a certain class of the people will tend to embarrass the situation. Obstacles will doubtless be thrown in the way where active support should be given.[66]

The legislature in 1868 construed the constitutional provision as permitting separate schools. "The Act to Establish and Maintain a System of Free Common Schools for the State of Arkansas," enacted July 23, 1868, provided with reference to the Board of Education:

> That the said Board [shall] make the necessary provisions for establishing separate schools for white and colored children and youths, [ ] and shall adopt such other measures as they judge expedient for

[66] House J., 1868, pp. 297–99.

> carrying the Free Common School system into effectual and uniform operation throughout the State, and providing as nearly as possible for the education of every youth. * * *[67]

In 1871 the progress of this school system was reported by the Superintendent of Public Instruction:

> The organization of a system of Free Schools, for the universal education of the people, is an important era in the history of Arkansas. The great lack of education among the masses, even of the white population of the State, had long been felt among the intelligent classes to be a great evil and a serious hindrance to the upbuilding of the material, social and moral interests of the commonwealth.
>
> And when, by operation of the laws of Congress, the colored race were made free and endowed with the rights of citizenship, the proportion of the population having a right to participate in civil affairs, and who could not read and write, was greatly increased. Hence the establishment of a system of schools which proffers educational facilities to all classes, without respect to color, must be hailed by all right-thinking persons as marking an epoch in our history of more than ordinary importance.
>
> * * * * *
>
> The condition of the country, as all know, was not the most favorable for carrying forward an enterprise, one of the prominent features of which was directly at variance with the preconceived notions and opinions of the great body of the people—namely,

[67] Arkansas Acts, 1868, No. 52, Sec. 107, p. 163, July 23, 1868.

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> the education and elevation of the colored race. Much prejudice and ignorance of the system had to be met and overcome before a hearty cooperation of the people could be secured in furtherance of its aims and its objects, and without such cooperation the system must prove a failure.
>
> The nature and provisions of the school law had to be explained, and the people convinced that the education of all the children would promote the best interests of the community, and all this required time and a vast amount of labor.[68]

The segregation provision of the law of 1868 was repeated in the comprehensive revision of the school law by the 1873 legislature.[69] The same legislature enacted a Civil Rights Act which imposed penalties for failure "to provide equal and like accommodations, and advantages for the education of each and every youth of school age." [70]

CALIFORNIA

California did not take any final action on the Fourteenth Amendment.

The California school laws of 1866 and 1870 excluded colored children from the existing public schools but authorized separate public schools for them. In 1874 the California Supreme Court held that racially segregated schools did not violate the "equal protection" clause of the Fourteenth Amendment. *Ward* v. *Flood,* 48 Cal. 36. Separate schools were abolished in 1880.

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[68] Ark. Docs., 1871, First Report, Sup't of Public Instruction, pp. 5, 8.

[69] Arkansas Acts, 1873, No. 130, Sec. 108, p. 392.

[70] Arkansas Acts, 1873, No. 12, Sec. 6, p. 15.

At the time the Fourteenth Amendment was before the legislature, Negroes were not permitted to vote, sit on juries, or intermarry with whites, but they were qualified as witnesses in court.

RATIFICATION

California did not take any final action on the Fourteenth Amendment. The Governor's message on December 2, 1867, recommended ratification. It commented on Section 1 as follows:

> By the first section it is provided that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the State wherein they reside, and States are prohibited from abridging the privileges and immunities of citizens, or of depriving them of life, liberty, or property, without due process of law. This section declares "equality before the law" for all citizens, in the solemn and binding form of a constitutional amendment, to which no reasonable objection can be urged.[71]

The Committee on Federal Relations of the Senate reported in its favor,[72] while the Committee in the Assembly advised against the proposal (March 4, 1868),[73] neither specifying the reasons for their recommendations. No vote was taken.

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[71] Assembly J., 1867–68, p. 52.
[72] Sen. J., 1867–68, p. 676.
[73] Assembly J., 1867–68, p. 611.

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SCHOOLS

The Constitution of 1849 provided for a system of free common schools,[74] which was established in 1851. The school laws of 1851[75] and 1852[76] were silent as to segregation of colored and white children, and provided for apportionment of school funds among the districts according to the total number of children. In 1860, there were only 382 Negro children in the State between the ages of five and fifteen, and most of these appear up to that time to have attended the common schools, although separate schools for Negroes existed in San Francisco and Sacramento. The State Superintendent of Schools in his Report to the Legislature in 1859 strongly criticized mixing the races and urged the establishment of separate schools throughout the state. He instructed the school officials that in the meantime the common schools then established were clearly intended for white children.[77] In 1863, the establishment of separate schools with public funds was permitted.[78]

In 1866 a law was passed providing for the establishment of racially segregated schools.[79]

In his message to the Legislature, dated December 2, 1867, the Governor discussed the "common schools" as follows:

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[74] Art. IX, § 3.

[75] Cal. Laws, 1851, c. 126, p. 491.

[76] Cal. Laws, 1852, c. 53.

[77] Sen. J., 1859, App., p. 14; Ferrier, *Ninety Years of Education in California*, 1846–1936, pp. 97 *et seq.*

[78] Cal. Laws, 1863, c. 159, § 68.

[79] Cal. Laws, 1866, c. 342.

> The school law now on our statute books, is believed to be well adapted to the wants of the State and I trust that no attempt to repeal or modify it, in any essential particular, will be made * * *.[80]

The Superintendent of Public Instruction reported that in the school year 1866–67 there were 16 schools for Negro children, with a total of 400 pupils, and that there were no instances where they had been admitted to white schools under Section 58 of the Law of 1866.[81]

The School Law of 1870[82] was similar to that of 1866 in requiring separate schools for "children of African descent." It also provided that

> The same laws, rules and regulations, which apply to schools for white children, shall apply to schools for colored (Sec. 57.).

In *Ward* v. *Flood,* 48 Cal. 36 (1874), this statute was held not to violate the Fourteenth Amendment. With regard to the "equal protection" clause, the court stated:

> * * * The public law of the State—both the Constitution and Statute—having established public schools for educational purposes, to be maintained by public authority and at public expense, the youth of the State are thereby become *pro hac vice* the wards of the State, and under the operations of the constitutional amendment referred to, equally entitled to be educated at the public expense. It would, therefore, not be competent to the Legis-

[80] Assembly J., 1867–68, p. 45.
[81] Senate and Assembly J., 1867–68, Appendix 2, p. 22.
[82] Cal. Laws, 1869–70, c. 556.

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> lature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution (p. 51).

But the 1870 statute was not of an exclusionary nature:

> * * * the policy of separation of the races for educational purposes is adopted by the legislative department, and it is in this mere policy that the counsel for the petitioner professes to discern "an odious distinction of caste, founded on a deep-rooted prejudice in the public opinion." But it is hardly necessary to remind counsel that we cannot deal here with such matters, and that our duties lie wholly within the much narrower range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense (p. 52).

Following this decision, the school law was amended in 1874 to provide that while separate schools might be maintained, colored and Indian

children were entitled, in the absence of such a system, to enter any public school.[83]

In 1880, those sections of the Code providing for the establishment of separate schools were repealed.[84] The Supreme Court in *Wysinger* v. *Crookshank,* 82 Cal. 588 (1890), held that because of the repeal of the statutory authority for segregation, separate schools could not be maintained.

LEGAL STATUS OF NEGROES

At the time the Fourteenth Amendment was considered by the California legislature, the Negro, in addition to being excluded from white schools, was not permitted to vote,[85] sit on a jury,[86] or intermarry with whites.[87] Prior to 1863, he had been disqualified as a witness in cases involving a white person, but in that year this restriction was removed, although continued with respect to Indians, Mongolians and Chinese.[88]

CONNECTICUT

Connecticut ratified the Fourteenth Amendment in June, 1866. The state had never had racial distinctions in its school legislation. A law enacted in 1868 affirmed the right of every child to be admitted to any public school in the district of his residence.

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[83] Cal., Amendments to the Code, 1873–74, p. 97.

[84] Cal., Amendments to the Code, 1880, c. 44, sec. 62.

[85] Cal., Const., 1849, Art. II, sec. 1; Gen. Laws, 1850–1864, ¶ 2431.

[86] *Id.*, ¶ 3870, sec. 1.

[87] *Id.*, ¶ 4462.

[88] *Id.*, ¶ 5332.

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RATIFICATION

Connecticut was the first state to act on the Fourteenth Amendment. Governor Buckingham in his message of June 19, 1866, recommended ratification;[89] the Senate voted favorably on June 25, 1866;[90] and the House concurred on June 28, 1866.[91] There was a brief debate in the Senate.[92] A contemporary account states that:

> The vote was a party one in both branches of the legislature. The Democrats opposed the amendment on the grounds of expediency and policy, and contended that Congress was powerless to change the Constitution during the enforced exclusion of certain Representatives from Congress. This view was repelled by the Republicans, who held that Congress has against conquered rebels all the powers of conquest.[93]

SCHOOLS

In 1866, the Secretary of the Board of Education, in his report to the legislature, remarked on the general educational situation as follows:

> For many years the opportunities have not been so favorable as they are just now for uniting all classes in the community, irrespective of creed, party, or nationality, in vigorous efforts for the improvement of public education. Important questions in respect to the abolition of slavery, on which

[89] Sen. J., May Session, 1866, p. 335.
[90] *Id.*, p. 374.
[91] House J., May Session, 1866, pp. 410–413.
[92] See Sen. J., May Session, 1866, p. 374.
[93] *Appleton's Annual Cyclopaedia*, 1866, pp. 255–256.

> the wise and good have been for years divided, and which have tended to separate even in the district school meeting those who should always have stood united in liberal and progressive sentiments, are now for ever settled. The war, which has absorbed since 1861 all the best forces of the State, has happily ended in the establishment of the Union and the vindication of the principles of local self-government. The return of peace is characterized not only at home, but in the national councils at Washington, and still more remarkably in the discussions which are in progress throughout all the Southern States, by a lively demand for the more thorough diffusion of public education as indispensable for the support of a free republic. So likewise in our own State there are manifold indications of an educational awakening.[94] * * *

Connecticut had never restricted its public schools to any class defined by color. It did prohibit for a short period the establishment of schools for the instruction of colored people who were not inhabitants of the state, on the ground that this would tend to increase the influx of Negroes into the state.[95] A colored school was established in Hartford in 1830, at the request of the colored inhabitants, and this example was followed by two or three other towns [96] but they were "broken

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[94] Report of the Secretary of the Board of Education, p. 18, Conn. Doc., 1866.

[95] P. L., 1833, chapter IX, p. 425, repealed in 1838, P. L., 1838, p. 30.

[96] Special Report of the U. S. Commissioner of Education (1871), p. 328, 41st Cong., 2d Sess., vol. 13, no. 315.

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up'' by legislation in 1868.[97] The 1868 law provided that

> The public schools of this state shall be open to all persons between the ages of four and sixteen years, and no person shall be denied admittance to and instruction in any public school in the school district where such person resides, any law or resolution of this state heretofore passed to the contrary notwithstanding.[98]

LEGAL STATUS OF NEGROES

The Constitution of Connecticut restricted the franchise to white males,[99] and only voters were eligible to serve on juries.[1]

DELAWARE

Delaware, although it had remained with the Union, rejected the Fourteenth Amendment in February, 1867. The joint resolution against ratification declared that adoption of the Amendment would prevent a restoration of national unity and nullify the original purposes of the United States Constitution. Delaware ratified the Amendment in 1901.

In 1867 the public schools of the State were open to white children only. Schools for colored children were provided in 1875, to be supported by taxes assessed upon the colored population. The Constitution of 1897 required equal participation of Negroes in school funds, and made separate schools mandatory.

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[97] *Ibid.*

[98] P. L., 1868, c. 108.

[99] Conn., Const., 1818, Art. VI, sec. 2.

[1] Conn. Gen. Stats., 1866, title I, c. IX, sec. 129.

In 1867 stringent laws were in force against free Negroes. On the day it rejected the Amendment, the legislature also rejected a bill to permit Negroes to testify in all court cases. Also in 1867, the Court of General Sessions declared the federal Civil Rights Act of 1866 void insofar as it prohibited discrimination in that respect. Negroes were excluded from jury service.

RATIFICATION

In 1865 Delaware refused to ratify the Thirteenth Amendment.[2] On January 2, 1867, Governor Saulsbury recommended rejection of the Fourteenth Amendment, in part because it was "so manifestly unjust to the people of ten States of the Union," in part because of its "ulterior purpose, the bestowal of the elective franchise on the African race."[3]

In the House the committee report recommending rejection did not discuss the details of the Amendment, but objected that its adoption "would be a breach of faith implied between the States at the time of the ratification of the Constitution."[4] A minority report stated that the amendment contained "honorable, magnanimous * * * [and] lenient terms."[5] The majority report was adopted,[6] and on February 7 the Senate voted against ratification.[7]

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[2] Dela. Laws, 1865, c. 592.
[3] House J., 1867, pp. 18, 20.
[4] *Id.*, p. 224.
[5] *Id.*, p. 225.
[6] *Id.*, p. 226.
[7] Sen. J., 1867, p. 176.

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In 1901, the Delaware legislature ratified the Thirteenth, Fourteenth, and Fifteenth Amendments.[8]

SCHOOLS

A general system of free public schools in Delaware was first established in 1829.[9] The 1829 law provided that the schools should be free "to all the white children of said district."[10] This provision continued[11] until the Constitution of 1897 was adopted, providing that "in * * * apportionment [of school funds] no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."[12]

It was not until 1875 that provision was made for tax support of colored schools,[13] and in 1881, the state began to appropriate money for them.[14]

LEGAL STATUS OF NEGROES

Delaware had been among the more liberal of the slave states in its legislation toward Negroes: they were presumed free rather than slave; laws providing against the importation of slaves into the State, even those whose owners had taken them out temporarily, acted to decrease the slave population; and stringent penalties attached to persons attempting to re-enslave the free Negroes

[8] Dela. Laws. 1901, c. 235.
[9] Dela. Laws, Rev. Ed., 1829, p. 486.
[10] Dela. Laws, Rev. Ed., 1829, p. 493.
[11] See Dela. Rev. Code, 1852, c. 42, § 11 (3).
[12] Const. 1897, Art. X, § 2.
[13] Dela. Laws, 1875, c. 48.
[14] Dela. Laws, 1881, c. 362.

of the state.[15] Measures were, however, directed against the possible political organization of the free Negroes,[16] and these were strengthened during the Civil War.[17]

The House on the day it rejected the Fourteenth Amendment also rejected a bill giving Negroes the same right to appear as witnesses as accorded to whites,[18] and the Delaware Court of General Sessions declared the federal Civil Rights Act of 1866 void insofar as it gave Negroes that right in the states. *State* v. *Rash,* Houst. Cr. 271 (1867). Negroes were excluded by law from juries until the law was declared invalid in *Neal* v. *Delaware,* 103 U. S. 370 (1880). Miscegenation was prohibited,[19] and Negroes were barred from voting.[20]

FLORIDA

Florida rejected the Fourteenth Amendment in December, 1866. One of the reasons given was that the Amendment was destructive of the rights of the states by investing Congress with vast powers. The later ratification, in June 1868, by the Reconstruction legislature, was perfunctory. Prior to the Civil War Negroes were excluded from the public schools. Schools for freedmen were established in 1866. The Constitution of

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[15] See, generally, *4 Judicial Cases concerning American Slavery and the Negro,* pp. 211–215.

[16] Dela. Laws, 1832, c. 176.

[17] See Dela. Laws, 1863, c. 305.

[18] House J., 1867, p. 228–29.

[19] Dela. Rev. Stats., 1852 (1874 ed.), Tit. 11, c. 74, sec. 1.

[20] Const. 1831, Art. IV, § 1.

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1868 outlawed all civil and political distinctions based on race or color, and provided for educational facilities for all children. A law in 1869 established a uniform system of public schools, without any reference to segregation. A Civil Rights Act enacted in 1873 prohibited racial discrimination in the public schools. The Constitution of 1885 forbade mixed schools, and subsequent legislation required separate schools for Negroes.

RATIFICATION

Florida in December, 1866, rejected the Fourteenth Amendment. Governor Walker, in recommending rejection, said with reference to sections 1 and 5 of the Amendment:

> These two Sections taken together, give Congress the power to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color, and leave no further use for the State governments. It is in fact a measure of consolidation entirely changing the form of the government.[21]

The Senate Committee on Federal Relations made the same objection:

> Section I of this proposed article would confer upon Congress all the powers which are now supposed to appertain to the States.—From the moment of its engraftment upon the Constitution of the United States, the States would in effect cease to exist as bodies politic, for at the instant of its adoption a great central power, which is ever the enemy of freedom and advance-

[21] House Journal, 1866, p. 76.

> ment would exist at Washington. The Congress would under this section alone subvert and change the whole domestic economy of a State, regardless of the approval or disapproval of the people thereof; for in the construction of this section as those that follow, it becomes necessary to consider the fifth section to this proposed amendment and when we do that we are appalled, and well might the people of every State in this Union pause and consider as to the power which might be taken and seized under the head of "appropriate legislation." [22]

The report of the House Committee on Federal Relations was similar:

> The first section of this amendment, considered in connection with the fifth, is virtually an annulment of State authority in regard to rights of citizenship. It invests the Congress of the United States with extraordinary power at the expense of the States. It would so operate that under its provisions all persons, without distinction of color, would become entitled to the "privileges and immunities" of citizens of the States, and among those privileges would be embraced the elective franchise, as well as competency to discharge the duty of jurors. In addition to this, without denying to the State the power and right to legislate and to control to some extent the liberty and property of the citizen, it vests in the General Government the power to annul the laws of a State affecting life, liberty and property of its people, if

[22] *Id.*, p. 102.

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Congress should deem them subject to the objections therein specified.[23]

With reference to the second section of the Amendment, the report stated:

We cannot at this time, just as they have emerged from slavery, without education, and controlled by prejudice, invest them with the elective franchise without restriction or qualification. We have done everything already that is necessary to secure their practical advancement.

The following article is incorporated in the Constitution of this State:

"All the inhabitants of this State, without distinction of color, are free and shall enjoy the rights of person and property without distinction of color." "In all criminal proceedings founded upon injury to a colored person, and in all cases affecting the rights and remedies of colored persons, no person shall be incompetent to testify as a witness on account of color."

The General Assembly at its last session passed an act providing that "all the criminal laws of this State shall be deemed and held to apply equally to all the inhabitants of the same, without distinction of color."

This State, while it has no system of public schools for the whites, has instituted a common school system even in her bankruptcy for this portion of our population, and is distributing elementary books all over the State. Six thousand blacks are now availing themselves of State aid for the purposes of education.

[23] House Journal, 1866, p. 76.

> These measures and any others which will tend to their practical advancement and improvement, we deem it our duty and pleasure to adopt, and we do not think it just that the general government should declare that we must in addition give them at once the elective franchise without qualification, thereby ruining our interests, theirs, and the country's, or our representation shall be reduced in the proportion which the males among them, twenty-one years of age and not invested with the right to vote, bear to the whole number of male citizens twenty-one years of age in this State.[34]

Both Houses rejected the Amendment unanimously.[35]

The later ratification by the Reconstruction legislature was perfunctory. On June 9, 1868, the Governor sent the following message:

> *Gentlemen of the Senate and the Assembly:*
>
> You are assembled under the provisions and in obedience to the requisitions of the Constitution of the State, adopted in accordance with the acts of Congress.
>
> Until admitted to representation upon the floor of Congress, your acts will be merely provisional.
>
> I therefore recommend that no action be taken save that dictated by the acts of Congress as conditions precedent to admission, to wit: The passage of the proposed amendment to the Constitution, known as the Fourteenth Article, and the election of United States Senators—unless it be to ratify the Thirteenth Article, already

[34] *Id.*, p. 77-78.

[35] Senate Journal, 1866, p. 111; House Journal, 1866, p. 150.

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> adopted, your immediate assent to which I advise.
>
> After we shall have been recognized by Congress in the admission of our Representatives and Senators, I shall communicate more at length upon the general interests of the State.[26]

Action in the Senate took place immediately. The vote for ratification was 10 to 3.[27]

In the House, approval was equally rapid. The vote was 23 to 6.[28]

SCHOOLS

Prior to the war the public school system was limited to white children only.[29] Any education of Negroes was discouraged. A territorial act had made it unlawful for free Negroes or mulattoes to assemble "for the purpose of preaching or exhorting, or for any other purpose, unless it be for the purposes of labour * * *."[30] A similar prohibition was enacted after Florida became a State.[31] In 1866 this prohibition, among others on the conduct of Negroes, was repealed.[32]

In 1865, Governor Walker had recommended against the establishment of any Negro schools:

> * * * in the present condition of this population, it would be premature to attempt to organize any general system of education * * *. The first lesson to be taught them is, that their new-found *liberty* is not *license,* and that labor is ordained of

[26] Senate Journal, 1868, p. 7.

[27] *Id.*, p. 9.

[28] House Journal, 1868, pp. 8–9.

[29] Florida Acts, 1848, c. 229, Art. I, Sec. 3.

[30] Florida Acts, 1832, No. 94, Sec. 10.

[31] Florida Acts, 1846, c. 87, Sec. 9.

[32] Florida Acts, 1865, c. 1474, p. 37.

> God, and a necessity of their condition * * *.[33]

The Assistant Superintendent of Education of the Freedmen's Bureau, however, stated that the "negro should be educated, at least in the rudiments of a common school education," but that the expense should be borne by the Negroes because of "the embarrassment of the finances of the State." He said:

> I am convinced that one of the best means to make the freedmen contented, industrious and reliable as a laboring class, is to provide schools for their children.[34]

In 1866 the legislature passed "An Act Concerning Schools for Freedmen." This provided for a Superintendent of Common Schools for Freedmen, who was directed "to establish schools for freedmen, when the number of children of persons of color, in any county or counties will warrant the same * * *" to the extent that funds permitted. The cost was to be defrayed by tuition fees collected from each pupil and by a poll tax of $1.00 on "male persons of color" between the ages of 21 and 55.[35]

The Governor's message to the 1868 legislature recommended enactment of a law to organize a public school system, but made no reference either to Negro education or to the Fourteenth Amendment.[36] At that time there were in existence private schools for both races, schools for freed-

[33] Sen. J., 1865, pp. 59–60.
[34] House J., 1865, p. 221.
[35] Florida Acts, 1865, c. 1475, p. 37.
[36] House J., 1868, p. 60.

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men operated under the auspices of the state, and schools operated under the auspices of northern benevolent associations.[37]

The Constitution of 1868 contained the following provisions relative to education in the form recommended by the Convention's Committee on Education:

ARTICLE IX

> SECTION 1. It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.
>
> Sec. 2. The legislature shall provide a uniform system of common schools, and a university, and shall provide for the liberal maintenance of the same. Instruction in them shall be free.

It was also declared in Article XVII, Section 28, that:

> There shall be no civil or political distinction in this State on account of race, color, or previous condition of servitude, and the legislature shall have no power to prohibit by law any class of persons, on account of race, color, or previous condition of servitude, to vote or hold any office, beyond the conditions prescribed by this constitution.[38]

On January 30, 1869, the Governor approved "An Act to establish a Uniform System of Common Schools and a University." It directed that

> There shall be established, and liberally maintained, a uniform system of public

[37] Report of the Superintendent of Public Schools, Fla., House J., 1869, pp. 76–85.

[38] See Convention Journal, pp. 69–71, 101.

> instruction, free to all the youth residing in the State between the ages of six and twenty-one years, so far as the funds will admit, as hereinafter provided.

The Board of Public Instruction of each county was required

> To locate and maintain schools in every locality in the county where they may be needed, to accommodate, as far as practicable, all the youth between the ages of six and twenty-one years during not less than three months in each year.

There was no specific reference to the question of separate or mixed schools.[39]

In 1885 the Constitution was amended to provide that

> White and colored children shall not be taught in the same school, but impartial provision shall be made for both. [Art. XII, Sec. 12]

In 1887 the Legislature enacted a statute requiring separate schools.[40]

CIVIL RIGHTS LEGISLATION

In 1870 it was made illegal to deny the right of conveyance to any person. It was further provided that "all persons shall have equal privileges of accommodation and conveyance on all railroads, steamboats, stages, and other public means of travel in this State".[41]

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[39] Florida Laws, 1869, c. 1686, pp. 7–19.

[40] See Florida Laws, 1887, c. 3692, p. 36, for separate normal schools.

[41] Florida Laws, 1870, c. 1744, p. 35.

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The Civil Rights Act enacted in 1873 made specific reference to schools. It provided:

> SECTION 1. That no citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by inn-keepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theatres or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law, also of cemetery association and benevolent associations, supported or authorized in the same way: *Provided,* That private schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.
>
> * * * * *
>
> SEC. 3. That every discrimination against any citizen on account of color by use of the word "white" or any other term in any law, statute, ordinance, or regulation, is hereby repealed and annulled.
>
> SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as juror in any court in this State by reason of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the

> reason above named, shall, on conviction thereof, be guilty of a misdemeanor, and be fined not less than one hundred nor more than one thousand dollars.
>
> SEC. 5. All acts conflicting with the provisions of this act are hereby repealed.[42]

Similarly, in the following year in an act defining the privileges and obligations of hotel keepers, one section provided that "nothing in this Act shall be construed so as to discriminate in relation to the rights of guests in consequence of race or nationality."[43]

GEORGIA

Georgia rejected the Fourteenth Amendment in November 1866 with protests directed largely at the power granted to Congress; the Amendment was ratified in July 1868 without discussion, and again in February 1870 because of a question as to the legitimacy of the membership of the 1868 legislature. In 1866 public schools for whites only had been established. The Constitution of 1868 made no reference to separate schools, but the legislature in providing a system of public education in 1870 required segregation.

RATIFICATION

Georgia rejected the Fourteenth Amendment in 1866. Governor Jenkins recommended rejection, in part because of the power it gave to Congress, saying:

> The fifth and last section empowers the Congress "to enforce, by appropriate

[42] Florida Laws, 1873, No. 13, c. 1947, p. 25.
[43] Florida Laws, 1874, c. 1999, p. 65.

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> legislation," the provisions of the Amendment. It will be contended that they are the proper judges of what constitutes appropriate legislation. If, therefore, the Amendment be adopted, and a fractional Congress, from which the Southern States, chiefly interested in it, are excluded, be empowered "to enforce it by *appropriate legislation,*" what vestige of hope remains to the people of those States? Nay, more, what semblance of Republican Government can the true patriot of the North discern in such a state of affairs? Yet, that is the point to which we seem to be drifting; * * *.
>
> I will not further analyze this Amendment, equally novel and unjust.[44]

The report of the Joint Committee of the Legislature on the State of the Republic, recommended rejection but did not discuss the substance of the amendment. It based its recommendation on the argument that the Amendment had not been legally proposed, since it came from a Congress in which the Southern States were not represented.[45] The recommendation was accepted by both Houses on November 9, 1866.[46]

Georgia's subsequent ratification was without discussion. On July 21, 1868, the House of Representatives and the Senate received the following message from the Governor:

> By the provision of the act of Congress entitled "An act to admit the States of North Carolina, South Carolina, Louisiana,

[44] Senate Journal, 1866, p. 8; House Journal, 1866, p. 9.

[45] Senate Journal, 1866, pp. 65–71; House Journal, 1866, pp. 61–68.

[46] Senate Journal, 1866, p. 72; House Journal, 1866, p. 68.

> Georgia, Alabama, and Florida, to representation in Congress," passed June 25th, 1868, you are required to duly ratify the amendment to the Constitution proposed by the 39th Congress, and known as Article 14, and by solemn public act declare the assent of the State to that portion of the act of Congress which makes null and void the first and third subdivisions of section 17 of the fifth article of the State Constitution, except the proviso to the first subdivision, before the State shall be entitled and admitted to representation in Congress as a State of the Union.
>
> Copies of the said act of Congress, and of the said proposed amendment to the Constitution, are herewith transmitted.[47]

The House immediately approved ratification by a vote of 89 to 69.[48]

In the Senate, the proceedings were equally perfunctory. The Senate rejected a motion to refer the question to committee and approved ratification by a vote of 27 to 14.[49]

Shortly thereafter the Legislature of 1868 excluded its Negro members. The acts of the Legislature were held invalid by Congress on the ground that it contained members disqualified under the Reconstruction Acts. Pursuant to congressional act of December 22, 1869, the Legislature was reconvened with its original Negro members present and its disqualified white members excluded.[50] On February 2, 1870, the Four-

[47] House Journal, 1868, p. 49.

[48] *Id.*, pp. 49–50.

[49] Senate Journal, 1868, pp. 44–46.

[50] See message of Governor Bullock, Senate Journal, 1870, pp. 47–66; House Journal, 1870, pp. 52–72.

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teenth Amendment was again ratified with no discussion.[51]

SCHOOLS

The Georgia Legislature of 1866 provided for a system of free public schools open only to free white inhabitants.[52]

The Georgia Constitution of 1868 contained the following provisions:

> ARTICLE I. SEC. 2. All persons born or naturalized in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State, or deny to any person within its jurisdiction the equal protection of its laws. And it shall be the duty of the General Assembly, by appropriate legislation, to protect every person in the due enjoyment of the rights, privileges and immunities guaranteed in this section.
>
> ARTICLE VI. SEC. 1. The general assembly, at its first session after the adoption of this constitution, shall provide a thorough system of general education, to be forever free to all children of the State, the expense of which shall be provided for by taxation or otherwise.

In the Constitutional Convention the Committee on Education had proposed a provision authorizing separate schools, which read as follows:

> SEC. 2. Separate departments in all the Public Institutions of the State, and separate Schools, may be established by law, for

[51] Senate Journal, 1870, p. 70; House Journal, 1870, p. 74.
[52] Georgia Laws, 1866, No. 108, p. 59.

> such scholars as may be required to occupy such separate departments or Schools: *Provided,* That no partiality shall be shown in such regulations.[53]

A substitute was offered which referred to "separate public institutions for learning" as distinguished from the "Common Schools."[54] Neither this proposal nor that of the Committee on Education was accepted, and the Constitution as adopted contained no reference to "separate schools."[55]

The Legislature of 1870 provided for a system of public education for all but specified separate schools for white and colored.[56] It was provided

> That it shall be the duty of the trustees, in their respective districts, to make all necessary arrangements for the instruction of white and colored youth of the district in separate schools. They shall provide the same facilities for each, both as regards school-houses and fixtures, and the attainments and abilities of teachers, length of term-time, etc.; but the children of the white and colored races shall not be taught together in any sub-district of the State.[57]

Attempts in the House to eliminate racial references had been defeated.[58]

Substantially similar provisions were repeated in the 1871 and 1872 revisions of the school law.[59] Finally, the Constitution of 1877 specified that

[53] Convention Journal, p. 151.

[54] *Id.*, p. 477.

[55] *Id.*, pp. 479–483.

[56] Georgia Laws, 1870, No. 53, pp. 49–61.

[57] *Id.*, § 32.

[58] See House Journal, 1870, pp. 434, 449.

[59] Georgia Laws, 1871, No. 7, pp. 279–281; Georgia Laws, 1872, No. 71, pp. 69, 72.

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> The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races.[60]

Governor Bullock, in August 1870 in recommending the establishment of a university for colored students, based his recommendation on "justice" and "good policy," "so that separate facilities shall be afforded to colored students, equal in kind and character to those now furnished to white students in the State University of Athens." [61]

CIVIL RIGHTS LEGISLATION

The same legislature which enacted the public school law of 1870 required equal facilities on common carriers. The "Act to regulate Common Carriers in this State" provided in part that

> * * * all common carriers of passengers for hire in the State of Georgia shall furnish like and equal accommodations for all persons, without distinction of race, color or previous condition.[62]

Another Act enacted in 1870 required

> That the different railroads in this State acting as public carriers be required to furnish equal accommodations to all, without regard to race, color or previous condition, when a greater sum of fare is exacted than was demanded prior to January 1, 1861, which was at that date half fare for persons of color.[63]

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[60] Art. VIII, Sec. I.

[61] House Journal, 1870, p. 416.

[62] Georgia Laws, 1870, No. 258, p. 398.

[63] Georgia Laws, 1870, No. 289, p. 427.

ILLINOIS

Illinois ratified the Fourteenth Amendment in January, 1867. At that time Negroes were excluded from the public schools and were virtually without educational facilities. In 1872 a school law was enacted which provided for public education for all children, without reference to their race or color. Nevertheless, segregated schools were established in some areas; in other areas the schools were racially integrated. In 1874, Negro children were held entitled to admission to white schools where separate equal facilities were not available. *Chase* v. *Stephenson,* 71 Ill. 383. In 1882 segregated schools were held to violate the state law, without reference to the Fourteenth Amendment. *People* v. *Board of Education,* 101 Ill. 308. In 1865 Negroes were qualified as witnesses in court proceedings, but until 1870 they could not vote, serve as jurors, or serve in the militia.

RATIFICATION

Governor Oglesby, in his Message of January 7, 1867,[64] recommended ratification of the Fourteenth Amendment, which "after full and deliberate discussion, has received a most emphatic approval and indorsement by the people of the State."[65] The Governor declared:

> * * * While in some sense it may be supposed the necessity for this amendment grew out of the late rebellion, and that it was framed with direct reference to the

[64] House J., Reg. Sess., 1867, p. 12.

[65] Sen. J., Reg. Sess., 1867, p. 40.

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state of facts resulting from the war, it is candidly submitted that there is not a principle asserted, a right declared, or a duty defined by it, that might not, with great propriety, have been engrafted upon the Constitution, without any reference to the war, and independently of and antecedently to it. Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights, except for treason or other infamous crime?

* * * * *

This is a government of the people, based upon certain and well defined principles of universal justice, carefully guarding and regulating the rights of all men—defining the distinctions between right and wrong in the light of equal liberty to all—and, as we all hope who love it, created to stand as long as human liberty shall be worth preserving. * * *

If the pending constitutional amendment shall fail, or if adopted shall still fail to secure these ends, other more adequate and comprehensive measures will be inaugurated, which shall not fail to restore and re-establish the government upon the basis of the indivisibility of the Union, the supreme authority of its laws, and the equal liberty of all its citizens in every State in the Union. * * * [66]

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[66] *Id.*, pp. 40–41.

The Senate, after debate (unreported), voted for ratification on January 10, 1867;[67] the House voted likewise on January 15, 1867, apparently without any debate,[68] and after an unsuccessful motion to refer the matter to the Committee on Federal Relations.[69]

SCHOOLS

The early school system of Illinois, which had its beginnings in 1825,[70] was on a voluntary local basis and was expressly for white children. In 1857 a system of free, state-supported schools was introduced, but colored children were excluded by implication. The school law of 1857 [71] provided that the public school funds were to be apportioned according to the number of white children in a district (section 16), and that in townships where there were persons of color, the school trustees were to refund to them the amount of school taxes collected from them (section 80), presumably so that they could use them for separate schools for colored children.[72]

The Superintendent of Public Instruction, in 1865, initiated a census of colored children of school age,[73] and found that they numbered approximately 6,000. In his Report to the 25th Session of the Legislature (which was to ratify the Fourteenth Amendment) he said:

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[67] *Id.*, p. 76.

[68] House J., Reg. Sess., 1867, p. 155.

[69] *Id.*, p. 154.

[70] Ill. P. L., 1825, p. 121.

[71] Ill. P. L., 1857, p. 259.

[72] Report of the Superintendent of Public Instruction for 1865–1866, p. 28, Ill. Doc., 1867, vol. 1.

[73] *Id.*, p. 27.

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> For the education of these six thousand colored children, the general school law of the State makes, virtually, no provision. By the discriminating terms employed throughout the statute, it is plainly the intention to exclude them from a joint participation in the benefits of the free school system. Except as referred to by the terms which imply exclusion, and in one brief section of the act, they are wholly ignored in all the common school legislation of the State. * * * I commend the subject to the attention of the General Assembly, as demanding a share of public regard.[74]

In 1868, the Superintendent, in reply to a questionnaire from the Indiana Superintendent of Public Instruction, made the following statement:

> Colored citizens are not allowed to vote. They are not entitled to the privileges of the Public School Fund, but all school taxes paid by them are required to be refunded. Their children are not by law admitted into the public schools, but in a few districts, where no objection is made, they are admitted.[75]

At the same time, Chicago, which operated its own school system, reported the following experience with separate and mixed schools:

> For one year, 1864–1865, the experiment of a separate colored school was tried. The school was disorderly and much trouble existed in the vicinity of the school. The Legislature in 1864–5, abolished this school, and since that time colored children have

[74] *Id.*, pp. 28–29.

[75] Report of the Superintendent of Public Instruction of Indiana for 1867–68, p. 26, Ind. Doc. 1867–68, vol. 1.

> been admitted to the public schools on an equality with other children. Not a word of complaint has come, with perhaps one or two individual exceptions, arising from seating pupils, a matter which is easily remedied. Colored children are admitted to our High School. One graduated last year. Others will graduate this year. All difficulty with the children of color has disappeared, except such as may be common to all children who have had no better advantages than themselves. We certainly have less frequent complaints than in the separate system."[76]

In his report to the 1869 legislature the Superintendent again urged that the school law be amended to provide for Negro education, saying:

> * * * I regard the longer presence in the school law of this great and free commonwealth, of provisions which now exclude 7,000 children, of lawful school age, from all the blessings of public education * * * as alike impolitic and unjust; the opprobrium and shame of our otherwise noble system of free schools. No State can afford to defend or perpetuate such provisions, and least of all the State that holds the dust of the fingers that wrote the proclamation of January first, 1863. Let us expunge this last remaining remnant of the unchristian "black laws" of Illinois, and proclaim in the name of God, and the Declaration of Independence, that *all* the school-going children of the State, without distinction, shall be equally entitled to share in the rich provisions of the free school system."[77]

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[76] *Id.*, pp. 26–27.

[77] Report for 1867–68, pp. 20–21, Ill. Doc. 1869, vol. 2.

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On the question of segregated or mixed schools, he said:

> Nor need any one be scared by the phantom of blended colors in the same school-room. The question of co-attendance, or of separate schools, is an entirely separate and distinct one, and may safely be left to be determined by the respective districts and communities, to suit themselves. In many places there will be but one school for all; in many others there will be separate schools. This is a matter of but little importance, and one which need not and cannot be regulated by legislation. Only drive the spirit of caste from its *intrenchments in the statute,* giving all equal educational rights *under the law,* and the consequences will take care of themselves.[78]

The Constitutional Convention which met in 1869 and 1870 amended the education article to provide for "a thorough and efficient system of free schools, whereby all the children of this State may receive a good common school education" (Article 8, sec. 1). In the Convention Mr. Washburn offered a resolution to the effect that the Constitution should provide for mandatory school segregation and for a separation of the funds obtained from taxation of white and colored persons.[79] He said:

> * * * In view of the prospective settlement of the negro suffrage question, it is eminently desirable that all other questions of public interest affecting that race should also be settled speedily and permanently, so as to close out, if possible, all future agita-

[78] *Id.*, p. 21.

[79] Illinois Constitutional Convention, 1869, Debates and Proceedings, p. 679.

> tion of the public mind upon this vexed question; and this can be done only by constitutional enactment.
>
> It cannot be denied or ignored that the question of mixed schools has greatly agitated the public mind in some portions of the State, that the question is every day growing more important, and that the agitation of the subject will continue and increase until it shall have been settled one way or the other by the organic law.
>
> * * * * *
>
> * * * The people demand of this Convention an opportunity to decide for themselves whether they will have mixed schools or separate schools for the two races; whether they will have social equality of the races, by compelling associations in the public schools of the State.[80]

The resolution was tabled.[80a] There was no discussion of education for colored children, and no provision for segregated schools was written into the Constitution.

Following the adoption of the Constitution of 1870, a school law was enacted in 1872, which provided that the public schools were to be available to all children.[81] It contained no reference to racial distinctions. The State Superintendent of Public Instruction construed the law as not prohibiting separate schools, but requiring equal facilities for Negroes.[82] The matter being left to the discretion of the local school authorities, seg-

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[80] *Id.*, pp. 679–680.

[80a] Id., p. 703.

[81] Ill. P. L., 1872, p. 700, 712, § 34.

[82] Report of the Superintendent of Public Instruction for 1871–72, pp. 115 *et seq.*, Ill. Doc., 1873, vol. 2.

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regated schools were established in some areas; in other areas the schools were racially integrated.[83] *Chase* v. *Stephensen,* 71 Ill. 383, decided in 1874, held that Negro children were entitled to admission to white schools if equal facilities were not available to them elsewhere; it left open the question whether separate schools, if equal, were permissible. The Fourteenth Amendment was not discussed.

The matter was taken up in the Legislature in 1874. Two proposals in favor of a statutory requirement for segregation in the public schools were defeated.[84] The Legislature in March, 1874, passed "An Act to protect colored children in their rights to attend public schools."[85] It provided:

> § 1. * * * That all directors of schools, boards of education, or other school officers whose duty it now is, or may be hereafter, to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child.[86]

This law, however, did not end segregated schools in the State. See *People* ex rel. *Longress* v. *The Board of Education,* 101 Ill. 308. In

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[83] Report for 1873–74, pp. 48 *et seq.*, 259 *et seq.* The Superintendent commented with approval on the opinion of the Ohio Court in *State* v. *McCann*, 21 Ohio St. 198. *Id.*, pp. 45–46.

[84] Sen. J., 1874, p. 177.

[85] Ill. Rev. Stat., 1874, c. 122, §§ 100–102.

[86] *Ibid.*

that case, decided in 1882, the Supreme Court of Illinois held that where a city was divided into several school districts, the assignment of colored pupils to one school exclusively rather than to the schools in their district was not authorized by state law. The court stated that it did not find it necessary to determine the applicability of the Fourteenth Amendment to the question.

LEGAL STATUS OF NEGROES

In 1865, the Legislature repealed a statute declaring Negroes and Indians incompetent as witnesses.[87] At the time the Fourteenth Amendment was ratified by the Legislature, the selection of jurors was expressely limited to whites,[88] and miscegenation was prohibited.[89]

In the Constitution of 1870 the word "white" was stricken out wherever it occurred. Attempts by a minority in the Constitutional Convention to restrict the militia to whites were defeated, the majority report stating that the Fourteenth Amendment prohibited such a restriction.[90]

A Civil Rights Act guaranteeing equal treatment in public accommodations and facilities was enacted in 1885.[91]

INDIANA

Indiana ratified the Fourteenth Amendment in January, 1867. Although the debates in the Legis-

[87] Ill., Laws, 1865, p. 105.

[88] Gross, Ill. Stats., 1818–1869, c. 58, sec. 1.

[89] *Id.*, c. 69, sec. 2.

[90] Constitutional Convention, 1870, Debates, vol. 1, pp. 860, 861–866.

[91] Ill. Laws, 1885, p. 64.

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lature were largely concerned with the question whether Negro suffrage was intended by the Amendment, one opponent of the Amendment stated that its effect would be to place colored children in the white schools. Negroes were exempted from school taxes and excluded from the public schools until 1869. The school law enacted in that year provided that separate schools were to be established for colored children and that other means of educating them might be used when in any particular area there were not enough colored children to justify a separate school. In *Cory* v. *Carter,* 48 Ind. 327 (1874), the Supreme Court of Indiana upheld these segregation provisions and held that the Fourteenth Amendment did not apply to segregation in public schools. In 1877 the maintenance of separate schools for colored children was made discretionary. In 1949 Indiana abandoned racially-segregated public schools. Until 1866, Indiana had imposed severe legal restrictions on the Negro. He could not immigrate into the state and he could not testify as a witness in court proceedings. In that year the Supreme Court of the state, in *Smith* v. *Moody,* 26 Ind. 299, held that these restrictions violated Article IV of the Federal Constitution and the Civil Rights Act of 1866. Negroes did not have the right to vote prior to the Fifteenth Amendment.

RATIFICATION

The Fourteenth Amendment was submitted to the Legislature in January, 1867. Governor Morton in his message of January 11, 1867, sum-

marized the provisions of the Amendment, and said:

> No public measure was ever more fully discussed before the people, better understood by them, or received a more distinct and intelligent approval. I will enter into no arguments in its behalf before this General Assembly. Every member understands it, and is prepared, I doubt not, to give his vote for or against on the question of ratification.[92]

He did not discuss the scope of Section 1 of the Amendment. As regards Negro suffrage, he did not favor the immediate granting of suffrage to men who but yesterday were slaves, and "the great mass of whom are profoundly ignorant and all impressed with that character which slavery impresses upon its victims."[93]

The Senate Committee on Federal Relations recommended the passage of the Joint Resolution to ratify the Fourteenth Amendment, without elaborating on it.[94] A minority of three dissented on the ground that the time was not propitious for a change in "the organic law of the government."[95]

The opponents of ratification objected to a change of the "whole organic structure of our Government" at a time when ten States were not represented in Congress, and denounced the Amendment as an attempt of the "Radical" party

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[92] House J., 1867, p. 48.
[93] *Id.*, p. 51.
[94] Sen. J., 1867, p. 77.
[95] *Ibid.*

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to enfranchise the Negroes in its own interest.[96] The Senate voted for ratification on the same day.[97]

The majority report of the Select Committee of the House recommended ratification with a brief statement along the lines of the Governor's statement.[98]

The minority report listed numerous objections to ratification.[99] With regard to the first section, that report said:

> The first section places all persons without regard to race or color, who are born in this country, and subject to its jurisdiction, upon the same political level, by constituting them "citizens of the United States, and of the States wherein they reside," thus conferring upon the negro race born in this country the same rights, civil and political, that are now enjoyed by the white race, and subject to no other conditions than such as may be imposed upon white citizens, including, as we believe, the right of suffrage.[1]

In the House debate Mr. Kizer, in criticizing the Amendment, stated that he had no use for "negro equality."[2] Mr. Ross, also of the opposition, was of the view that the "privileges and immunities" which the Negro would acquire under the Amendment would be

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[96] January 16, 1867, 9 Brevier Legislative Reports, 1867, pp. 44–45.

[97] Sen. J., 1867, p. 79.

[98] House J., 1867, p. 101.

[99] *Id.*, pp. 102–105.

[1] *Id.*, p. 102.

[2] 9 Brevier Legislative Reports, 1867, p. 79.

> * * * the same as those enuring to the white man. The negro may be President—for the amendment makes him a co-equal citizen with the white man * * *. [It] will repeal all our State laws making distinctions because of race and color * * * he said this amendment would simply operate as though it had struck out the word "white" from the State Constitution; so the blackest negro would become eligible to a seat—to the Speakership—in this hall. The blacks would sit with us in the jury box, and with our children in the common schools.[3]

A considerable portion of the House debate was concerned with the question whether the Amendment conferred suffrage on the Negro. The objection was also raised that the Amendment merely repeated the principles of the Civil Rights Bill. On this point, Mr. Dunn, a supporter of the Amendment, said:

> Well, we propose to make these principles permanent by writing them in the fundamental law * * * If you have not this amendment, and the civil rights bill be declared unconstitutional, the negro will be in a worse condition than he was before his emancipation.[4]

The House voted for ratification on January 23, 1867.[5]

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[3] Id., p. 80. This statement is the only one dealing expressly with the question of segregated schools. It was neither enlarged upon nor contradicted by any of the other speakers.

[4] *Id.*, p. 89.

[5] House J., 1867, p. 184.

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The Indiana Constitution of 1851 provided as follows:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement, and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all. (Art. VIII, sec. 1.)[6]

School laws were enacted in 1852[7] and 1855.[8] These were rendered largely ineffective by decisions of the state Supreme Court declaring that the provisions authorizing townships and incorporated cities to assess and levy taxes for the support of schools violated the state Constitution.[9] The law of 1852 provided for the enumeration of "children" of school age (sec. 12); the law of 1855 exempted "negroes and mulattoes" from the school tax and excluded their children from the school census and the benefits thereof (Sec. 1).

The "Act to provide for a general system of Common Schools" of March 6, 1865,[10] exempted

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[6] The school system then existing was on a voluntary basis, i. e., its adoption depended on a popular vote in the counties.

[7] Ind. Rev. Stat., 1852, vol. I, C. 98, p. 439.

[8] Ind. Laws, 1855, C. LXXXVI, p. 161.

[9] *Greencastle Township, Putnam County* v. *Black*, 5 Ind. 557 (1854), and *City of Lafayette* v. *Jenners*, 10 Ind. 70 (1857).

[10] Ind. Laws, 1865, p. 3.

Negroes from the school tax (sec. 1) and directed an annual census only of the white children of school age (sec. 14). Colored children were thus excluded from the school system. Governor Morton, in his message to the Extra Session of the Legislature on November 14, 1865, urged that the law should be amended to provide for inclusion of colored children in the enumeration, and that a proportionate share of the school fund be set aside for their education. He voiced the opinion that such provisions were required by the state constitution but beyond that, he declared, it was a matter of "natural justice", as well as of "sound political economy", to give the Negroes educational opportunities; finally, this would set an example to the Southern States.[11] He commented:

> I would not recommend that white and colored children be placed together in the same schools, believing, as I do, in the present state of public opinion, that to do so would create dissatisfaction and conflict, and impair the usefulness of the schools. I am informed that a system can be devised by which separate schools for the education of colored children can be successfully maintained in various parts of the State, and believe that justice, humanity and sound policy require that it should be done.[12]

The same arguments in favor of Negro schools were presented by the Superintendent of Public

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[11] 8 Brevier Legislative Reports, Extra Sess., 1865, p. 31.

[12] *Id.*, pp. 31–32.

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Instruction in his Report to the Legislature, dated December 31, 1866. Stating his awareness of the "extreme sensitiveness of public opinion," he suggested that separate schools be established whenever a sufficient number of Negro children reached school age in a given district, and that some other provision for their schooling be made where there were not enough children to warrant a school. He said:

> * * * *Therefore,* whereas it is clear; 1, that the colored man is to remain with us, i. e., in our State; 2, that he is being, and is to be, clothed with new and larger powers of citizenship, it follows that he is becoming a greater force in both society and the State. Any force generated in, or injected into, the social or political organism at once suggests the necessity of guidance or control. Uncontrolled, evil if not ruin will ensue. But in a popular government like ours, human force in the aspect now under consideration, is most easily controlled for the good of society and the State, when the party possessing the exerting of such force, is educated. The Constitution of our State broadly and explicitly recognizes the above truth as applied to governments. * * *
> Therefore, the above granted true, it follows that the welfare of the government, i. e., the State, requires the education of all the community, hence of the colored man. * * *[13]

A convention of freedmen met in November, 1866, "to devise measures to obtain full rights of citizenship." The participants demanded the

[13] Ind. Doc., 44th Reg. Sess., Part I, pp. 337–338.

vote for Negroes; declared they were not asking for "social equality", and "requested that colored children might be permitted to participate in the benefits of the public schools." [14]

In his message to the Legislature, in which he submitted the Fourteenth Amendment, Governor Morton also incorporated the recommendations for Negro education which he had made in 1865, merely adding that Negroes should be subject to like taxation with white persons for school purposes.[15]

The School Report for 1868 contains statements on the status of Negro education in fourteen Northern states, which the Superintendent had obtained in reply to an inquiry.[16] In commenting on this information, the Superintendent did not differentiate between those states that had non-segregated schools and those providing separate schools for colored children. He urged again the "natural and constitutional right" of the colored population to a share in the school funds which were mainly derived from grants of Congress and "evidently designed for the citizens of the State without regard to color." In this context he referred to the Fourteenth Amendment: whatever distinctions might have been previously made by the laws of the state, "they have been set aside by the emendations of our National Constitution and the 'Civil Rights Bill.' All citizens are now equal before the law." [17]

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[14] *Appleton's Annual Cyclopaedia*, 1866, p. 405.

[15] House J., 1867, pp. 41–42.

[16] Report, pp. 24 *et seq.* Ind. Doc., 1867–68.

[17] *Id.*, p. 23.

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In 1869, Governor Baker in his message to the Legislature declared:

> It is time that the illiberal policy heretofore pursued toward the colored people of the State in reference to the education of their children should be abandoned. * * *
>
> If there were no higher motives to urge us to do justice in this regard, the letter and spirit of our own Constitution would seem to make the path of duty so plain that none could err therein. * * *
>
> The precise manner in which the colored people shall be secured in their educational rights, is a question of minor importance, and one on which we can derive assistance from the experience of other States, in which the question has arisen and been settled.[18]

In 1869 the Legislature passed a law which admitted Negro children into the public school system.[19] It provided that all property subject to taxation for State and County purposes should be taxed for the support of common schools without regard to the race or color of the owner (Sec. 1); that all children, regardless of race or color, should be enumerated for school purposes, but there were to be separate lists for the races (Sec. 2); that colored children should be organized in separate schools, "having all the rights and privileges of other schools of the township"; that where there was not a sufficient number of colored

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[18] House J., 1869, pp. 66–67.

[19] "An Act to render taxation for Common School purposes uniform and to provide for the education of the colored children of the State," Ind. Laws, 1869 (Special Session), p. 41.

children in a district, districts might be consolidated; and that if there were not enough colored children within a reasonable distance, such "other means of education" should be provided for them "as shall use their proportion, according to numbers, of school revenue to the best advantage" (Sec. 3).

The legislative debates on the 1869 law indicate that it was a compromise between liberal proposals for admitting Negro children to the existing schools by local option [20] and proposals for limiting funds for Negro schools to the taxes collected from Negroes.[21] Both in the House and the Senate doubts were expressed as to whether the provisions which were finally adopted were compatible with the state Constitution,[22] but no reference was made to the Fourteenth Amendment.[23]

In 1874 the Supreme Court of Indiana in *Cory* v. *Carter,* 48 Ind. 327, upheld the validity of the segregation provisions of the law of 1869. It declared that they violated neither the State Constitution (relying on *Lewis* v. *Henley,* 2 Ind. 332, decided in 1850) nor the Fourteenth Amendment (approving the reasoning of the Ohio Supreme Court in *State* v. *McCann,* 21 Ohio St. 198.)

The Act of 1869 was amended in 1877, for the reason that "there are a large number of colored

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[20] 10 Brevier Legislative Reports, 1869, p. 193.

[21] 11 Brevier, 1869, Special Session, p. 115.

[22] E. g. 10 Brevier, 1869, p. 533; 11 Brevier, 1869, Special Session, pp. 115, 387.

[23] The same is true of the debate in the Senate of another education bill, which did not become law. 10 Brevier, 1869, pp. 490, 492 *et seq.*

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children in this State that have not now equal educational advantages with white children."[24] The establishment of separate schools for Negro children was entrusted to the discretion of the school trustees; where separate schools were not provided, colored children were to be admitted to the white schools; and when a child attending a colored school was qualified for a higher grade than that afforded by such school, he had a right to enter that grade in a white school, "and no distinction shall therein be made on account of race or color of such colored child" (Sec. 1).

Prior to the enactment of the school law of 1869, separate primary schools for colored children had been established in Indianapolis in 1868.

Ten years later the primary and grammar schools were segregated, but the high school was not.[25] In 1878 Fort Wayne and Logansport reported that they had abandoned segregated schools.[26] Other cities continued to maintain separate colored schools.[27]

Indiana abandoned segregated schools in 1949.[28]

LEGAL STATUS OF NEGROES

Until 1866, the Constitution and the laws of Indiana imposed severe restrictions upon Ne-

[24] Ind. Laws, 1877, p. 124.

[25] "Historical Sketches of City Schools" appended to the 26th Report of the Superintendent of Public Instruction for the years 1877 and 1878, pp. 313 *et seq.*, at 316. Ind. Doc., 1877–1878, Part 2.

[26] *Id.*, pp. 327, 339.

[27] *Id.*, pp. 346, 367, 371.

[28] Ind. Acts, 1949, c. 186.

groes.[29] It was unlawful for them to enter the State after 1851, and any Negro who entered the state illegally could not make a valid contract.[30] They could not testify in cases involving a white party.[31] In *Smith* v. *Moody,* 26 Ind. 299 (1866), the Supreme Court of Indiana declared that these provisions violated the United States Constitution (Article IV, § 2) and the Civil Rights Act of 1866. Miscegenation, however, remained a crime.[32] Negroes were not entitled to vote prior to ratification of the Fifteenth Amendment.[33]

IOWA

The Fourteenth Amendment was ratified by Iowa in March, 1868. In contrast with earlier legislation, the school laws enacted in the period from 1860 to 1866 did not mention race or color. Segregated schools, however, were maintained until 1868, when the state Supreme Court in *Clark* v. *The Board of Directors,* 24 Iowa 266, held that they violated both the school laws and the state constitution. Negroes were permitted to appear as witnesses after 1856. In 1868 the word "white" was eliminated from the Constitution, so that Negroes obtained, *inter alia,* the right to vote, hold office and be members of the militia.

[29] See Governor Morton's speech on *Reconstruction and Negro Suffrage* (September 1865, Pamphlet), p. 15.

[30] Constitution of 1851, Article XIII; "Enforcement Act" of June 18, 1952, Ind. Rev. Stat., 1852, c. 74.

[31] Ind. Laws, 1853, p. 60.

[32] Ind. Statutes, 1870, vol. II, part III, c. VI, sec. 47.

[33] Ind., Constitution, 1851, Article II, section 5.

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In *Coger* v. *The North West Union Packet Co.*, 37 Iowa 145 (1873), the Supreme Court held that the refusal of a steamship company to serve the colored plaintiff in the main cabin violated both the state constitution and the Fourteenth Amendment.

RATIFICATION

Governor Stone submitted the Fourteenth Amendment to the 12th General Assembly on January 14, 1868, with a brief recommendation for ratification.[34] The House voted in favor of ratification on January 27.[35] There was no debate. The Senate followed on March 9, 1868.[36] A motion by Senator Hollman to strike out the first, second and third sections of the Amendment was ruled out of order, as was a motion by Senator Fellows to have each section voted upon separately.[37]

SCHOOLS

Iowa's first constitution of 1846 provided that the general assembly was to establish "a system of common schools, by which a school shall be kept up and supported in each school district, at least three months in every year" (Art. 9, sec. 3). The first school law of the state[38] required that the common schools were to be "open and free alike to all white persons" of school age in each district

[34] Sen. J., 1868, pp. 32–33.
[35] House J., 1868, pp. 132–133.
[36] Sen. J., 1868, p. 265.
[37] *Id.*, p. 264.
[38] Iowa Laws, 1846–47, c. 99.

(sec. 6).[39] The school law of 1849 limited the school census to white persons (sec. 51) and exempted the property of "black and mulattoes" from taxation for school purposes (sec. 88).[40]

The Constitutional Convention of 1857 debated an amendment to make the public schools "equally open to all."[41] It was opposed on the ground that it would entitle colored children to "mingle" with white children in the common schools.[42] Its proponents argued that separate schools for Negroes would satisfy the requirement of equality.[43] The amendment was tabled, as was another which would have restricted the common schools to white children.[44] The Constitution, as adopted in 1857, required "the education of all the youths of the State, through a system of Common Schools" (Art. IX, sec. 12).

In 1858, the legislature enacted a school law,[45] which directed the district school boards to "provide for the education of the colored youth, in separate schools, except in cases where by the unanimous consent of the persons sending to the school in the sub-district, they may be permitted to attend with the white youth" (sec. 30, subd. 4).

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[39] The school law of the Territory (Iowa Laws, 1839–40, c. 73) had no reference to race or color.

[40] Iowa Laws, 1848–49, c. 80.

[41] Debates of the Constitutional Convention, 1857, pp. 825 *et seq.*

[42] *Id.*, pp. 825–826.

[43] *Id.*, pp. 826, 829.

[44] *Id.*, pp. 832 *et seq.*

[45] An Act for the Public Instruction of the State of Iowa, Laws, 1858, c. 52.

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This act was, however, declared unconstitutional in the same year that it was enacted, on grounds not related to the provisions concerning separate schools for colored children.[46] Subsequent legislation in 1860, 1862, and 1866 made provision for public education with no mention of race or color.[47] As appears from *Clark* v. *Board of Directors,* 24 Iowa 266 (1868), segregated schools were, nevertheless, maintained. The court held that this violated both the state constitution and the state school laws. The court stated that the general discretion of the school boards in administering the schools was "limited by the line which fixes the *equality of right* in all the youths between the ages of five and twenty-one years" (p. 275) [italics as in original]. The court did not discuss the relevance of the Fourteenth Amendment to the question. The decision was followed, without further discussion, in *Smith* v. *The Directors,* 40 Iowa 518, and *Dove* v. *The Independent School District,* 41 Iowa 689, both decided in 1875.

LEGAL STATUS OF NEGROES

The Iowa Constitution of 1857 limited the right of suffrage to white male citizens (Art. 2, sec. 1). Since they were barred from voting, Negroes were also excluded from juries.[48] The Constitution, however, secured their right to testify in court (Art. 1, section 4).

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[46] *District Township of the City of Dubuque* v. *City of Dubuque,* 7 Iowa 262 (1858).

[47] Rev. Laws 1860, c. 88, secs. 2023 *et seq.;* Laws 1862, c. 172, sec. 12; Laws 1866, c. 143, sec. 3.

[48] Iowa, Revision of 1860, sec. 2720.

In November 1868, the people voted on amendments to the State Constitution to strike the word "white" from the Constitution wherever it appeared, i. e., with regard to the right of suffrage (Art. II, Section 1), eligibility for the House of Representatives and the Senate (Article III, Sections 4, 5), census of inhabitants (Article III, Section 33), apportionment of Senators (*id.*, Section 34) and Representatives (*id.*, sec. 35), and service in the militia (Article VI, Section 1).[49] All these amendments were adopted.[50] Governor Merrill declared:

> Thus was finally accomplished an act of justice already too long delayed, the denial of which, on a former occasion had cast a stigma on a State which may truthfully boast that the foot of a slave has never pressed her soil.[51]

In 1873, the Supreme Court of Iowa held that the Fourteenth Amendment and the state constitution were violated by the refusal of a steamship company to serve meals to a colored person in the main cabin. *Coger* v. *The North West. Union Packet Co.*, 37 Iowa 145.

KANSAS

The Kansas legislature ratified the Fourteenth Amendment in January 1867, without debate in

[49] Sen. J., 1868, pp. 384–385; House J., 1868, p. 539.

[50] Governor Merrill's Message to the Thirteenth General Assembly (1870), pp. 46–47, Iowa Doc., 1868–69.

[51] *Id.*, p. 47. In the same message Governor Merrill recommended ratification of the Fifteenth Amendment to the Federal Constitution, which he believed marked "the final eradication of the last vestige of human bondage from the polity of the republic" (*Ibid.*).

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the House and without dissent in the Senate. The right of colored children to public education—which had been left open in the 1859 state constitution—was reinforced in 1867, although separate schools were permitted generally until 1876. In 1867 Negroes were barred from the polls, juries and the militia, and the electorate in that year rejected a Negro suffrage amendment to the state constitution.

RATIFICATION

Governor Crawford submitted the Fourteenth Amendment to the Legislature of 1867 with this comment:

> Whilst the foregoing proposed amendment is not fully what I might desire, nor yet, what I believe the times and exigencies demand, yet, in the last canvass, from Maine to California, it was virtually the platform which was submitted to the people; the verdict was unmistakable. The people have spoken on the subject, at the ballot-box, in language which cannot be misunderstood. And as we are but their servants, to do their will, it is now our unquestionable duty to accept it, and give it our cheerful and hearty support. * * *
>
> The abolition of slavery, the investment by the laws of Congress, of all persons born within the United States, or in case of foreigners, when naturalized, with citizenship, has precipitated upon us, as a practical question, sooner than many desired, the question of impartial suffrage. If we desired, we could no longer avoid the issue. Speaking for myself, I have no desire to avoid it, but propose to meet it, like many others that have demanded adjustment as a

> consequence of a successful suppression of the rebellion. I know of no reason, in law or ethics, why a loyal citizen that has shouldered his musket in defense of the National flag; that pays his taxes; that is amenable to the law in every respect, should be excluded from a participation in every right and franchise that others enjoy who are no more worthy because of their race or color.[52] * * *

The Amendment was adopted, without debate, by the House on January 10, 1867.[53] It was unanimously adopted by the Senate on January 11, 1867.[54]

SCHOOLS

The 1855 territorial laws provided for the establishment of common schools, which were to be "open and free for every class of white citizens" (Chap. 144, Sec. 1). The School Act of 1858[55] did not restrict school benefits to white children. It declared expressly:

> All district schools established under the authority of this act shall be free and without charge for tuition, to all children between the ages of five and twenty-one years, and no sectarian instruction shall be allowed therein.

The Constitution adopted in 1859[56] provided in Article VI, Section 2:

> The legislature shall encourage the promotion of intellectual, moral, scientific and

[52] Sen. J., 1867, p. 45.
[53] House J., 1867, p. 79.
[54] Sen. J., 1867, p. 76.
[55] Kan. Laws, 1858, c. 8, sec. 71.
[56] Kan. Laws, 1861, p. 46.

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> agricultural improvement, by establishing a uniform system of Common Schools, and Schools of a higher grade, embracing normal, preparatory, collegiate, and university departments.

As originally proposed in the Convention this section contained the additional language: "which schools shall be open for the admission of pupils of both sexes." [57] Attempts to add an express provision for exclusion of Negroes failed; it was said that the question was being left to the legislature.[58] Because some of the opposition feared, however, that the provision might be interpreted as giving Negroes a constitutional right to admittance to any school, the language was deleted.[59]

In 1861 a school law was enacted,[60] framed in general terms and without reference to color distinctions, except that it empowered local school authorities

> To make such order as they deem proper for the separate education of white and colored children, securing to them equal educational advantages.[61]

In 1862, the "Act to incorporate cities of the State of Kansas," [62] provided:

> The city council of any city under this act, shall make provisions for the appropriation of all taxes for school purposes

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[57] *Kansas Constitutional Convention* (1920), p. 170.

[58] *Id.*, pp. 175–183, 192.

[59] *Id.*, pp. 192–93.

[60] Kan. Laws, 1861, c. 76, Art. III, sec. 1 (10).

[61] This provision was identical with c. 181, Art. III, sec. 19 (10) of the Compiled Laws of Kansas, 1862, p. 802, at 807.

[62] Compiled Laws, 1862, Chapter 46, pp. 384 *et seq.*

> collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons (Art. 4, section 18).

This was amended in 1868. In "cities of the first class," the Board of Education was given power "to organize and maintain separate schools for the education of white and colored children."[63] With regard to "cities of the second class", it was provided that

> In each city governed by this act, there shall be established and maintained a system of free common schools, which shall be kept open not less than three nor more than ten months in any one year, and shall be free to all children residing in such city, between the ages of five and twenty-one years.[64]

The city boards of education were granted power, *inter alia,*

> to provide separate schools for the education of colored and white children.[65]

The 1861 general school law was amended in 1867 in respect of non-urban schools.[66] It defined the powers of the local school meetings as follows:

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[63] Revised Statutes, 1868, Chapter 18, Art. V, Section 75.

[64] *Id.*, Chapter 19, Art. V, section 54.

[65] *Id.*, section 57.

[66] Kan. Laws 1867, Chapter 123. The law was approved on February 20, 1867.

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> To make such order as they may deem proper for the education of white and colored children separately or otherwise, securing to them equal educational advantages (section 1 (10)).

The Legislature also in 1867 enacted a law to enforce the provisions for public education of Negro children.[67] This law provided:

> That any district board refusing the admission of any children into the common schools, shall forfeit to the county the sum of 100 dollars each for every month so offending, during which such schools are taught, and all moneys forfeited to the common school fund of the county under this Act shall be expended by the County Superintendent for the education of such children in the school district thus denied equal educational advantages: *Provided,* That any member of said district board who shall protest against the action of his said board in excluding any children from equal educational advantages shall not be subject to the penalty herein named (sec. 1).

In 1868, the State Superintendent of Public Instruction reported as follows on the enrollment of colored children:

> In some localities, a very great prejudice against the co-education of the races still exists. * * * In a few districts, schools for the white children, even, were entirely suspended, in order to deprive a few colored children of the "equal educational advantages" which the law guarantees to all the

[67] An Act to regulate Common Schools, Kan. Laws, 1867, Chapter 125. Approved February 26, 1867.

> children of the State, irrespective of caste or color. The true policy is to let the statute remain impartial. General intelligence will dissipate prejudices. Separate schools, in small districts, are a waste of means. Why should the highest institutions of the State be open to colored children, and the public schools be closed?[68]

In 1869, the Superintendent said in his Annual Report:

> The statistics of this year do not distinguish between colored and white children. In some districts the old prejudice still exists; but the law provides that the educational advantages extended to colored children shall be in all respects equal to those furnished to white children. By the ratification of the Fifteenth Amendment to the Constitution of the United States, the right of suffrage will be conferred upon colored men, and that will do much toward removing the prejudices which now exist. The sooner, perhaps, the educational statistics of a State drop the discrimination respecting the color of persons of school age, the better. Separate schools in nearly every case are bad economy, as well as a disgrace to republican institutions.[69]

The Special Report of the federal Commissioner of Education,[70] stated in regard to Kansas:

> The people of this State have from its earliest settlement been imbued with the spirit of freedom; and their legislation in

[68] Eighth Annual Report of the Superintendent of Public Instruction, pp. 3–4, Kans. Mess. & Doc., 1868.

[69] Annual Report, pp. 2–3, Kans. Mess. & Doc., 1869.

[70] 41st Congress, 2d Session, Ex. Doc. No. 315.

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> reference to educational matters has consequently been free from invidious discriminations as to the several races. Their schools are generally open to black and to white children alike; and it is only at a few points, where large numbers of negro emigrants are to be found, that schools for colored children exist separately. [71]

In 1876, the school laws were revised and consolidated. All provisions relating to segregation were eliminated,[72] while there were retained the provisions that the common schools were to be free for all children and those penalizing the exclusion of any child.[73]

In 1881, the power of a school board to direct segregation of colored children was denied in *Board of Education of the City of Ottawa* v. *Tinnon,* 26 Kans. 1. In this case the state Supreme Court referred with approval to several decisions of the Supreme Court of Iowa [74] and concluded:

> If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German

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[71] *Id.*, p. 346.

[72] Kan. Laws, 1876, c. 122, p. 238, in particular Article III, section 11 (powers of district meeting), Article X, section 4 (powers of boards of education in cities of first class), Article XI, section 9 (powers of boards in cities of second class). But in 1879 cities of the first class were again granted the power to establish segregated schools. Kans. Laws, 1879, c. 81, sec. 1.

[73] *Id.*, Article V, sections 3 and 4, Article XI, section 2.

[74] *Clark* v. *The Board of Directors*, 24 Iowa 266; *Smith* v. *The Directors*, 40 Iowa 518; *Dove* v. *The Independent School District*, 41 Iowa 689.

> descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power. We have conceded, for the purposes of this case, that the legislature has the authority to confer such power upon school boards; but in our opinion the legislature has not exercised or attempted to exercise any such authority (pp. 22–23).

The court also touched upon the effect of the Fourteenth Amendment on racial segregation in public schools, as to which it concluded:

> The question whether the legislatures of states have the power to pass laws making distinctions between white and colored citizens, and the extent of such power, if it exists, is a question which can finally be determined only by the supreme court of the United States; and hence we pass this question, and proceed to the next, over which we have more complete jurisdiction (p. 18).

Judge Brewer (later a justice of the United States Supreme Court), dissented "entirely from the suggestion that under the fourteenth amendment of the federal constitution, the state has no power to provide for separate schools for white and colored children. I think, notwithstanding such amendment, each state has the power to classify the school children by color, sex or otherwise, as to its legislature shall seem wisest and best" (pp. 23–24). He also held that the board, under the general authorization of

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the school law of the state, had the power to make such classifications.

LEGAL STATUS OF NEGROES

Article V, section 1, of the Constitution of 1859 restricted suffrage to white males. The selection of juries was limited by statute to qualified electors.[75] In 1867, the year in which the Legislature ratified the Fourteenth Amendment, the electorate rejected amendments to give the vote to Negroes and to women.[76]

The earlier territorial law of 1855 declaring Indians and Negroes incompetent as witnesses[77] appears nowhere to have been expressly repealed, but it does not appear in the General Statutes compiled in 1868.

KENTUCKY

Kentucky never ratified the Fourteenth Amendment. It rejected the Amendment in January, 1867 by large margins in both houses. The school system since 1838 had provided for education of white children only, and colored persons were exempt from some of the taxes which supported it. In 1867 colored schools were authorized, but they were not generally established until mandatory provisions were enacted in 1874. The 1874 legislation expressly provided for segregated schools. Negroes were barred from voting and serving as jurors.

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[75] Kans. Gen. Stat., 1868, c. 54, sec. 2.

[76] *Kansas Constitutional Convention* (1920), App., p. 594.

[77] Kans. Terr., Laws, 1855, c. 165, Sec. 22.

RATIFICATION

Governor Bramlette, in his message to the Kentucky Legislature on January 4, 1867, urged that the Fourteenth Amendment had not been constitutionally proposed since the Southern States were not represented in Congress and the necessary two-thirds of the Congress was not present.[78] The House of Representatives on January 8, 1867, rejected the Amendment by a vote of 67 to 27,[79] and the Senate, on the same day, by a vote of 24 to 9.[80] There appears to have been no debate by either house.

SCHOOLS

In 1830, the Kentucky legislature passed an act "to encourage the general diffusion of education," [81] which permitted, but did not require, the counties of the Commonwealth to establish public schools. While the statute did not expressly exclude Negroes from the schools, the authorization of a tax upon every "white male inhabitant" [82] implied that Negro education was not contemplated. Kentucky, unlike many slave States, had no prohibition against the instruction of Negroes.[83]

The permissive school system was made mandatory in 1838. There was an express provision for

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[78] House Journal, 1867, p. 22.

[79] *Id.*, pp. 60–65.

[80] Senate Journal, 1867, pp. 62, 63, 64.

[81] Ky. Laws, 1829–30, c. 387.

[82] *Id.*, sec. 22.

[83] Special Report of the U. S. Commissioner of Education (1871), p. 346, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, no. 315.

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the allotment of state funds on the basis of the number of white children in the county,[84] although the county was still empowered to tax all inhabitants. When the school law was revised in 1864, these provisions were retained.[85]

In 1867, an act "for the benefit of negroes" was passed. This provided for the application of all capitation taxes paid by colored persons, as well as an authorized additional tax of two dollars on each Negro male, to the support of colored paupers and the education of colored children.[86] With these funds the counties were permitted to establish colored schools towards the support of which the state would also contribute.[87]

The 1870 act "to revise, amend and reduce into one the laws relating to the common schools of Kentucky"[88] defined a common school as one which every white child between the ages of six and twenty years had the privilege of attending, whether contributing towards defraying its expenses or not (Art. X, sec. 1). No mention was made of colored schools in this law but its language implied that colored pupils were not admitted to the common schools.

A year later there was enacted "an act to cause good school houses to be erected in the 8th and 9th congressional districts."[89] This stated that it "shall not be construed so as in any way

[84] Ky. Laws, 1837–38, c. 898, sec. 18.
[85] Ky. Laws, 1863–64, c. 196.
[86] Ky. Laws, 1867, c. 1913, secs. 1, 2, 4.
[87] *Id.*, sec. 6.
[88] Ky. Laws, 1870, c. 854.
[89] Ky. Acts, 1871, Vol. 1, c. 1483, p. 51.

to apply to negroes and mulattoes." (Sec. 10.) Similarly, an act regulating the school district of Carrollton in Carroll County provided that only white children were to be admitted to the schools of the district.[90] Schools for Negroes were provided for in a few towns, e. g., Henderson (1871)[91] and Catlettsburg (1873).[92]

A uniform system of common schools for colored children was initiated by legislation enacted in 1874.[93] This legislation set up a school system similar to that existing for white children. Provision was made for Negroes to elect Negro trustees. A property and personal tax to be levied upon Negroes was imposed. Section 16 of the 1874 act provided

> That it shall not be lawful for any colored child to attend a common school provided for white children, nor for a white child to attend a common school provided for colored children.

The Report of the Superintendent of Education for the year ending June 30, 1875, noted the improvement in the status of Negro education:[94]

> We have had one year of experiment with our Colored Common School System, and the results have fully justified the wisdom of its inauguration. * * * (p. 105.)
>
> The white system had quite as feeble a beginning as the colored. It is a growth. From a rudimental cell it has developed

[90] Ky, Acts, 1872, Vol. II, c. 594.

[91] Ky. Acts, 1871, Vol. I, c. 1478, p. 388.

[92] Ky. Acts, 1873, Vol. II, c. 653, p. 193.

[93] Ky. Acts, 1873–74, c. 521.

[94] Report of the Superintendent of Education, pp. 105, 106, Ky. Doc. 1874–75.

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> into its present proportions. The lapse of the same number of years will, in the natural growth of sentiment and resources, put the colored system abreast with that of the whites, and every one should be willing, in patience and faith, to wait for the growth of that which cannot be forced by any hot-bed processes (p. 107).

In 1891 Kentucky adopted a constitution, Section 187 of which provided:

> In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.

LEGAL STATUS OF NEGROES

Negroes were barred from voting in Kentucky,[95] and excluded from juries.[96] In February 1866, the legislature passed two laws designed to give the Negro the right to marry one of his own race, and to institute civil and criminal proceedings. However, both laws specifically retained certain discriminations; the one made miscegenation a crime;[97] the other restricted the Negro's appearance as a witness to civil cases where only Negroes were involved, and to criminal actions in which a Negro was a defendant.[98] Negroes had previously been allowed to appear as witnesses in all cases brought by the Commonwealth for or against Negroes.[99]

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[95] Ky. Const., 1850, Art. II, sec. 8.
[96] Ky. Rev. Stats., 1867, c. 55, Art. III, sec. 2.
[97] Ky. Laws, 1866, c. 556, sec. 3.
[98] *Id.*, c. 563, sec. 3.
[99] Ky. Rev. Stats., 1867, c. 107, sec. 1.

LOUISIANA

The Louisiana legislature unanimously rejected the Fourteenth Amendment in February, 1867. In July, 1868, the Reconstruction legislature ratified the Amendment. Public schools were restricted to whites until the adoption of the Constitution of 1868 which expressly prohibited distinction on grounds of race, color or previous condition of servitude. This provision was incorporated in the school law of 1869. The Constitution of 1879 was silent on the subject. The 1898 Constitution expressly required separate schools. Racial distinctions, as well as discriminations, by any public conveyance or place of business were prohibited by the 1868 constitution, and all citizens were declared entitled to the "same civil, political, and public rights and privileges." The Legislature in 1872 memorialized Congress in favor of Senator Sumner's supplementary Civil Rights bill.

RATIFICATION

Louisiana rejected the Fourteenth Amendment in February, 1867, by a unanimous vote of both Houses,[1] despite the recommendation of Governor Wells that it be ratified.[2] In July, 1868, the amendment was ratified by a vote of 22 to 11 in the Senate and 57 to 3 in the House.[3] In the House

> Mr. McMillen moved that the resolution be put through its several readings.
> Carried,

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[1] Senate Journal, 1867, p. 20; House Journal, 1867, p. 23.
[2] Senate Journal, 1867, p. 5.
[3] Senate Journal, 1868, p. 21; House Journal, 1868, p. 8.

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> On the third reading, the yeas and nays were ordered, and the resolution was adopted by the following vote, as follows—yeas 57, nays 3.[4]

In the Senate there was more delay, but little debate except that Senator Bacon objected to ratification under duress.[5]

SCHOOLS

Prior to 1868, public education was for white children only. For example, the Legislature of 1867 authorized the cities of Baton Rouge and New Orleans to establish schools "for the gratuitous education of the white children residing therein."[6]

Education (of white children) had been recognized as a public responsibility. The Constitution of 1845 provided that

> The legislature shall establish free public schools throughout the State, and shall provide means for their support by taxation on property, or otherwise. (Title VII, Art. 134.)

That of 1852 specified "white children:"

> The general assembly shall establish free public schools throughout the State; and shall provide for their support by general taxation on property or otherwise; and all moneys so raised or provided shall be distributed to each parish in proportion to the number of free white children between

[4] House Journal, 1868, p. 8.

[5] Senate Journal, 1868, p. 21.

[6] Louisiana Acts, 1867, No. 34, p. 61; No. 107, p. 203.

> such ages as shall be fixed by the general assembly. (Title VIII, Art. 136.)

The 1864 Constitution did not specify:

> The legislature shall provide for the education of all children of the State, between the ages of six and eighteen years, by maintenance of free public schools by taxation or otherwise. (Title XI, Art. 141.)

Governor Wells in his message on January 28, 1867, in which he transmitted the Fourteenth Amendment with a recommendation for ratification,[7] urged education for the freedman. He made no reference to the possible applicability of the Amendment to this question:

> * * * I remind you of the claims of the freedman and his family to an equal participation in the benefits to be derived from this beneficent system * * * I regard it as the most important recommendation I can make to you, that an appropriation be made from the school fund for the establishment of colored schools in all the parishes under the general law.[8]

The Reconstruction Constitution of 1868 was specific that all children were to be educated, and went farther to prohibit segregated schools:[9]

> ART. 135. The general assembly shall establish at least one free public school in every parish throughout the State, and shall provide for its support by taxation or otherwise. All children of this State be-

[7] Senate Journal, 1867, p. 5.

[8] *Id.*, p. 7.

[9] The Constitution of 1879 (Art. 224) omitted the prohibition on separate schools. That of 1898 required separate schools (Art. 248).

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tween the ages of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.

ART. 136. No municipal corporation shall make any rules or regulations contrary to the spirit and intention of article 135.

The prohibition on separate schools in the 1868 Constitution was recommended by the majority of the Committee on Education, but a minority preferred to make no reference to the question.[10] The section on education was referred to the Committee on the Draft of the Constitution, which reported an article which did not refer to separate or mixed schools, but merely provided for education "without prejudice or partiality to any."[11] A minority of that committee agreed with the majority of the Committee on Education[12] and their recommendation was adopted by a vote of 61 to 12.[13] Objections to the proposal for mixed schools as reported contained no reference to the Fourteenth Amendment.[14]

The Legislature of 1868 did not enact a public school law, although it contemplated the establishment of free public schools.[15] In 1869 a compre-

[10] Convention Journal, pp. 60–1.
[11] *Id.*, p. 94.
[12] *Id.*, pp. 96, 107.
[13] *Id.*, pp. 200–202, 268–70, 275.
[14] *Id.*, pp. 201, 277, 290, 292.
[15] Louisiana Acts, 1868, No. 162, p. 212.

hensive "Act to Regulate Public Education in the State of Louisiana and to Raise Revenue for the support of the same" was enacted.[16] It contained no reference to color. A revision of the following year[17] specifically mentioned the constitutional requirement:

> * * * It shall be the duty of said Board of Education to make a general regulation whereby all schools established under this law, shall be according to the provisions of the Constitution, open to all children of this State between the ages of six and twenty-one years, without distinction of race, color, or previous condition, and in case of failing to pass such regulation, the members of said board shall forfeit the salary allowed them * * * (Sec. 5).

The question of education for Negroes and the further question of mixed schools was discussed without reference to the Fourteenth Amendment.

Governor Warmoth in his annual message for 1869[18] recommended school laws:

> It is to be regretted that the last Legislature did not pass some laws on the subject of education. At this time the school system is woefully defective. Outside of the parishes of Orleans and Jefferson public schools have always been a failure, and here at the capital, where it is in its greatest perfection, it is nothing to boast of. * * * There are not school houses enough in the city or State to accommodate half the children, while large numbers are almost totally denied the means of educa-

[16] Louisiana Acts, 1869, No. 121, pp. 175–189.
[17] Louisiana Acts, 1870, Extra Sess., No. 6, pp. 12–30.
[18] Louisiana Legislative Documents, 1869.

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> tion on account of color. The Legislature should give immediate attention to this subject, and provide means by which every child may receive an education without any distinction * * *[19]

The following year he stated the basis of education for the Negro as arising out of his enfranchisement:

> You need no lengthy and labored discussion to impress you with the importance of education. Without it the duties of a citizen are difficult, and we who have enfranchised a race, and have taught that American citizenship is the crowning glory of our Republican institutions, must appreciate that education is the first and most indispensable want of the citizen. Self-protection and self-government alike demand the enlightenment of the masses. The report of the Superintendent of Public Education will show you the impracticable character of the present law. The machinery is cumbrous and expensive * * *[20]

In the legislative debates references were made to the fact that in New Orleans colored children were placed in separate and inferior schools. This was condemned as a violation of the state constitution, no mention being made of the Fourteenth Amendment.[21]

The State Superintendent of Public Education discussed the question of mixed schools, again only with reference to the state constitution:

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[19] Message, p. 9.

[20] Message of Governor Warmoth, Jan. 4, 1870, p. 7, Louisiana Legislative Documents, 1870.

[21] Louisiana House Debates, 1869, pp. 209–10, 217–20, 246–7.

Than this, there is no subject connected with our system of education on which stronger feeling has been awakened, and none, the influence of which, has been more powerfully felt, as the opinions of the advocates and opponents of the present law have come into collision. Yet upon this point the constitution of the State and the laws passed under it, leave no discretionary power. Our schools, if they exist at all under the constitution, must be open, impartially, to all citizens of the State for the education of their children.

* * * * *

I believe that the subject of mixed schools is one which needs no new discussion. A republican State can make no distinction between those who are equally citizens, nor can any humiliating conditions be made in the bestowment of benefits to which all have an equal claim. Yet while standing thus firmly on the principle which underlies the present system, I believe it to be not in the nature of true statesmanship to ignore existing difficulties, nor to underestimate the obstacles which oppose themselves to measures in themselves desirable. In all great changes, whether political or social, where the old order is superseded by new and unfamiliar usages, time is needed for the public mind to adjust itself to the change * * *.

* * * * *

* * * For the present, this question will, in most localities, adjust itself if left to the unconstrained choice of those immediately interested; and it is doubtful if that liberty of choice should be interfered with by a forcible attempt to mix the schools in lo-

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> calities where such action is undesired by any.
>
> Still, the right of any child to admission into any school of the district in which he resides, and to which he is by law entitled, is one that must be enforced. The position I have taken, and on which I shall continue to act in administering the law, is, that "no public schools must be established from which any children are excluded by reason of color." [22]

At the end of the year 1870, he reported:

> There is, probably, no other State in the Union where the work of popular education, by a system of free schools, is conducted under the disadvantages which are encountered in Louisiana. Not only have we, in common with some sister States, to build the whole system anew, and to do this in the face of that general apathy, rising at times to positive antagonism, which prevails in the Gulf States, but that provision of our Constitution which forbids the establishing of public schools from which any child shall be rejected, on account of race, color or previous condition, excites a determined opposition on the part of many, who would otherwise cooperate in the opening of schools and in the raising of funds for their support.[23]

Article 224 of the Constitution of 1879 is silent on the question of race, and apparently permitted

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[22]Annual Report of the State Superintendent of Public Education for 1869, pp. 11–13, Louisiana Legislative Documents 1870.

[23]Annual Report of the State Superintendent of Public Education for the year 1870, p. 28, Louisiana Legislative Documents 1871.

segregation while not requiring it. Article 248 of the Constitution of 1898 made separate schools mandatory.

CIVIL RIGHTS LEGISLATION

In fields other than education the Constitution of 1868 prohibited not merely "discrimination," but also "distinction" based on race or color:

> ART. 2. All persons, without regard to race, color, or previous condition, born or naturalized in the United States, and subject to the jurisdiction thereof, and residents of this State for one year, are citizens of this State. The citizens of this State owe allegiance to the United States; and this allegiance is paramount to that which they owe to the State. They shall enjoy the same civil, political, and public rights and privileges, and be subject to the same pains and penalties.
>
> ART. 13. All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color.

The legislatures of this period attempted to enforce the non-discrimination provisions of Article 13 of the Constitution. Enforcement acts to prevent discrimination on account of race or color were passed in 1869, 1871, and 1873.[24] In addition Congress was requested to adopt Senator

[24] Louisiana Acts, 1869, No. 38, p. 37; 1871, No. 23, p. 57; 1873, No. 84, p. 156.

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Sumner's supplementary civil rights bill, pending in 1872.[25]

MAINE

Maine ratified the Fourteenth Amendment in January, 1867. Segregation by law never existed in the public schools of Maine, and the only racial law was an anti-miscegenation statute.

RATIFICATION

Governor Chamberlain, in addressing the Legislature on January 3, 1867, referred to the Fourteenth Amendment as follows:

> Imperfect as this was, as hazarding one of the very fruits of our victory by placing it in the power of the South to introduce into the Constitution a disability founded on race and color, still as it was the best wisdom of our Representatives in Congress, and at least a step in the right direction, at the same time that it smoothed the way for the returning South, and especially as it was the declared issue in the recent elections good faith doubtless requires us to support it.[26]

This same sentiment was voiced in the Senate by at least five Senators, all in favor of adopting the Amendment, and all maintaining that something more was needed.[27]

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[25] Louisiana Acts, 1872, No. 1, p. 29.

[26] House J., 1867, p. 20.

[27] Bangor Daily Whig and Courier, Jan. 17, 1867, p. 2, col. 3; McPherson's *Scrap Book*, *Fourteenth Amendment*, p. 68 (paper not named).

The House on January 11, 1867, adopted a resolution ratifying the Amendment,[28] and the Senate followed on January 16.[29]

SCHOOLS

Maine's public school laws, enacted under its original Constitution of 1820, do not appear to have made any distinction between colored and white children.

It has been stated that a separate school for Negroes was established in Portland at one time.[30]

LEGAL STATUS OF NEGROES

The only legislation found concerning Negroes is a miscegenation statute.[31] This statute continued after the Civil War,[32] and was repealed in 1883.[33]

MARYLAND

The Maryland legislature rejected the Fourteenth Amendment in January, 1867, following a message from the Governor that its effect would be "the ultimate enforcement of negro suffrage and negro equality." Although before the war there was no prohibition against education of Negroes, as late as 1872 there was no provision for Negro participation in public education, ex-

[28] House J., 1867, p. 78.

[29] Sen. J., 1867, p. 101.

[30] Woodson, *Education of the Negro Prior to 1861* (1915), p. 326, citing Adams, *The Neglected Period of Anti-Slavery in America*, Radcliffe College Monograph No. 14 (1908), p. 142.

[31] See *Bailey* v. *Fiske*, 34 Me. 77 (1852).

[32] Maine Rev. Stats. 1871, tit. 5, c. 59, § 2.

[33] Maine Laws, 1883, c. 203.

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cept in Baltimore. The public school system was established in 1865. That law provided public schools for white children and contemplated the establishment of separate schools for colored children. Maryland's "Black Code" was repealed in 1865 and 1867, but Negroes remained subject to disabilities in respect of voting and jury service.

RATIFICATION

The Maryland legislature in 1867 refused to ratify the Fourteenth Amendment. Governor Swann, in his message of January 4, 1867, urged rejection of the Amendment, in part because it was an attempt "to force equality between the races." He made no reference to education. His message stated in part:

> It cannot have escaped notice, that the proposed amendment, comprising five distinct propositions, embodies more than its language would seem to convey, and that the clause, to enforce these provisions, "by appropriate legislation," may leave the Southern and Border States at the mercy of the majority in Congress, in all future time—subversive, as I believe, of every principle of justice and equality among the States, and in times of high party excitement and sectional alienation, dangerous to the liberties of the people.
>
> I assume, without the fear of contradiction, that the effect of this Amendment of the Constitution as a condition precedent to the re-admission of the revolted States, will be the ultimate enforcement of negro suffrage and negro equality, by indirect legislation. * * *
>
> * * * * * *

The great obstacle in determining this vexed question of re-construction, is the future status of the negro race.

The Constitutional Amendments mean this and nothing else. The fear of disloyalty is not to be thought of for a moment; and the proposed change in the basis of representation, points to negro suffrage, and the equalization of the races.—There are four millions of negroes to be dealt with. If this element were insignificant or out of the way, there would be no talk of Constitutional Amendments. But the power of the South is to be held in check at least, if not appropriated by the extreme men of the dominant party.

My opposition to any further tampering with the Constitution, proceeds upon the honest belief, that Congress controls all the power needed to protect the country against disloyalty, whatever form it may assume, if any such exists, and that Constitutional Amendments, to force equality between the races, can only result in the ultimate annihilation of the weaker race. Some time ago, the absorbing topic among political agitators, was amalgamation: now it is "manhood suffrage," which means amalgamation, and the power to hold office, without regard to race or color, and every other attribute of perfect equality between the races. This will all do very well for the States of the North, where the colored race have never lived, and cannot be induced to emigrate. With the Southern border States, it is a question of social and political existence. In Maryland the negro would anon hold the balance of power, if in a few years, from the swelling current

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of immigration alone, he did not command the numerical ascendency.[34]

The Joint Committee on Federal Relations reported against ratification.[35] With respect to the first section, the report stated:

> * * * the Constitution of the United States declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In the judgment of your Committee it is not safe to confer any additional powers upon Congress touching this subject.
>
> * * * * * *
>
> The proposition to vest in Congress the power of supervision, interference and control over State legislation affecting the lives, liberty and property of its citizens and persons subject to its jurisdiction, is virtually to enable Congress to abolish the State governments.[36]

Ratification was rejected by a vote of 13 to 4 in the Senate [37] and 47 to 10 in the House.[38]

SCHOOLS

In Maryland in 1860, 87,189 Negroes were slaves, and 83,942 were free.[39] Although the freedmen were subject to various legal restrictions,

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[34] House Journal and Documents, 1867, Doc. A, pp. 21–22, 24–25; Senate Journal and Documents, 1867, Doc. A.

[35] Maryland Laws, 1867, pp. 879–911.

[36] *Id.*, pp. 893–894.

[37] Senate Journal, 1867, p. 808.

[38] House Journal, 1867, p. 1141.

[39] Special Report of the Commissioner of Education (1871), p. 352.

there had been no prohibition on their education, and at least one school for the children of freedmen had been in existence since 1835.[40]

The first public school law was enacted in 1865.[41] It provided for a system of free public schools for white children only:

> In every school district in each city and county established as hereinbefore provided, there shall be kept for at least six months, in each year, one or more schools according to population, which shall be free to all white youth over six and under nineteen years of age.[42]
>
> * * * * *
>
> All white youth between the ages of six and nineteen years, are entitled to free instruction in any of the public schools of the State * * *.[43]

It also envisaged the establishment of schools for colored children:

> The total amount of taxes paid for school purposes by the colored people of any county and the city of Baltimore, together with any donations that may be made, shall be set aside for the purpose of founding schools for colored children, which schools shall be established under the direction of the School Commissioners, and shall be subject to such rules and regulations as the Board of Education shall prescribe.[44]

A revision in 1868 contained similar provisions.[45]

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[40] *Id.*, p. 353.

[41] Maryland Laws, 1865, C. 160, pp. 269–301.

[42] *Id.*, p. 282.

[43] *Id.*, p. 285.

[44] *Id.*, pp. 295–296.

[45] Maryland Laws, 1868, C. 407, pp. 745–68.

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At the 1867 session of the legislature the Superintendent of Public Instruction submitted his First Annual Report for the year ending June 30, 1866.[46] He recommended education for Negroes as "the duty and interest of the State":

> * * * I believe it to be the duty and interest of the State to provide opportunities of education for all who live within her borders; and therefore repeat the recommendation, that separate schools for colored children to be under the control of the School Commissioners, be established in every district where 30 or more pupils will regularly attend.
>
> While nothing has yet been done for this class by the State, it is gratifying to know that the colored people, appreciating the advantages of education, are doing what they can for themselves, aided by liberal contributions from benevolent individuals, and the Baltimore Association. (Report, p. 64.)

In Governor Swann's message of January 15, 1868,[47] he regarded the success of the Democrats in the 1867 State elections as a repudiation of the Congressional plan of reconstruction. In the section of his message dealing with the topic, "Negro Suffrage and Negro Equality—Territorial Government for Maryland," he said in part that

> * * * The white man can never be educated to believe that the Negro is his equal, nor can he be persuaded, unless warped in his heretofore fixed impressions, that the

[46] House Journal and Documents, 1867, Doc. K.

[47] House Document A, Maryland Documents, 1868.

two races can be brought together in political or social fraternization, upon terms of equality, without degradation to his own * * *

Our obligation to clothe the Negro with the full privileges of citizenship cannot be claimed upon any reasonable ground, either of justice or humanity. "Equality before the Law" and "Manhood Suffrage," are phrases, in no wise applicable to us whose misfortune it has been to deal with a distinct and peculiar people, whose intrusion into our midst was the result of agencies which imposed no obligation beyond that which affected the rights of person and property, which the Negro is now enjoying to the fullest extent under our laws. This Government was never intended by its founders to be shared by the African race; it was no part of our compact of Union. It was a white man's government exclusively. The liberty to exercise the right of suffrage and to hold office was a function of the Government intended to be parted with or not, as the people in the aggregate might determine, in the mode pointed out in their organic law. * * * (pp. 18–19).

* * * * *

The change which has been wrought by the verdict of the people in the late elections, certain to be followed by more overwhelming expressions of the public sentiment, will enable us to deal more advisedly hereafter with this Negro issue; and will point to enlarged educational facilities, and the security of person and property, in lieu of amalgamation and forced equality with the white race, as the only privileges which in justice to themselves, as well as the peaceful working of our system, can be ad-

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> vantageously conferred upon the Negro race * * * (p. 22).

The Second Annual Report of the State Superintendent of Public Instruction (1868),[48] stated that

> No public organized plans have been adopted for the education of this class of children, except in the city of Baltimore. As reported last year, schools have been continued in the counties under the direction of the Baltimore Association for the moral and mental improvement of colored persons, supported by contributions from benevolent associations, and the payment of tuition fees by the parents or friends of the children educated.
>
> * * * * *
>
> The Schools for colored people in the city of Baltimore were adopted by the City Council in September 1867, and are now conducted under the supervision of the City School Commissioners.
>
> * * * * *
>
> Whatever prejudice may have existed in the minds of some of our citizens on this subject, is rapidly disappearing, and I think it may be asserted that while there is not at present a willingness to educate colored children at the public expense, there is a readiness to grant them such facilities and encouragements as will not prove a burden upon the resources of the State (pp. 42–43).

He then quoted the following from the report of Dr. S. A. Harrison of Talbot County:

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[48] Maryland Documents, 1868, No. W.

> "The question suggests itself, can and should anything be done by the County or State for the support of these schools? * * * Emancipation accomplished, education must follow or society suffers. In slavery the master stood in the relation of parent to his slaves. The State must now assume that relation. They are now children of the State, but children who will rend and tear their own mother if not properly educated * * *" (p. 44).

The Maryland Legislature next met in 1870, after the Fourteenth Amendment had become a part of the Constitution. Governor Bowie in his annual message recommended modifications in the school law. As to colored schools, he said the following:

> If at a period, immediate or remote, [the freed men] are to become citizens, possessed of the elective franchise, would not sound policy, then, dictate such education of the colored population as would prepare them intelligently to exercise the elective franchise, and as citizens to judge for themselves of the proper workings of our political system, and not be misled by the crafts and clamors of designing and unscrupulous politicians? Education among the colored people of the State would have a beneficial effect in rendering them more valuable in any position they may be destined to fill. It would doubtless render them, as a class, more virtuous and provident, and better members of the community in which they live. * * *[49]

In the 1870 Annual Report on the condition

[49] House Document A, January 20, 1870, pp. 14–15.

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of the public schools,[50] the reason for educating colored children was given as follows:

> It is evident that if the colored people are to be educated by the State, some more effective measure must be adopted. And in view of all the circumstances of the case, I do not believe that the counties can do a better or a wiser thing than to follow the example of Baltimore City, in educating the colored children in separate schools, but under the same general laws and superintendence as the white children. True, this will cost some money, but will it not cost more to educate them for the penitentiary and in it? (pp. 17–18).

The annual message of Governor Bowie in 1872 referred to the subject of Negro education as follows:

> The total amount of school taxes paid by the colored people, is set aside for the support of colored schools; but this amount is so small as to be practically worthless. Even when supplemented by additional donations from the school funds, it did not reach, in 1870, the sum of five thousand dollars. The kind and generous feeling entertained in this State for the colored race, who have been reared among us, and who, in their changed condition of circumstances, have conducted themselves, as a rule, with marked propriety, will dictate that the opportunity of at least a rudimental education should be offered them.[51]

In another part of the message he stated that the Ku Klux Act[52] was not authorized under the

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[50] House Document G, January 1870.

[51] Md. Docs., 1872, House Doc. B, p. 12.

[52] 17 Stat. 13.

Fourteenth Amendment,[53] but he made no reference to the Amendment in connection with education.

The Board of State School Commissioners in discussing education for Negroes in 1872 did so without reference to the Fourteenth Amendment:[54]

> There are no arguments in favor of the education of the people that do not apply with equal or greater force to the education of colored people, now that they are free, and are by Law entitled to the elective franchise. Every consideration of public policy, of philanthropy, and of justice demands that a beginning should be made in this direction as soon as the finances of the State will permit.

In April, 1872, the county school commissioners were required by statute to establish colored schools "provided the average attendance be not less than fifteen scholars;" such schools were to be supported by special appropriations as well as by all school taxes paid by Negroes.[55]

LEGAL STATUS OF NEGROES

Before the Civil War Maryland had had a "Black Code." Manumission was prohibited;[56] slaves might be brought into the state, but not free Negroes, other than personal servants;[57] strict regulations controlled meetings of Negroes,

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[53] Md. Docs., 1872, House Doc. B, pp. 65–80.

[54] Report of the Board of State School Commissioners, House Doc. V, p. 12 (March 1872).

[55] Md. Laws, 1872, c. 377, c. 18.

[56] Md. Code, 1860, art. 66, sec. 42.

[57] *Id.*, sec. 2, 44 *et seq.*

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and the circulation of abolition papers was prohibited.[58] There were special provisions relating to criminal offenses, contracts, and employment.[59] Negroes could not appear as witnesses in cases involving white persons.[60]

During the war and shortly thereafter most of these restrictions were removed. The provision against manumission went in 1864.[61] In 1865 and 1867, the entire part of the Civil Code dealing with Negroes, except for one section, was repealed.[62] The special provisions of the criminal law applicable to Negroes were also eliminated in 1867.[63]

Remaining in force, however, were the denial of suffrage,[64] and exclusion from juries.[65] The law against miscegenation, carrying stringent penalties, was repealed in 1867,[66] but in 1884, it was again made a crime punishable by imprisonment.[67]

MASSACHUSETTS

Massachusetts ratified the Fourteenth Amendment in March, 1867, over the opposition of a minority which objected mainly to the provisions of section 2. Prior to 1855, there was no provi-

[58] *Id.*, sec. 58 *et seq.*

[59] See, generally, art. 66 of the Code, and art. 30 (crimes).

[60] Md. Code, 1860, art. 37, sec. 1.

[61] Md. Laws, 1864, c. 105.

[62] Md. Laws, 1865, c. 166; 1867, c. 54.

[63] Md. Laws, 1867, c. 10, 64.

[64] Md. Const., 1867, art. I, sec. 1.

[65] Md. Laws, 1867, c. 329. There does not seem to have been any explicit statutory prohibition before this.

[66] Md. Laws, 1867, c. 64.

[67] Md. Laws, 1884, c. 264.

sion in the Massachusetts school laws referring to race or color, but schools for colored children were established in some cities. In 1845 a law was enacted giving a right of action to children unlawfully excluded from any public school. In *Roberts* v. *City of Boston,* 5 Cush. 198 (1850), the Supreme Court of the state declared that school segregation did not violate the equality before the law which was guaranteed by the Massachusetts Constitution. The Legislature in 1855 prohibited any racial distinctions in the admission of pupils to the public schools. Negroes always had the right to vote.

RATIFICATION

Massachusetts ratified the Fourteenth Amendment in March, 1867. Governor Bullock recommended ratification in his Inaugural Address of January 4, 1867, and at the same time advocated universal suffrage. He said:

> * * * Prominent among the provisions of this Article of amendment, I notice great principles of government, long recognized by the people of this Commonwealth, and endeared to them by the sanctions of their own history and usage.
>
> The first section guarantees to all persons born or naturalized in the United States, and subject to its jurisdiction, the right of citizenship and of civil equality before the law; and it protects them from any State legislation which might abridge their privileges, or deprive them of life, liberty or property, without due legal process. To this cardinal principle of a republican government I am unable to see how any citizen can reasonably object, who is himself in

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> sincerity of belief a supporter of the Democratic idea. As an abstract proposition, it is so manifestly an axiom of free government as to preclude the necessity of argument. In its special application to the condition of the insurgent States, its adoption by Congress was designed to give certain and enduring effect to the provisions of the Act, commonly called the Civil Rights Bill, passed at its last session, by the constitutional majority, notwithstanding the objections of the President. Whatever reasons existed at the time for the enactment of that bill, apply with redoubled force to the incorporation of its provisions into the organic law. The denial of its benefits and immunities to a large class of citizens in those States, rendering emancipation to a great extent a nullity, now demands its affirmation in the most solemn form, to the end that neither the Executive nor the judicial power, nor the local authorities, may render inoperative the deliberate verdict of the people.[68]

After discussing the other sections of the Amendment, the Governor stressed the need for Congressional action for the reconstruction of the Southern states. Such reconstruction could not be successful, he stated, unless complete justice was done to the Negroes through the grant of suffrage. No educational requirement such as was incorporated in the Constitution of Massachusetts should be attached to the franchise in the South:

> To the colored race, held in ignorance by local laws in regions where district schools

[68] Mass. Acts and Resolves, 1867, pp. 820–821.

> are unknown and public education scarcely exists in any form, with the law and the purse in the hands of determined opponents, suffrage thus limited would be practically unattainable.

Unrestricted franchise would be the surest method of securing education for the Negroes in the Southern states.[69]

The Amendment was referred to the House Committee on Federal Relations,[70] which reported on February 28.[71] The majority submitted an extensive discussion, with the conclusion

> that no exigency exists requiring immediate action upon an amendment open to the grave objections we have presented.[72]

They recommended that the matter be referred to the next legislature. The principal criticisms were directed against the second section. It was said that this perpetuated the "outrage" of Negro disfranchisement.[71a]

As to the first section of the Amendment, the majority found that

> It is difficult to see how these provisions differ from those now existing in the Constitution * * *.
>
> * * * The last clause, no State shall "deny to any person within its jurisdiction the equal protection of its laws," though not found in these precise words in the Constitution, is inevitably inferable from its whole scope and true interpretation.

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[69] *Id.*, p. 826.

[70] Jan. 5, 1867. House J., 1867, p. 12.

[71] Mass. House Doc., 1867, No. 149.

[71a] *Id.*, pp. 5–9, 17.

[72] *Id.*, p. 24.

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> The denial by any State to any person within its jurisdiction, of the equal protection of the laws, would be a flagrant perversion of the guarantees of personal rights which we have quoted. If it should be said that such denial has existed heretofore in spite of these guarantees, we answer that such denial would be equally possible and probable hereafter, in spite of an indefinite reiteration of these guarantees by new amendments.
>
> We are brought to the conclusion, therefore, that this first section is, at best, mere surplusage; and that it is mischievous, inasmuch as it is an admission, either that the same guarantees do not exist in the present Constitution, or that if they are there, they have been disregarded, and by long usage or acquiescence, this disregard has hardened into constitutional right; and no security can be given that similar guarantees will not be disregarded hereafter.[73]

Section 5 of the Amendment, the majority stated, "will not enlarge, nor its rejection curtail, the powers now conferred upon Congress by the Constitution." [74]

The minority recommended ratification, describing the Amendment as an extremely important "measure of support to loyal men, and of protection to the property of the country":

> * * * As a declaration of the true intent and meaning of American citizenship, it appeals to freemen everywhere. And while it cannot be considered as a finality in the work of reconstructing our federal

[73] *Id.*, pp. 2–4.
[74] *Id.*, p. 16.

> government, it is an advance in the direction of establishing unrestricted popular rights, which, when completed, will make our Constitution and laws accordant with the highest principles of free civil organization.[75]

The Report was debated in the House on March 12, 13, and 15.[76] Mr. Mason proposed to substitute the minority report for the majority report. He "did not believe that the rights of the colored man would be injured by its adoption." The people of the state were in favor of ratification; their representatives in Congress had voted for it, and the voters had sent them back to Washington satisfied with their action. Mr. Walker, in opposition, asked the legislature to consider where the country would be led by a provision "that carries undisguised on its face something that makes possible the introduction of serfdom in a country claiming to be republican." Referring to the Declaration of Independence and the Preamble to the Constitution, he said that all men who loved justice could readily assent to the Amendment were it not for the second section. Mr. Howe favored ratification because the Amendment "was a part of a grand scheme for the reconstruction of the South."[77]

On March 13, Mr. Dana spoke in favor of ratification. Section 1, he said, was

> a most important article; by it the question of equal rights was taken from the Supreme Courts of the States and given to

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[75] *Id.*, p. 25.

[76] Summaries of the debates are found in the *Boston Daily Advertiser* of March 13 to 16, and March 21, 1867.

[77] *Boston Daily Advertiser*, March 13, p. 4.

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> the Supreme Court of the United States for decision; the adoption of this article was the greatest movement that the country had made towards centralization and was a serious and most important step. This was taken solely for the reason of obtaining protection for the colored people of the South; the white men who do not need this article and do not like it, sacrifice some of their rights for the purpose of aiding the blacks.[78]

Mr. Avery opposed ratification because he felt that the Constitution was well enough as it stood; this was no time to make a grave change in the organic law. By the first section, Massachusetts, as well as other States, "was ousted from her protective jurisdiction"; by its adoption, all rights, civil and criminal, would be transferred from State courts to federal courts; in fact, all states' rights were taken away.[79]

The minority report for ratification was adopted by a vote of 120 to 22.[80] On March 15, after some further debate, the House voted for ratification, 120 to 20.[81]

In the Senate there was a brief debate on March 20, in which Senator Ball condemned any compromises "with sin or rebellion."[82] The vote, taken on the same day, was 27 to 6 in favor of ratification.[83]

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[78] *Id.*, March 14, p. 4.

[79] *Ibid.*

[80] House J., 1867, p. 207.

[81] Mass. Acts and Resolves, 1867, p. 787; McPherson, *Reconstruction*, p. 194.

[82] *Boston Daily Advertiser*, March 21, p. 1.

[83] Mass. Acts and Resolves, 1867, p. 787; McPherson, *Reconstruction*, p. 194.

The school laws of Massachusetts in the early part of the 19th century provided that the schools were to be "for the benefit of all the inhabitants of the town."[84] About 1820 the school committees in several towns, acting under their general authority to supervise the schools and determine the qualifications of pupils, established separate schools for colored children.[85] Shortly thereafter strong pressure was brought through petitions to the school committees to end segregation, and by 1845 this was accomplished in every town except Boston.[86] Little or no trouble was reported.[87]

In 1844, a petition was presented to the Boston School Committee to end segregation in the public schools. The Committee, with the support of the City Solicitor, refused to change its position.[88] The minority of the Committee filed a dissent:[89]

> It is the peculiar advantage of our republican system, that it confers civil equality and legal rights upon every citizen—that it knows no privileged class, and no degraded class—that it confers no distinction, and creates no difference * * * (p. 4).

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[84] See Mass. Rev. Stats., 1836, Pt. I, Tit. 10, c. 23, sec. 5.

[85] Woodson, *The Education of the Negro prior to 1861* (1915), p. 320.

[86] *Ibid.*

[87] *Ibid.* See also the letters printed in Report of the Minority of the Committee of the Primary School Board on The Caste Schools of the City of Boston (pamphlet, 1846).

[88] Woodson, *op. cit.*, p. 321.

[89] Report of the Minority, etc., p. 10, cited in note 87, *supra*.

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> The whole argument may be stated thus. The colored man, as any other citizen, has the right to send his child to the nearest school, subject only to restrictions for good and lawful reasons. But his race or his color is an unlawful and inhuman reason for restraining his right of choice; for our constitution and laws have everywhere repudiated all distinctions of citizens into classes, on this, or any other ground, and have pronounced all possible reasoning in support or justification of such distinctions insufficient and dangerous (p. 7).

However, the minority made the following reservation:

> When we deny that it is as advantageous for the colored children to attend the separate schools, as it would be, to be educated with the white children, we do not mean to be understood, that under other circumstances than exist here, they might not receive equal educational advantages from separate schools—but under the circumstances which do exist, we do deny, that they can receive equal benefit from separate which they would from the common schools. They are a small minority, less than two per cent of our city population. * * * (p. 10).

In 1845 the legislature passed a law providing that

> * * * Any child unlawfully excluded from public school instruction in this Commonwealth, shall recover damages therefor, in an action on the case * * * in any court of competent jurisdiction to try the same,

against the city or town in which such public school instruction is supported.[90]

The Senate committee which reported the measure stated that it resulted from petitions "for some remedy in the school law, that will extend to all children the same educational rights."[91]

In *Roberts* v. *City of Boston,* 5 Cush. 198 (1850), suit was brought against the City of Boston, under the 1845 law, for damages resulting from exclusion of a Negro pupil from a white school. The attorneys for the plaintiff, one of whom was Charles Sumner, argued that racial separation in the schools violated the principle of equality before the law, which was a part of "the spirit of American institutions, and especially of the constitution of Massachusetts" (p. 201).

The decision of the court, however, upheld the action of the city and suggested that the remedy was through legislation.

Legislative action followed in 1855. In that year the House committee, to which petitions seeking an

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[90] Mass. Acts and Resolves 1845, c. 214.

[91] Mass. Legis. Docs. 1845, Sen. No. 42. The law, according to Henry Wilson, who was one of its supporters, was one of the results of the abolitionist campaign for the admission of colored children to all schools without distinction. (Wilson, *History of the Rise and Fall of the Slave Power in America* (1872), pp. 496–98). In *Sherman* v. *Inhabitants of Charlestown,* 8 Cush. 160 (1851), Chief Justice Shaw said that it was probably passed in consequence of the court's decision in *Spear* v. *Cummings,* 23 Pick. 224 (1839), which had held that no action could lie where a child claimed to have been unlawfully excluded from a school. The report of the *Spear* case does not indicate the reason for exclusion.

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end to segregation had been referred, reported out a bill to that effect, stating:

> Your committee have been unable to find from an examination of the Constitution, states, or regulations pertaining to schools, any specific authority on the part of superintendents or committee men to exclude, by reason of color, race, or religious opinions, any portion of the children of the State from the benefits of common school education.[92]

While the Committee "fully recognize[*d*] the weight and influence" of the opinion in the *Roberts Case,* it adopted the following view contained in an earlier opinion of the City Solicitor of Salem:

> "It may be said that the free school, provided exclusively for colored children, is equally advantageous to them. I think it would be easy to show that this is not the case. But suppose it were so, it would in no way affect the decision of the question. The colored children are lawfully entitled to the benefit of the free schools, and are not bound to accept an equivalent. * * *"[93]

The Legislature amended the 1845 Act by adding as Section One the following:

> In determining the qualifications of scholars to be admitted into any public school or any district school in this Commonwealth, no distinction shall be made on account of the race, color or religious opinions, of the applicant or scholar.[94]

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[92] Mass., Legislative Documents, 1855, House No. 167, p. 2.

[93] *Id.*, p. 5.

[94] Mass. Acts and Resolves, 1855, ch. 256.

Massachusetts never excluded Negroes from voting.[95] In 1843 the miscegenation statute was repealed.[96]

MICHIGAN

The Fourteenth Amendment was ratified by Michigan in January 1867. In that year, the legislature provided for all children "an equal right to attend any school * * *." At this time Negroes could not vote in general elections nor serve as jurors. These restrictions were removed by 1870. In 1890, the Supreme Court of Michigan declared the "separate but equal" doctrine invalid under the common law, with respect to public accommodations and services. *Ferguson* v. *Gies,* 82 Mich. 358.

RATIFICATION

Governor Crapo submitted the Fourteenth Amendment to the Legislature on January 7, 1867, expressing a desire for unanimous ratification.[97] The Senate voted to ratify, 25 to 1;[98] the House, by a vote of 77 to 15, adopted the Senate proposal, with a slight modification in the procedural provisions to be followed,[99] and the change was accepted by the Senate.[1]

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[95] See Mass. Laws and Resolves, 1781, c. 25; Mass. General Statutes, 1860, c. 6, sec. 1.

[96] Mass. Acts and Resolves, 1843, c. 5.

[97] Sen. J., 1867, p. 34.

[98] *Id.*, p. 125 (Jan. 15).

[99] House J., 1867, pp. 181–82 (Jan. 16).

[1] Sen. J., 1867, p. 162 (Jan. 17).

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SCHOOLS

Free tax-supported schools were first established in Michigan while it was a territory.[2] In the years following this was replaced by a tuition system.[3] The Constitution of 1850 stated that beginning in 1855 schooling was to be free,[4] but this was not effected until 1869.[5] In the meantime, tax-supported schools in Detroit alone, established in 1842, continued in operation.[6]

In 1841 the Legislature authorized a separate school district in Detroit, not geographically described, but consisting of the city's colored children, who were thus excluded from the census of the other school districts in the city.[7] In 1842 a single district for the city was created but the Board of Education was given

> full power and authority * * * relative to anything whatever that may advance the interest of education, the good government and prosperity of common schools in said city and the public welfare concerning the same.[8]

In 1867, the Legislature declared that

> All residents of any district shall have an equal right to attend any school therein: *Provided,* that this shall not prevent the grading of schools according to the intel-

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[2] Mich. Terr. Laws, Vol. II, 1827, p. 472.

[3] See Pierce, *Historical Sketches of Education in Michigan* (1881), pp. 23–24.

[4] Art. XIII, Sec. 4.

[5] Mich. Laws, 1869, Act No. 110.

[6] Mich. Laws, 1869, Act. No. 233.

[7] Mich. Laws, 1841, Act No. 29.

[8] Mich. Laws, 1842, Act No. 70.

lectual progress of the pupils, to be taught in separate places when deemed expedient.[9]

In *People* v. *Board of Education,* 18 Mich. 400 (1869), the court held that this Act superseded the provision of the Detroit charter concerning segregation. In other districts the state school Superintendent reported in 1868 that "we have wiped caste from our school laws."[10]

LEGAL STATUS OF NEGROES

The original constitution under which Michigan was admitted to the Union in 1836 provided suffrage for white males only.[11] This requirement remained until 1870, when it was eliminated by the Legislature, a month after it ratified the Fifteenth Amendment.[12] While the 1836 provision was in force it also barred Negroes from juries.[13] Negroes never appear to have been disqualified as witnesses.

Marriage between whites and Negroes was prohibited at the time of the adoption of the Fourteenth Amendment.[14] In 1883, this prohibition was eliminated.[15]

In *Ferguson* v. *Gies,* 82 Mich. 358 (1890), the state Supreme Court rejected the "separate but equal" doctrine in so far as public accommodations and services were involved. The case arose from the refusal of a restaurant owner to serve

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[9] Mich. Laws, 1867, Act No. 34.

[10] See Report of the Superintendent of Public Instruction of Indiana for 1867–68, p. 26. Indiana Documents, 1867–68.

[11] Mich. Const., 1836, Art. II, Sec. 1.

[12] Mich. Laws, 1869, Jt. Res. No. 42, p. 425 (Apr. 5).

[13] Mich. Comp. Laws, 1857, Tit. 29, C. 128, Sec. 9; Tit. 39, C. 196, Sec. 1.

[14] Mich. Rev. Stats., 1846, C. 83, Sec. 6.

[15] Mich. Pub. Acts, 1883, Act No. 23.

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the Negro plaintiff at a table reserved for whites, although service in another part of the room was afforded. The trial judge had charged:

> While the defendant had no right to make a rule providing for an unjust discrimination, still he would have the right, under the law, to make proper and reasonable rules for the conduct of his business, and governing the conduct of his patrons; and whether this was a reasonable rule I will submit to you for determination. * * * By this term "full and equal" is not meant identical accommodations, but by it is meant substantially the same accommodation (p. 362).

The court held:

> The fault of this instruction is that it permits a discrimination on account of color alone, which cannot be made under the law with any justice (pp. 362–363).

The court held that the Michigan statute, enacted in 1885,[16] prohibiting the denial of "full and equal" privileges of inns, restaurants, eating houses, barber shops, public conveyances and theaters to any citizen, was only declaratory of the common law of the state; that prior to the time when Negroes were made citizens of the state, a discrimination such as that in the case at bar against a white citizen would have given him a claim for damages, and that the Negro had gained a similar right on becoming a citizen.

MINNESOTA

The Minnesota legislature ratified the Fourteenth Amendment in January, 1867. The public

[16] Mich. Pub. Acts, 1885, Act No. 130.

schools had always been open to Negroes. In 1867 Negroes were barred from voting or serving as jurors. These restrictions were removed by the adoption of a constitutional amendment in November, 1868.

RATIFICATION

The Governor addressed the Minnesota legislature on January 10, 1867. After asking for universal suffrage in the state, and expressing the hope that it would soon be adopted throughout the Nation, he submitted the Fourteenth Amendment:

> I recommend to you [its] prompt adoption.
>
> It secures to all citizens of the United States equal civil rights—it apportions representation in Congress and the electoral college equally among the States, according to the number of persons enjoying political rights. * * *
>
> In the event of their [the Southern states'] refusal to accept the amendment it may become the duty of Congress to reorganize their civil governments on the basis of equal political and civil rights to all men, without distinction of color, and thus to devolve upon the now disfranchised loyal people of the south the work of national reintegration.[17]

The next day, the House adopted a resolution for ratification by a vote of 40 to 5.[18] The Senate the following day adopted the resolution for ratification by a vote of 16 to 5.[19]

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[17] Address of Governor, pp. 25–26, Minn., Exec. Docs., 1866.

[18] House J., 1867, pp. 24–25.

[19] Sen. J., 1867, pp. 22–23.

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SCHOOLS

The Minnesota public school law of 1864 provided that

> * * * if any child of suitable age is denied admission, or any scholar expelled without sufficient cause, or on account of color, social position, or nationality, the teacher so offending or board of trustees [of the district shall be fined].[20]

The territorial statutes of 1851 contained no provision distinguishing between races with respect to schools.[21]

In reply to a questionnaire from the Superintendent of Public Instruction of Indiana, the Minnesota Superintendent of Schools wrote in 1868:

> Colored people vote. They send their children to school, who have all the rights, privileges and immunities of white children. They are excluded from no educational rights. They are just as the white children in their opportunities.[22]

LEGAL STATUS OF NEGROES

Under Article VII, section 1, of the Constitution of 1857 the franchise was limited to white males and Indian males who had accepted the "language, customs and habits of civilization." Proposed amendments to remove the racial bar

[20] Minn. Gen. Laws, 1864, c. 4, sec. 1.

[21] See Minn. Terr., Rev. Stat., 1851, c. 29.

[22] See Report of the Superintendent of Public Instruction of Indiana for 1867–68, p. 27. Ind. Doc., 1867–68.

were rejected in 1865,[23] and again in 1867.[24]. The amendment was finally adopted in the elections of November 1868, and it was promulgated January 9, 1869.

During the period that the Negro was barred from voting, he was similarly barred from acting as a juror.[25] There does not seem to have been at any time a law against miscegenation. In 1885, Minnesota enacted a Civil Rights Act prohibiting any discrimination against Negroes in public places, or by common carriers.[26]

MISSISSIPPI

In January 1870 Mississippi ratified without debate the Fourteenth Amendment, which it had rejected unanimously in each House in January 1867. Its Constitution of 1868 was silent on the question of separate schools. All legislation until 1876 seems to have contemplated mixed schools. In that year, segregation was permitted, and in 1878 was required. An 1870 statute repealed all color discriminations in the laws of the state.

RATIFICATION

Mississippi rejected the Fourteenth Amendment in January 1867, by a unanimous vote of

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[23] Oberholtzer, *A History of the United States Since the Civil War* (1917), p. 140, n. 2.

[24] *Id.* at p. 479.

[25] Minn., Gen. Stats., 1866, c. 8, tit. 3, sec. 98.

[26] Minn., Gen. Laws, 1885, c. 224.

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both houses.[27] Governor Humphreys, in his Message of October 16, 1866, had urged rejection, saying:

> The Radical Congress has enacted laws and proposed amendments to the Constitution, which if adopted will destroy the rights of the States and of the people, and centralize all the powers of government in the Federal Head.
>
> * * * * *
>
> This amendment, adopted by a Congress of less than three-fourths of the States of the Union, in palpable violation of the rights of more than one-fourth of the States, is such an insulting outrage and denial of the equal rights of so many of our worthiest citizens who have shed lustre and glory upon our section and our race, both in the forum and in the field, such a gross usurpation of the rights of the State, and such a centralization of power in the Federal Government, that I presume, a mere reading of it, will cause its rejection by you.[28]

The Report of the Joint Standing Committee on State and Federal Relations[29] objected to the Amendment for various reasons, including that

> * * * It transfers to the United States a criminal and police regulation over the inhabitants of the States touching matters purely domestic. It intervenes between the State Government and its inhabitants on the assumption that there is an alienation

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[27] Mississippi Laws, 1866–67, p. 734; Senate Journal, 1866–67, p. 196; House Journal, 1866–67, p. 201.

[28] House Journal, 1866–67, pp. 7, 8.

[29] *Id.*, App., pp. 77–87.

> of interest and sentiment between certain portions of the population. And that such intervention is for the benefit of one class against the other.[30]

Further,

> * * * the object is, to compel the Southern States to accept negro suffrage * * * It cannot be pretended that the lately enfranchised blacks are, as a body, either morally or intellectually competent to vote.[31]

Former Governor Sharkey also outlined his objections in a letter to Governor Humphreys, dated September 17, 1866, saying in part

> But let us look, for a moment, at the provisions of the proposed amendment. The first section * * * does not say what are privileges and immunities; that is left for the next Congress to provide in virtue of the last section, which declares "that Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We may find Congress conferring "privileges and immunities" on one class to the exclusion of another class; or we may find Congress assuming absolute control over all the people of a State and their domestic concerns, and this virtually abolishes the State.
>
> * * * * *
>
> I need say nothing of the fourth section, but the fifth is the Trojan horse abounding in mischief. It provides that "Congress shall have the power to enforce, by appropriate legislation, the provision of this

[30] *Id.*, p. 79.
[31] *Id.*, pp. 79, 80.

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> article," which may be construed to authorize Congress to do whatever it may desire to do. Un[der] this same provision, attached to the emancipation amendment, you have the Civil Rights bill and the Freedmen's Bureau bill. It was construed in the Senate, just as I admonished many members of the Legislature it would be, to authorize these odious measures. We should profit by the experience it has furnished us.
>
> * * * I will only add, that should this amendment become part of the Constitution, we shall have a very different government from that which we inherited from our ancestors.[32]

Three years later, in January, 1870, Mississippi ratified the Amendment without debate or comment.[33]

SCHOOLS

The Mississippi Constitution of 1868 did not specify whether the public schools were to be separate or mixed:

> As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and

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[32] McPherson's *Scrap Book, Fourteenth Amendment*, pp. 22–23.

[33] Mississippi Laws, 1870, p. 631; Senate Journal, 1870, p. 19; House Journal, 1870, p. 20.

> shall, as soon as practicable, establish schools of higher grade. (VIII, 1.)
>
> A public school or schools shall be maintained in each school-district at least four months in each year * * *. (VIII, 5.)

The Bill of Rights (Article I) contained the following provision:

> SEC. 21. No public money or moneys shall be appropriated for any charitable or other public institutions in this State making any distinction among the citizens thereof, *Provided,* That nothing herein contained shall be so construed as to prevent the legislature from appropriating the school-fund in accordance with the article in this constitution relating to public schools.

Attempts to put into the article on education a requirement of separate schools were defeated,[34] as was a proposal to have the Convention adopt an ordinance providing for separate schools.[35]

The Legislature of 1870 passed "An Act to Regulate the Supervision, Organization, and Maintenance of a Uniform System of Public Education for the State of Mississippi,"[36] which contained no reference to color. Governor Alcorn, in his Inaugural Address in March, 1870, had emphasized the importance of educating both white and colored children:

> The new system has its work still further increased by the benevolence of its spirit. The poor white children of the State, who were permitted in the past to grow up like

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[34] Constitutional Convention Journal, pp. 316, 318.

[35] *Id.*, p. 479–80.

[36] Mississippi Laws, 1870, ch. 1, pp. 1–18.

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> wild flowers, without training, the administration which we are about to inaugurate to-day is determined to expend a large proportion of its energies in educating. And so, also, will the government which reigns over us from this hour devote a large proportion of its energies to the training of the rising generation of the colored people for the higher duties of life, under an enlightened system of public schools.[37]

But in his message on education[38] he recommended separate schools:

> But the question of local government of public schools is complicated, amongst *us*, by prejudices of race. To conciliate these, at the same time make the system of common schools operative, will require dispassionate deliberation. My judgment is unable to say positively how this difficulty is to be met most effectually; but whether the best means be a mixed Board of Directors for each district, or by a distinct system of districting for each color, I have no doubt the Legislature will bring to the subject that earnest spirit of justice to both races which demands that the schools themselves shall be kept absolutely separate.[39]

He did not, however, indicate any requirement for equal facilities. The University of Oxford was for whites only; he proposed a high school and agricultural college for colored students.[40] Conversely, he urged the establishment of a

[37] Senate Journal, 1870, p. 50.
[38] *Id.*, App., p. 12.
[39] *Id.*, p. 17.
[40] *Id.*, pp. 14, 20.

normal school for colored teachers, although there was none for whites:

> One Normal School we cannot dispense with, even at the very outset of our educational system. As the white teachers obtainable at present for the common schools are more advanced than those teachers who may be obtained at present amongst the colored people, it appears to me that our first Normal School for the training of teachers should be devoted to the education of teachers of color.[41]

A reenactment of the education law in 1873 contained no reference to color.[42] In 1876 the school laws were amended to recognize distinctions of color,[43] and in 1878 segregation was made mandatory:

> *Be it further enacted,* That the schools in each county shall be so arranged as to afford ample free school facilities to all the educable youths in that county, but white and colored pupils shall not be taught in the same school-house, but in separate school-houses.[44]

The Constitution of 1890 provided that

> Separate schools shall be maintained for children of the white and colored races. (Article 8, sec. 207.)

CIVIL RIGHTS LEGISLATION

The legislators of 1870 insisted on full equality, without distinction, for Negroes. Section 3 of

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[41] *Id.*, p. 13.

[42] Mississippi Laws, 1873, ch. 1, pp. 1–17.

[43] Mississippi Laws, 1876, ch. 113, sec. 8, p. 209.

[44] Mississippi Laws, 1878, ch. 14, sec. 35, p. 103.

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"An Act to repeal certain laws relating to slaves, free negroes and mulattoes and freedmen, and for other purposes"[45] provided

> * * * That it is hereby declared to be the true intent, meaning and purpose of this Act, to remove from the records of the laws of this State all laws of whatever character, which in any manner recognize any natural difference or distinction between citizens or inhabitants of this State, or which in any manner or in any degree, discriminate between citizens or inhabitants of this State, founded on race, color or previous condition of servitude.

Another act prohibited segregation on railroads, steamboats, and stagecoaches.[46]

MISSOURI

Missouri ratified the Fourteenth Amendment in January, 1867. Prior to 1865 the education of Negroes was prohibited. In that year slavery was abolished within the state; the legislature provided separate public schools for Negro children; it also repealed the existing restrictions on Negroes, including those on the competency of Negroes as witnesses in judicial proceedings. However, the prohibition against miscegenation continued, as did the disqualification of Negroes as voters and jurors.

RATIFICATION

The Fourteenth Amendment was presented to the Missouri Legislature on January 4, 1867, in

[45] Mississippi Laws, 1870, ch. 10, p. 73.

[46] Mississippi Laws, 1870, ch. 32, p. 104.

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the form of a resolution introduced by Senator Bonham. On the same day the Legislature received a message from the Governor, Thomas C. Fletcher. Regarding the first section of the Amendment, the message stated:[47]

> The first section of the proposed amendment secures to every person born or naturalized in the United States, the rights of a citizen thereof in any of the States. It prevents a State from depriving any citizen of the United States of any of the rights conferred on him by the laws of Congress and secures to all persons equality of protection in life, liberty, and property, under the laws of the State.

The Senate voted to ratify the Amendment on January 5, 1867, by a vote of 26 to 6.[48] The House vote, on January 8, was 85 to 34.[49] The Joint Resolution ratifying the Amendment recited that "the people of Missouri, in the election of the present General Assembly, have indicated their approval of said amendment," and "the measure is in itself eminently just and proper, and greatly tends to a settlement of the issues growing out of the late rebellion."[50]

SCHOOLS

The Missouri Constitution of 1820 provided that "one school or more shall be established in

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[47] Senate Journal 1867, p. 14.

[48] *Id.*, pp. 30, 32.

[49] McPherson, *Reconstruction*, p. 194.

[50] Mo. Laws 1867, p. 196.

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each township as soon as practicable and necessary, where the poor shall be taught gratis." (Art. VI, section 1.) The first school law was enacted in 1825.[51] An "Act respecting slaves, free Negroes and mulattoes" of 1847 [52] prohibited schools for Negroes and declared all meetings of colored persons for purposes of instruction "unlawful assemblages". This law was repealed on February 20, 1865,[53] after slavery had been abolished within the state. On the same date an amendment to the school law was approved,[54] which provided that the school census was to include all colored children (sec. 1) and that

> The word "white" wherever it occurs in the act to which this is amendatory, is hereby stricken out; and it is further enacted that the trustees of all school districts in this State shall make provision for the instruction of all children of the proper age in their respective school districts without respect to color, provided that they shall be sent to separate schools. (Sec. 2.)

The Constitution of 1865 authorized the establishment of separate schools for colored children. It provided:

> Separate schools may be established for children of African descent. All funds provided for the support of public schools shall be appropriated in proportion to the

[51] Mo. Rev. Laws 1825, p. 711.
[52] Mo. Laws 1846–47, p. 103.
[53] Mo. Laws 1864–65, p. 63.
[54] *Id.*, p. 125.

> number of children, without regard to color. (Art. IX, § II.)

These provisions were implemented by the school law of 1866,[55] which made the establishment of schools for colored children mandatory wherever there were more than twenty in a district; where the number of colored children was less than twenty, their proportionate share in the school fund was to be used for their education as the school authorities deemed proper. In all other respects the schools for colored children were to be equal to "others of the same grade." (Sec. 20.)

The requirements for segregated schools were reenacted in 1867 and 1868.[56]

In 1868, the Superintendent of Public Schools made the following statement:

> The school law provides for the establishment of separate schools for colored children in every locality wherein the number exceeds fifteen. This is done in deference to the deep prejudice existing in the minds of the loyal and disloyal against the education of the colored and white youth in the same schools. Except this, their schools are to be paid, conducted and superintended the same as other schools. In a few years I am satisfied the prejudice will be so far obliterated that no opposition will be made to the *mixed* schools where the number of

[55] "An Act to provide for the Reorganization, Supervision and Maintenance of Common Schools," Mo. Laws, 1865–1866, p. 170 (approved March 29, 1866).

[56] Mo. Laws 1867, p. 160 (approved March 13, 1867); Mo. Laws 1868, p. 165.

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colored children is too small for a good separate school." [57]

The 1875 Constitution declared that separate schools for Negro children "shall" be provided (Article XI, sec. 3). This was in contrast to the 1865 Constitution, which used the word "may" (*supra*). In the debate in the 1875 Constitutional Convention this change was not explained. Mr. Switzler, commenting on this language, stated that the section was "substantially" the same as in the Constitution of 1865 and that the committee reporting the section had substituted the word "shall" for "may".[58] The section was adopted without debate.[59]

In 1889 the school law was amended by a provision making mixed schools illegal.[60]

LEGAL STATUS OF NEGROES

Missouri abolished slavery by ordinance of the State Convention dated January 11, 1865.[61] Soon thereafter numerous laws imposing legal restrictions upon Negroes were repealed,[62] including the statute which prohibited them from testifying

[57] Letter to the Superintendent of Public Instruction of Indiana, Report of Superintendent of Indiana for 1867–68, p. 27. Ind. Doc., 1867–68.

[58] Debates, Missouri Constitutional Convention 1875, vol. IX, p. 30.

[59] *Id.*, p. 145.

[60] Mo. Laws 1889, c. CL, sec. 7051a.

[61] Mo. Gen. Stats., 1865, p. 46.

[62] Mo. Laws, 1864–65, p. 63, an act repealing "all laws recognizing the right of property in man, or intended to protect or perpetuate the institution of slavery in this State".

in court.[63] The repeal, however, did not extend to the miscegenation statute.[64]

The Constitution of 1865[65] declared slavery abolished (Art. I, Sec. II) and provided

> That no person can, on account of color, be disqualified as a witness; or be disabled to contract, otherwise than as others are disabled; or be prevented from acquiring, holding and transmitting property; or be liable to any other punishment for any offense than that imposed upon others for a like offense; or be restricted in the exercise of religious worship; or be hindered in acquiring education; or be subjected, in law, to any other restraints or disqualifications, in regard to any personal rights, than such as are laid upon others under like circumstances. (Art. I, Sec. III.)

It restricted the vote to white males (Art. II, Sec. XVIII).

As late as 1872 Negroes were barred from juries.[66]

NEBRASKA

Nebraska ratified the Fourteenth Amendment in June, 1867, four months after its admission to the Union. In the same month the legislature deleted from the territorial school law certain racial provisions. The right of all children to pub-

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[63] Mo. Rev. Stats., 1855, c. CLXVIII, sec. 6, subs. 9.

[64] Sec. 3 of the Act regulating marriages (1835), Mo. Rev. Stats. 1840, p. 401.

[65] Adopted by the Constitutional Convention on April 8, 1865, voted upon by the people on June 6, and declared in force on July 4, 1865. Mo. Gen. Stats., 1865, pp. 19 *et seq.*, 46.

[66] Mo. Stats., 1872, c. 80, sec. 2.

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lic education was declared in 1869. There were no provisions dealing specifically with racial segregation in the public schools. Congress had conditioned Nebraska's entry on its agreement not to deny "the elective franchise or * * * any other right, by reason of race or color". Negroes, however, continued to be excluded from juries until 1873.

RATIFICATION

Governor Butler of the Nebraska Territory, addressing the Territorial Legislature in July, 1866, said of the Fourteenth Amendment that

> * * * if fully carried out in letter and spirit, [it] will, as I think, restore harmony and concord to the national counsels, and reaffirm in our Constitution the fundamental principles enunciated in the Declaration of Independence, that all men are created free and equal.[67]

On May 17, 1867, speaking as Governor of the new state, he said:

> This proposed amendment * * * embodies in a few short, but comprehensive sentences the essence of the lesson taught the American people during the terrible agony of civil war. In extending the right of citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," and prohibiting the denial of the equal protection of the laws to any such person, it accepts fully, and forever vindicates by the solemn pledge of a nation the idea that was the cornerstone of American Independence, but has been

[67] House J., 1st Sess., 1866, p. 15.

> for a time rejected by the builders of the national superstructure.[68]

The House on June 8, 1867 voted in favor of ratification, 26 to 11,[69] and the Senate followed on June 15, by a vote of 8 to 5,[70] having rejected two proposed changes, one a virtual paraphrase of Section 2 of the Amendment, the other a proposal for a referendum on the Amendment.[71]

SCHOOLS

The laws of the Territory of Nebraska provided for free schools for whites only, and exempted Negroes from taxation for educational purposes.[72] The territorial laws were carried over by the new State Constitution.[73] The school law, when revised in 1867, did not mention either of the foregoing provisions of the territorial law.[74] In 1869, the school laws were again revised. While the territorial law had reserved the territorial school fund

> for the purpose of affording the advantages of a free education to all the white youth of this territory * * *

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[68] House J., 3d Sess., 1867, pp. 74–75.

[69] *Id.*, p. 149.

[70] Sen. J., 3d Sess., 1867, p. 174.

[71] *Id.*, p. 163.

[72] Nebr. Rev. Stats., 1866, c. 48, § 48.

[73] Const. 1866, Art. XI, § 1.

[74] See Nebr. Laws, 1867, Act of June 24, 1867, p. 101ff. Gov. Butler, in his address to the first session of the State Legislature devoted to regular business, said: "Your most earnest attention is * * * invoked, that no pains may be spared to render Nebraska second to no other State in the facilities offered to all her children, irrespective of sex or condition. * * *" House J., 3d Sess., 1867, p. 69.

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the 1869 law, in referring to the same fund, read as follows:

> for the purpose of affording the advantages of free education to all the youth of this State * * *.[75]

The Constitution of 1875 directed the legislature to

> provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.[76]

LEGAL STATUS OF NEGROES

Under the territorial laws of Nebraska Negroes were barred from voting[77] and jury service;[78] miscegenation was also prohibited.[79]

The Constitution of 1866 again restricted the vote to white males.[80] When Congress voted to admit Nebraska in February, 1867, it did so with the condition that

> within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed; and upon the further fundamental condition that the legislature of said State, by a solemn public act, shall declare the

[75] Nebr. Laws, 1869, Act of Feb. 15, 1869, § 71, p. 128.
[76] Art. 8, sec. 6.
[77] Nebr., Rev. Stats., 1866, c. 17, § 33.
[78] *Id.*, Code of Civil Procedure, Tit. 19, § 657.
[79] *Id.*, c. 34, § 3.
[80] Const., 1866, Art. II, § 2.

> assent of said State to the said * * * condition.[82]

The Nebraska legislature accepted this provision.[83]

The law excluding Negroes from juries was declared void in *Brittle* v. *People,* 2 Neb. 198 (1873) by reason of the Congressional proviso. The court did not consider or mention the possible effect of the Fourteenth Amendment.

NEVADA

Nevada ratified the Fourteenth Amendment in January, 1867, by overwhelming votes in both houses of the legislature, apparently after little, if any, debate. Negroes had been excluded from the public schools from the time of their institution in 1865, and because there was a small number of colored children who were scattered throughout the state, almost no effort was made toward the establishment of separate school facilities for them. The state Supreme Court in 1872 held that exclusion where no alternate schools were furnished violated the state constitution. *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342. In 1867, the Negro was unable to vote or act as a juror; restrictions upon him as a witness had been lifted in 1865, but continued with respect to Indians and Chinese.

RATIFICATION

The Governor addressed the Legislature on January 10, 1867, saying in part:

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[82] 14 Stat. 391.

[83] Sen. J., 2d Sess., 1867, p. 35; House J. 2d Sess., 1867, p. 52.

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> It is your high privilege and sacred obligation to ratify the [Fourteenth] amendment. * * * The just equalization of political power by a change in the basis of representation, the protection of life, liberty and property extended to the weak, heretofore enslaved and brutalized; [exclusion from office of Confederate leaders, the established validity of the federal debt, and invalidity of the Confederate] are the only conditions imposed. * * * [84]

Three resolutions were submitted, two in the Senate, one in the House. The Standing Committee of the Senate on Federal Relations reported on January 21 all three as substantially the same, and stated that "Inasmuch as the discussion of the merits and demerits of these Amendments are the current history of the day, the Committee deem it time thrown away to enter into such discussion, and ask their immediate passage." [85] This followed the next day by a vote of 11–3.[86]

The House had already acted. Receiving a favorable report on January 11,[87] it voted the same day to ratify, 34–4.[88]

SCHOOLS

Nevada's first constitution, adopted in 1864 when the state was admitted, provided for a system of public schools.[89] This was implemented by

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[84] Sen. J., 1867, App., p. 9.
[85] Sen. J., 1867, p. 42.
[86] *Id.*, at p. 47.
[87] House J., 1867, p. 21.
[88] *Id.*, at p. 25.
[89] Nev. Const., 1864, Art. XI, sec. 2.

"An Act to provide for the maintenance and supervision of Public Schools," passed in 1865, which contained the following provision:

> Negroes, Mongolians, and Indians shall not be admitted into the public schools; [public funds may be withheld where they are so admitted] *provided,* that the Board of Trustees of any district * * * may establish a separate school for the education of negroes, Mongolians, and Indians, and use the public school funds for the support of the same.[90]

This provision was substantially reaffirmed in 1867, after the Legislature had ratified the Fourteenth Amendment.[91]

The Superintendent of Public Instruction reporting for the school year ending August 31, 1866, announced that "A public school for colored children, the first and only one in the State, was organized and maintained for nearly six months. It had an average attendance of twenty-nine pupils."[92] This school was located in Storey County; apparently some Indian or Mongolian children were admitted since there were only 21 Negro children in the state.[93] Some of the state's Negro children must have been unable to attend this school, since only 14 lived in Storey County.[94]

The Superintendent's next report stated:

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[90] Nev. Stats., 1865, c. 145, sec. 50.

[91] Nev. Stats., 1867, c. 52, sec. 21 (March 8). By this statute the sanction of withdrawing funds seems to have been removed.

[92] Superintendent's Report, p. 14, Sen. J., 1867, App.

[93] *Id.*, Table III.

[94] *Ibid.*

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Inasmuch as neither Mongolian nor Indian children, except a few living in white families, manifest any desire to attend the public schools, this interdict affects mainly the Negro race.[95]

* * * * *

Few of the colored race are able to afford private tuition, and as a consequence we have growing up among us juvenile Pariahs, condemned by our State to ignorance and its attendant vices. * * * We believe this inhibition unwise, unjust, and unconstitutional.

Unwise, because dark, tawny or copper-colored children are no more calculated to make intelligent and virtuous citizens without education, than are white children: unjust, because the colored citizen is denied advantages secured in part by taxation levied upon his own industry: unconstitutional, because in violation of the express provisions of Section 1, and in contravention of the plain intendment of section 3 of Article XI of our State constitution.

* * * * *

If the prevalent prejudices against admixture of the races will not allow the abolition of the penalty for the crime of color, it is respectfully submitted whether it is not the duty of the Legislature to devise some "suitable means" of securing to these unfortunates the advantages of "intellectual * * * and moral improvement."[96]

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[95] Education was not compulsory even for whites. A large part of each Report is given over to a discussion of the merits of compulsory attendance.

[96] Superintendent's Report, pp. 16–17, Nov. 1868, Nev., Sen. J., 1869, App.

In his next report for 1869 and 1870, the Superintendent stated:

> From the returns of Census Marshals it appears that there are thirty negro children of school age in the State.
>
> For these no educational provision is made. They are denied admission to the Public Schools; separate schools are permitted under the law, but as they are not commanded, colored children are without educational privileges. Believing that it is not the intention of our State Government to be guilty of the injustice of taxing colored citizens for the support of Public Schools, and at the same time denying them the benefit of these schools, I beg to call attention to the fact, that our statutes are at present chargeable with this unworthy discrimination.[97]

In 1872, the case of *State ex rel. Stoutmeyer* v. *Duffy*, 7 Nev. 342, was decided by the state Supreme Court. Relator, a Negro, otherwise qualified, applied for mandamus against the school trustees who had refused him admission to a public school, contending that Section 50 of the 1865 school law[98] violated the state constitution, the Fourteenth Amendment, and the federal Civil Rights Bill. The federal contentions were rejected, the court stating:

> While it may be, and probably is, opposed to the spirit of the [constitution and laws of the United States], still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most

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[97] Superintendent's Report, p. 14, Dec. 1, 1870, Nev. Sen. J., 1871, App.

[98] See p. 298, fn. 90, *supra*.

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> tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation, such course will be declined. * * * (p. 346).

The court declared, however, that Section 50 of the school law contravened the provision of the state constitution that "the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school." If, said the court, the legislature acted to secure the attendance of some, it was required to secure the attendance of all (p. 347). Accordingly, mandamus was granted.

The Chief Justice, in concurring, relied on the state constitutional provision that "in all cases * * * where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." He agreed, however, that separate schools were constitutional (p. 355).

The dissenting judge was also of the opinion that the Fourteenth Amendment was not relevant to the question. He stated:

> The statute [section 50] does not abridge any privilege or immunity of the applicant, as a citizen of the United States. The privilege of admission to the common schools of this state is no more inherent in or connected with the *status* of citizenship than is the elective franchise; and to secure that against unfriendly state legislation, an additional amendment was required and was proposed. This privilege is not embraced within any meaning which has ever been attributed to the words "life, liberty

> or property," and the equal protection of the laws cannot well be denied to a right which never existed. (Pp. 355–356.)

No action was ever taken by the Nevada legislature to require the establishment of separate schools. In his next report in 1873 the Superintendent stated:

> In explanation of the omission [of statistics for colored children], I am happy to say that, practically, the children of all citizens are now free to attend our public schools.
>
> The statute yet discriminates against the children of colored citizens, but by decision * * * the section excluding negroes was declared unconstitutional.
>
> * * * * *
>
> I believe that this ruling has been cheerfully complied with throughout the State, and that the privilege which it secures is eagerly enjoyed by the hitherto proscribed race.[99]

In 1873, Section 50 of the school law was dropped.[1]

LEGAL STATUS OF NEGROES

The franchise was limited to white males by the Constitution of 1864, Article II, sec. 1. By statute, jurors were required to be qualified electors.[2] Article XVIII of the Constitution, adopted in 1880, removed the word "white" from Article II.

While Nevada was a territory, its law provided that

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[99] Superintendent's Report, pp. 15–16, Dec. 1, 1872, Nev. Sen. J., 1873, App.

[1] Nev. Stats., 1873, c. 81, sec. 14.

[2] Nev. Stats., 1865, c. 33, sec. 18.

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> No black, or mulatto person, or Indian, or Chinese, shall be permitted to give evidence in favor of, or against, any white person.[3]

But the first session of the state legislature changed this to read:

> No Indian or Chinese shall be permitted to give evidence in favor or against any white person, * * * In no case shall the Act of which this is amendatory, be construed to exclude as witnesses any negro, black or mulatto person, but the credibility of such negro, black or mulatto person shall be left entirely with the jury.[4]

Marriage of whites with Negroes, Indians or Chinese was a criminal offense.[5]

NEW HAMPSHIRE

The Fourteenth Amendment was adopted by New Hampshire in July, 1866, against contentions that the Amendment infringed upon states' rights by controlling legislation on "purely local" matters. Neither the school laws of the state, nor any other legislation, appear to have discriminated in any way against the Negro.

RATIFICATION

The Governor submitted the Fourteenth Amendment to the Legislature on June 21, 1866,[6] with a brief recommendation for ratification. It was referred to a committee of ten, which reported on June 26, 1866.[7] A majority recom-

[3] Nev. Terr. Laws, 1861, c. 28, sec. 13.
[4] Nev. Stats., 1865, c. 136, sec. 1.
[5] Nev. Terr. Laws, 1861, c. 32.
[6] House J., 1866, p. 137.
[7] Sen. J., 1866, pp. 70 *et seq.*; House J., 1866, pp. 174 *et seq.*

mended ratification, without detailed discussion of the various sections of the Amendment. A minority of three filed objections,[8] which may be summarized as follows: (1) The Southern states were excluded from all participation in the Congressional debates; (2) the Amendment was a dangerous infringement of states' rights, "assuming, as it does, to control their legislation in matters purely local in their character, and impose disabilities on them for regulating, in their own way, the right of suffrage—clearly a state right * * *"; (3) the effect of the second section would be to remove time-honored restrictions upon the right to vote and to open the ballot box to a large class of persons incapable of exercising their suffrage intelligently; (4) the real design of the Amendment was to force, by indirect means, Negro suffrage upon "an unwilling people".

The House voted for ratification on June 28, 1866.[9] The Senate, following some debate on July 5,[10] voted for ratification on July 6.[11]

SCHOOLS

New Hampshire's system of free public schools dates from the time when New Hampshire was a part of the Massachusetts Bay Colony. The Constitution of 1783 made it the duty of towns to educate their youth. In 1805 there was organized a system of public schools.[12] Neither this

[8] House J., 1866, pp. 176 *et seq.*
[9] House J., 1866, p. 231.
[10] Unreported. See Sen. J., 1866, pp. 85, 88.
[11] *Id.*, p. 94.
[12] N. H. Laws, Dec. 1805, p. 45.

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law nor any of the later school laws contained any reference to racial distinctions.[13] No legislation has been found which discriminated against Negroes.

NEW JERSEY

New Jersey ratified the Fourteenth Amendment in September, 1866, apparently without any debate. In March, 1868, the Legislature purported to rescind the ratification. One of the reasons given was that the Amendment interfered with the legislative power of the states and enlarged the powers of the federal courts. The school laws in force in 1866 and 1868 did not contain racial distinctions. They were interpreted, however, to permit separate schools, although requiring education for all children. A law in 1881 prohibited exclusion of colored children from any public school in their district. This statute was construed in *Pierce* v. *Trustees,* 46 N. J. L. 76, aff'd., 47 N. J. L. 348 (1884), to entitle Negro children to attend the public school closest to their residence in a district containing separate schools for Negroes and whites, but no constitutional issue was involved. Suffrage prior to the adoption of the Fifteenth Amendment was limited to white males.

RATIFICATION

New Jersey acted on ratification of the Fourteenth Amendment in September, 1866. The Governor in a brief message recommended ratification.[14]

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[13] See N. H. Gen. Stats., 1867, Tit. 11; Gen. Laws, 1878, Tit. 11.

[14] Minutes of the Assembly, Extra Session, 1866, p. 8.

The Assembly voted favorably on September 11,[15] and the Senate concurred on the same day.[16] No debates are reported.

After the Democratic Party had gained control of the Legislature as a result of the elections in 1867, it rescinded the ratification. The Committee on Federal Relations, on January 28, 1868, submitted a joint resolution[17] which repudiated the Amendment. Some of the reasons given were as follows: (1) the exclusion of the representatives of ten States from the Congress which adopted the Amendment; (2) the ouster of Senator Stockton of New Jersey from the United States Senate for the purpose of securing the necessary two-thirds vote; (3) the subsequent reconstruction measures in ten Southern States, which were arbitrary and unconstitutional; (4) the *ex post facto* character of its punitive provisions; (5) the vague provisions of the Amendment which would help the federal judiciary and Congress to encroach upon states' rights; (6) the new apportionment provisions intended solely to secure Negro suffrage.

The resolution was adopted by each House on February 19, 1868,[18] and February 20,[19] respectively, and passed over Governor Ward's veto in March.[20] It was submitted to Congress by a mem-

[15] *Id.*, p. 17.

[16] Sen. J., Extra Session, 1866, p. 14.

[17] Sen. J., 1868, pp. 39–40; N. J. Laws 1868, p. 1225.

[18] Sen. J., 1868, pp. 197–198.

[19] Minutes of the Assembly, 1868, p. 309.

[20] Sen. J., 1868, p. 356; Minutes of the Assembly 1868, p. 743. In the Assembly a protest by Mr. Atwater and other members was read but not entered on the minutes (*ibid.*).

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ber from New Jersey on March 30, but returned to him, before the reading had been completed, for the reasons that it was "disrespectful to the House, and scandalous in character." [21]

SCHOOLS

New Jersey made some provision for Negro education at an early date. The 1821 Act in respect of slaves required slave owners to cause every one of their slaves under 21 years to be taught to read, and imposed a fine for non-compliance.[22]

The Constitution of 1844 [23] provided for a fund for the support of "free schools," the income therefrom to be annually appropriated to the support of "public schools, for the equal benefit of all the people of the state" (Article IV, section VII, subs. 6).

In 1846, the year in which slavery was abolished in the state,[24] a system of public schools was established.[25] Nineteen years later the Superintendent of Public Schools characterized it as "yet crude and imperfect".[26] The 1846 legislation did not mention Negroes. The Superintendent of Public Schools in 1864, in a pamphlet entitled "Interpretation of the School Law," [27] which was

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[21] Congressional Globe, 40th Congress, 2d Sess., p. 2226.

[22] N. J. Rev. Law, 1821, p. 272.

[23] See N. J. Laws, 1845, pp. 5 *et seq.*

[24] Laws of New Jersey, 1847, tit. XI, c. 6.

[25] *Id.*, tit. XII, c. 3. See also the statute concerning the school fund, *id.*, c. 1.

[26] Report of Superintendent of Public Schools for 1864, p. 1, N. J. Documents, 1865.

[27] *Id.*, Appendix, p. 15.

distributed to school officers, dealt with the question of schools for colored children, as follows:

> 1. There is no section of the law nor any decision of the courts that deprives colored children of the advantages of public school instruction.
>
> 2. Schools may be established for the special benefit of colored children.
>
> * * * * *
>
> Trustees have full authority to establish schools and employ teachers for their respective districts; and if in their judgment the interests of a district require the establishment of a school for colored children, or the establishment of two or more schools differing as to grade, or character, they may act accordingly, provided always that every child enjoys the advantages to which he is entitled.[28]

In 1867, the State Superintendent declared in his report:

> * * * there is one cause which is the foundation of all reform, the corner stone of our government, the charter of our liberties, the secret of our prosperity in the past and the hope of our stability and success in the future, and that is a common school education for the whole people in the whole land without regard to race, color, condition or sex.[29]

From the 1869 report of the Superintendent for Hudson County it appears that 32 buildings in the county were occupied by schools for white children, two by schools for colored children.[30]

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[28] *Id.*, Appendix, pp. 69–70.

[29] N. J. Doc., 1867, p. 671.

[30] N. J. Doc., 1869, p. 774.

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The State Constitution, adopted in 1875, left the school provisions of the Constitution of 1844 [31] virtually intact, adding the sentence:

> The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years.

None of the school legislation prior to 1881 contains any reference to race.[32] In 1881 an act was passed expressly providing:

> That no child, between the age of five and eighteen years of age, shall be excluded from any public school in this state on account of his or her religion, nationality or color.[33]

This law was held to entitle Negro children to attend the public school closest to their residence, in a district where there were three schools for white children and one for Negroes. *Pierce* v. *Union District School Trustees*, 46 N. J. L. 76, aff'd, 47 N. J. L. 348 (1884). The decision was based solely upon the language of the statute. It did not discuss any constitutional aspects.

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[31] N. J. Rev. Stat., 1877, pp. XXXIII *et seq.*, Art. IV, Section VII, (6).

[32] See the "Act to establish a system of Public Instruction," Laws, 1867, p. 360; "An Act to make free the Public Schools of the State," Laws, 1871, p. 94: "Act relative to the attendance of Children at School" (making school attendance compulsory), Laws, 1874, p. 135.

[33] Laws, 1881, p. 186. Re-enacted in 1903, with a slight change as to age. (L., 1903, 2d Sp. Sess., c. 1 § 125, p. 48.)

Suffrage in New Jersey was limited to whites by the Constitution of 1844.[34] Jury service was not restricted to qualified voters, as in most states, but to "citizens" "resident within the county".[35] The Civil Rights Act, passed in 1884, expressly prohibited the exclusion of Negroes from juries. It also provided for "full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances * * *, theatres and other places of public amusement."[36]

NEW YORK

New York ratified the Fourteenth Amendment in 1867. Separate schools, permitted since 1841 and required to be equal after 1864, continued until 1900. They were upheld by the New York courts against attacks based on the Civil Rights Act of 1866, the Fourteenth Amendment, and a state statute of 1873 prohibiting denial of "full and equal enjoyment" of the common schools. *Dallas* v. *Fosdick,* 40 Howard's Pr. R. 249 (1869); *People* v. *Easton,* 13 Abbott's Pr. R. (N. S.) 159 (1872); *People* v. *Gallagher,* 93 N. Y. 438 (1883). In 1900 the Legislature outlawed segregated schools. New York had permitted Negroes to serve on juries, and to vote—under certain restrictions—before the Civil War.

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[34] N. J., Const., 1844, Art. II, sec. 1.

[35] Laws of N. J., 1847, p. 966.

[36] Laws, 1884, p. 339.

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RATIFICATION

Governor Fenton's recommendation of January 2, 1867, for ratification of the Fourteenth Amendment did not go into detail:[37]

> It will be your high privilege, in the name of the people of this State, to ratify the proposed constitutional amendment, which I have the honor to transmit upon this opening day of your session. I cannot too earnestly recommend your prompt action, in order that the judgment of New York on a proposition so moderate and so just, may be submitted at the earliest day to the unreconstructed States, and that, on our part, there may be no delay in anchoring these fraternal guarantees in the Federal Constitution. I need not discuss the features of this amendment; they have undergone the ordeal of public consideration since the adjournment of Congress in July last, and they are understood, appreciated and approved. * * *
>
> There is no other plan before the people, and the verdict of the ballot-box implies that no other plan is desired. * * *

The Senate ratified on January 3, by a vote of 23 to 3,[38] and the Assembly on January 10, by a vote of 71 to 36.[39]

SCHOOLS

Under the laws of New York of 1841[40] and 1847[41] the establishment of separate schools for

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[37] Annual Message, Jan. 2, 1867. Assembly Journal, 1867, Vol. 1, pp. 13–14.

[38] Senate Journal, 1867, p. 34.

[39] Assembly Journal, 1867, p. 77.

[40] N. Y. Laws, 1841, c. 260, sec. 15, p. 238.

[41] N. Y. Laws, 1847, c. 480, sec. 147, p. 714. (Repealed, Laws, 1864, c. 533, Tit. 10, sec. 4, p. 1281.)

colored children was authorized. This was continued by the Common School Act of 1864,[42] which, however, required that the facilities for instruction be equal to those of the white schools.[43]

There was no discussion of school segregation in the Constitutional Convention of 1867–68.

Special acts authorized specific cities and towns to establish separate schools for colored children.[44] In some cases the authorization was in terms of a requirement for separate schools.[45]

In *Dallas* v. *Fosdick,* 40 How. Pr. Rep., 249 (Sup. Ct., February, 1869), the validity of a provision in the city charter of Buffalo requiring separate schools was sustained. The court did not refer to the Fourteenth Amendment, holding, in effect, that public education was a privilege furnished at the pleasure of the state:

> The right to be educated in the common schools of the state, is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment (p. 251).

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[42] N. Y. Laws, 1864, ch. 555, pp. 1211–1290.

[43] *Id.*, p. 1281.

[44] N. Y. Laws, 1832, c. 136, § 1, p. 211; Laws, 1845, c. 306, p. 327; Laws, 1847, c. 51, § 30, p. 61; Laws, 1850, c. 60, § 10, p. 70; c. 143, § 4, p. 238; c. 349, § 22, p. 757; Laws, 1863, c. 446, § 12, p. 762.

[45] N. Y. Laws, 1851, c. 171, § 15, p. 327; Laws, 1852, c. 291, p. 430 (Repealed, Laws, 1859, c. 187, p. 447); Laws, 1853, c. 230, Tit. VI, § 5, 7, p. 487.

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The court held that the Civil Rights Act of 1866 did not secure to Negroes the "right or privilege" of attending a white school.

In *People ex rel. Dietz* v. *Easton,* 13 Abbott's Pr. Rep. (N. S.) 159 (Sup. Ct., November, 1872), a regulation of the Albany board of public instruction, which required colored children to attend separate schools, was sustained against the contention that it violated the "privileges and immunities" clause of the Fourteenth Amendment. On this point the court cited *State ex rel. Garnes* v. *McCann,* 21 Ohio 198.

In April, 1873, the legislature passed an Act "to provide for the protection of citizens in their civil and political rights". This repealed all laws discriminating "against any citizen on account of color, by the use of the word 'white,' or any other term in any law, statute, ordinance or regulation".[46] The law further provided:

> No citizen of this State shall, by reason of race, color or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility or privilege furnished by [innkeepers, common carriers, theaters or places of amusement, or] by trustees, commissioners, superintendents, teachers and other officers of common schools and public institutions of learning * * * (Sec. 1).

This provision, however, did not end segregation.

Ten years later the Court of Appeals considered the question of segregated schools in *People ex*

[46] N. Y. Laws, 1873, c. 186, sec. 3.

rel. King v. *Gallagher,* 93 N. Y. 438 (1883). The majority held compulsory segregation valid under the Fourteenth Amendment. Referring to the *Slaughter-House Cases,* 16 Wall. 36, the opinion stated:

> It would seem to be a plain deduction from the rule in that case that the privilege of receiving an education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation might be granted or refused to any individual or class at the pleasure of the State (p. 447).

With reference to the "equal protection" clause of the Fourteenth Amendment, the court held that what was required was "equality and not identity" of privileges and rights, and such equality existed in the separate schools (p. 455). For the same reason the court found the 1873 statute inapplicable (p. 456).

The dissenting opinion stated that

> * * * the object of the amendment was not only to give citizenship to colored persons, but by preventing legislation against them distinctly as colored, or on the ground of color, secure exemption against any discrimination which either implies legal inferiority in civil society or lessens the security of their rights, and which, if permitted, would, in the end, subject them while citizens to the degrading condition of an enslaved race * * * (p. 458).

A later case, *People ex rel. Cisco* v. *School Board,* 161 N. Y. 598 (1900) followed the *Gallagher* case.

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Authority to maintain separate schools was continued[47] until 1900. In that year the Legislature enacted an "Act to secure equal rights to colored children in the state of New York" which provided that

> No person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color.[48]

LEGAL STATUS OF NEGROES

New York was one of the few states which had permitted Negroes to vote before the Civil War. Article II, Section 1 of the 1846 Constitution had extended the franchise to Negroes although with residence and property qualifications not required of white persons.[49]

The Legislature which had voted on April 14, 1869, to ratify the Fifteenth Amendment, rescinded its ratification on January 5, 1870.[50] In 1874 the restrictions imposed on colored voters were removed by constitutional amendment.

Negroes were not excluded from juries by law.[51]

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[47] N. Y. Laws, 1894, c. 556, tit. XV, art. 11, §§ 28, 29, p. 1288. (Sec. 28 repealed by N. Y. Laws, 1900, c. 492, § 2, p. 1173; sec. 29 repealed by N. Y. Laws, 1938, c. 134, p. 657.)

[48] N. Y. Laws, 1900, c. 492.

[49] In November 1869, the people rejected a new constitution, but approved its retention of the property qualification for colored voters. See 5 Thorpe, *American Charters, Constitutions and Organic Laws*, p. 2693.

[50] N. Y. Laws, 1870, p. 2147.

[51] N. Y. Rev. Stat. at L., 1869, Part III, c. 7, tit. 4, art. 2, § 13.

NORTH CAROLINA

North Carolina, after rejecting the Fourteenth Amendment in December, 1866, ratified it in July, 1868. The Constitution of 1868 took no position on segregation, although the Convention itself had resolved in favor of separate schools. In April, 1869, a school law was adopted establishing separate schools.

RATIFICATION

In ratifying the Thirteenth Amendment, the legislature in its resolution of ratification specified "That it does not enlarge the powers of the Congress to legislate on the subject of freedmen within the States."[52] Fears had been expressed that under the second section of that Amendment Congress would claim and use the power

> * * * to say who shall testify in our courts, or sit in the jury box, or on our judicial benches—who shall be invested with the elective franchise—or whether the negro may be permitted to intermarry with the white race * * *. The advocates of negro equality will, under this amendment, contend that he is not free, so long as there is a distinction or discrimination between him and the white man; they will insist that there shall be but one law common to both races. * * * A revolution is demanded of us, in all our social relations. * * *[53]

Six months later the Fourteenth Amendment was submitted for ratification. In his message

[52] House Journal, 1865–66, p. 135.

[53] Senate Journal, 1865–66, pp. 149–155.

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to the Legislature, Governor Worth recommended its rejection, saying in part

> If there be any feature in the American system of freedom which gives to it practical value, it is the fact that a municipal code is provided under the jurisdiction of each State, by which all controversies as to life, liberty or property, except in the now limited field of Federal jurisdiction, are determined by a jury of the county or neighborhood where the parties reside and the contest arises; but if Congress is hereafter to become the protector of life, liberty and property in the States, and the guarantor of equal protection of the laws, and, by appropriate legislation, to declare a system of rights and remedies, which can be administered only in the Federal Courts, then the most common and familiar offices of justice must be transferred to the few points in the State where these courts are held, and judges and other officers, deriving and holding their commissions, not from the authority and people of the State as heretofore, but from the President and Senate of the United States. The States, as by so much, are to cease to be self-governing communities as heretofore * * *.[54]

The Legislature referred the matter to a Joint Select Committee on the Constitutional Amendment, which recommended against ratification. Its report[55] referred to the following objections:

> In the first section it is provided that "no State shall make or enforce any law

[54] House Journal, 1866–67, p. 29.

[55] Senate Journal, 1866–67, pp. 91–105.

which shall abridge the *privileges or immunities* of citizens of the United States." What those privileges and immunities are, is not defined. Whether reference is had only to such privileges and immunities as may be supposed now to exist, or to all others which the Federal Government may hereafter declare to belong to it, or may choose to grant to citizens, is left in doubt, though the latter construction seems the more natural, and is one which that Government could at any time insist upon as correct and entirely consistent with the language used. With this construction placed upon it, what limit would remain to the power of that Government to interfere in the internal affairs of the States? And what becomes of the right of a State to regulate its domestic concerns in its own way? Whatever restrictions any State might think proper, for the general good, to impose upon any or all its citizens, upon a declaration by the Federal Government that such restrictions were an abridgement of the privileges or immunities of the citizens of the Union, such State laws would at once be annulled. For instance: the laws of North Carolina forbid the intermarriage of white persons and negroes. But if this Amendment be ratified, the Government of the United States could declare that this law abridged the privileges of citizens, and must not be enforced; and miscegenation would thereupon be legalized in this Commonwealth. Grant that such action on the part of the Government would not be probable, still it would be possible; and its bare possibility sufficiently exemplifies the boundlessness of

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> the powers which the Amendment would confer on the Federal Government.
>
> * * * * *
>
> In the final section, power is given to Congress "to enforce by appropriate legislation, all the provisions of this Article." How wide a door is hereby opened for the interference of Congress, with subjects hitherto regarded beyond its range, it is impossible adequately to conceive, until experience shall have tested the matter. * * *

The proposal to reject the amendment was approved by both Houses.[56]

On July 2, 1868, the Reconstruction Legislature ratified the Amendment without discussion, the Governor merely recommending "immediate ratification" as the "first business to be performed by the Legislature".[57] The two Houses approved on the same day.[58]

SCHOOLS

Although the North Carolina Constitution of 1776 incorporated provisions for education, the first public school law was not enacted until 1839. From that time until the Civil War the public school system developed rapidly.[59] School districts were to be established "having regard to the number of white children in each."[60] No pro-

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[56] House Journal, 1866–67, p. 183; Senate Journal, 1866–67, p. 138.

[57] Senate Journal, 1868, p. 12.

[58] *Id.*, p. 15; House Journal, 1868, p. 15.

[59] Knight, *Public Education in the South* (1922), pp. 145–55, 233–8.

[60] Laws of North Carolina, 1838–39; ch. VIII, sec. 3, p. 13.

vision was made for education of even free persons of color, and it was forbidden to teach slaves to read or write or to give or sell them books or pamphlets.[81]

Immediately after the war, schools for the freedmen were established by charitable organizations, but the common schools were not opened to Negroes. The Act of 1866 prescribing the rights of "persons of color" did not put them on an equality with whites.[82]

The Constitution of 1868 provided that

> ARTICLE I. Section 27. The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.
>
> ARTICLE IX. Section 2. The general assembly, at its first session under this constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years.

It contained no provision either requiring or prohibiting separate schools. The Constitutional Convention did, however, adopt the following resolution:

> *Resolved,* That it is the sense of this Convention that intermarriages and illegal intercourse between the races should be discountenanced, and the interests and happiness of the two races would be best pro-

[81] Laws of North Carolina, 1830–31, ch. VI, p. 11; see also North Carolina Revised Statutes 1837, ch. 111.

[82] Laws of North Carolina, Spec. Sess., 1866, ch. 40, p. 99.

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> moted by the establishment of separate schools.[63]

On the other hand, it refused to insert a proposed proviso in the article on Corporations other than Municipal:

> Mr. Durham moved to amend by adding, "*Provided,* That institutions of learning in which black and white people are educated promiscuously, shall not be incorporated under general laws, or by special act."
>
> Mr. Hood moved to amend the amendment of Mr. Durham, which, after some discussion, was withdrawn.
>
> The question recurred on the amendment of Mr. Durham.
>
> Mr. Durham demanded the yeas and nays.
>
> The demand was not sustained.
>
> The amendment was lost.[64]

In the Address (of the convention) to the People of North Carolina, explanatory of the Constitution, is the following:

> Some persons have been so bold or ignorant, as to allege, that white and colored people are required to be enrolled in the same militia company, and white and colored children to attend the same schools, and that intermarriages between the races are encouraged. All these assertions are false, as any reader of the Constitution will see. *All these matters are left now, as they were by the Constitution of 1776, by the Constitution of 1835 and by the proposed Constitution of 1865, to be regulated by the representatives of the people in the General Assembly.* Any one who denies the pro-

[63] Convention Journal, p. 473.

[64] *Id.*, p. 287.

> priety of thus leaving them, both impeaches the wisdom of our ancestors and distrusts the people of the future.[65]

In his inaugural address to the Legislature on July 4, 1868, two days after its ratification of the Fourteenth Amendment, Governor Holden pointed out that the new Constitution "provides for education as 'a *right,*' which it is 'the *duty* of the State to guard and maintain.'"[66] He went on to recommend separate schools:

> The injunction of the Constitution regarding education should be faithfully observed * * *. The first duty of a free State is to educate its children. It cannot be too often repeated that the structure and perpetuity of free institutions depend on the intelligence and virtue of the people. We must either prepare to educate thoroughly the rising generation of both races, or abandon the hope that we shall continue a free, self-governing State. It does not follow, nor does the [State] Constitution require, that the white and colored races shall be educated together in the same schools. It is believed to be better for both, and more satisfactory to both, that the schools should be distinct and separate. But they should be equally calculated to impart instruction, and the schools for the two, thus separate and apart, should enjoy equally the fostering care of the State.[67]

He also recommended separate companies and regiments for white and colored in the militia.[68]

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[65] *Id.*, p. 485.

[66] North Carolina Public Documents, 1867–68, Doc. No. 2, Ses. 1868, p. 2.

[67] *Id.*, pp. 5–6.

[68] *Id.*, pp. 7–8.

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Later that year, in his message to the regular session of the Legislature, the Governor again recommended that the schools be separate, "but in other respects there should be no difference in the character of the schools, or in the provision made to support them." [69]

The "Act to Provide for a System of Public Instruction" of April 12, 1869, provided that the local school authorities establish "a separate school or separate schools for the instruction of children and youth of each race * * *." [70] The Constitution was amended in 1875 to require separate schools.[71]

OHIO

Ohio ratified the Fourteenth Amendment in January, 1867, and rescinded its ratification in 1868, declaring that the Amendment combined several distinct propositions which had already been fully provided for in the Federal Constitution. Under the school law in effect in 1867 and 1868, separate schools for colored children were required wherever there was a specified minimum number of such children in a district; where their number was less than the minimum, the local school authorities could admit them to the white schools or use their proportionate share of the school fund for having them taught in some other way. In 1871 the Supreme Court of Ohio held that the Fourteenth Amendment did not outlaw school segregation,

[69] North Carolina Public Documents, 1868–69, Doc. No. 1, Sess. 1868–69, pp. 8–9.

[70] Public Laws of North Carolina, 1868–69, ch. 184, sec. 50, p. 471.

[71] Art. IX, sec. 2.

State ex rel. Garnes v. *McCann,* 21 Ohio St. 198. The Constitutional Convention of 1873–74 did not vote on a proposal to provide separate schools, with local option for mixed schools. Segregation in the public schools was abolished in 1887. Some laws discriminating against Negroes were repealed in 1849, but until the adoption of the Fifteenth Amendment Negroes were barred from voting and excluded from jury service. The miscegenation law was repealed in 1887.

RATIFICATION

Governor Cox in his message of January 2, 1867, to the 57th General Assembly[72] recommended ratification, and said of the Amendment:

> * * * It consists of several sections containing provisions which in the wisdom of the National Legislature are necessary to secure permanent peace throughout the country, and to correct the most palpable evils remaining in those States which were lately in rebellion; evils, which, without such correction would endanger the National safety, and be a lasting source of irritation and strife.
>
> In examining the proposed amendment, its extreme moderation is, under all the circumstances of the country and the time, most remarkable. It contains four provisions, of which three would become irrepealable and unchang[e]able except by

[72] Ohio Doc., 1866, Part 1, pp. 263 *et seq.*

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new amendment of the Constitution; but the other could be suspended or annulled by act of Congress.

The three former consist, *First,* of the grant of power to the National Government to protect the citizens of the whole country in their legal privileges and immunities, should any State attempt to oppress classes or individuals, or deprive them of the equal protection of the laws; *Second:* of the equitable equalization of representation * * *; and *Third,* of (the debt provisions.)

* * * * *

A simple statement of these propositions is their complete justification. The first was proven necessary long before the war, when it was notorious that any attempt to exercise freedom of discussion in regard to the system which was then hurrying on the rebellion, was not tolerated in the Southern States; and the State laws gave no real protection to immunities of this kind, which are of the very essence of free government. The necessity, also, of having somewhere a reserved right to protect the freedom of the slaves whom the war emancipated is too palpable for argument. If these rights are in good faith protected by State laws and State authorities, there will be no need of federal legislation on the subject, and the power will remain in abeyance; but if they are systematically violated, those who violate them will be themselves responsible for all the necessary interference of the central government.[73]

[73] *Id.*, pp. 281-2.

On January 3, the Senate voted for ratification, without any debate.[74] The House concurred on January 4, by a vote of 54 to 25.[75]

The Legislature of 1868 had a small Democratic majority in both branches,[76] while a Republican, Rutherford B. Hayes, was Governor. In his Inaugural Address, in January 1868, he alluded to a proposal to rescind ratification, saying in part

> * * * I submit with confidence that nothing has occurred which warrants the opinion that the ratification by the last General Assembly of the Fourteenth Amendment to the Constitution of the United States, was not in accordance with the deliberate and settled convictions of the people. That amendment was, after the amplest discussion, upon an issue distinctly presented, sanctioned by a large majority of the people. If any fact exists which justifies the belief that they now wish that the resolution should be repealed, by which the assent of Ohio was given to that important amendment, it has not been brought to the attention of the public.[77]

On January 11, the House of Representatives adopted a resolution to rescind ratification on the following grounds:[78]

> The provisions of the said proposed amendment are *ex post facto* in their nature

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[74] Sen. J., 1867, p. 9. The vote was 21 to 12.

[75] House J., 1867, pp. 12–13.

[76] *Appleton's Annual Cyclopaedia*, 1866, p. 600.

[77] Ohio Doc., 1867, Part 1, pp. 207–208.

[78] House Joint Resolution No. 1, House J., Jan., 1868, pp. 10–12.

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> and operation, and confer upon congress power to legislate on subjects foreign to original objects of the Federal compact;
>
> The adoption of said resolution was a misrepresentation of the public sentiment of the people of Ohio, and contrary to the best interests of the white race, endangering the perpetuity of our free institutions.

The Senate substituted a resolution recommended by its Committee on Federal Relations, which was adopted on January 13, 1868, by a vote of 19 to 17.[79] The House concurred on the same day.[80] The Resolution declared:

* * * * *

> *And, whereas*, Several distinct propositions are combined in the said proposed amendment, several of which are already fully provided for in the constitution of the United States, and to which no person or party objects; therefore, be it
>
> *Resolved by the General Assembly of the State of Ohio,* That the above recited resolution be, and the same is hereby rescinded, and the ratification, on behalf of the state of Ohio, of the above recited proposed amendment to the constitution of the United States, is hereby withdrawn and refused.[81]

SCHOOLS

The Ohio Constitution of 1802 declared that education should be encouraged by the legislature (Art. VIII, Sec. 3); that no law was to be passed which would keep the poor from equal partici-

[79] Sen. J. 1868, pp. 33–39.

[80] House J. 1868, pp. 44–51. The vote was 56 to 46.

[81] *Ibid.*; 65 Ohio Laws 280, 281.

pation in federally-supported schools (Art. VIII, Sec. 25); and that such schools were to be open "without any distinction or preference whatever * * *." (*Ibid.*)

School laws of 1821[82] and 1825[83] initiated a system of public schools. The first racial references are found in the school law of 1831.[84] Under this statute a school fund was to be raised for the instruction of white children (Sec. 1) with the aid of a property tax, from which the property of "blacks and mulattoes" was exempted (Sec. 2). The schools in each district were to be open, for at least three months each year, to all white children residing in the district (Sec. 34).

Common schools for colored children were first provided by a statute enacted in 1848.[85] This statute permitted the organization of colored school districts, to be administered by the colored residents. However, it was superseded in 1849 by a law which made separate school mandatory wherever the local school authorities deemed it not expedient to admit colored children to the existing common schools; these separate schools were subject to the same laws and regulations as those governing the common schools.[86]

Difficulties arose in Cincinnati when an attempt was made in 1850 to establish colored

[82] 19 Ohio Laws 51.
[83] 23 Ohio Laws 36.
[84] 29 Ohio Laws 414.
[85] 46 Ohio Laws 81 (General Acts).
[86] 47 Ohio Laws 17.

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schools. After the Negro residents had elected their school trustees, employed teachers and rented school houses, the city treasurer withheld the funds apportioned for the schools. He contended that the Negro trustees, not being electors, did not qualify as office holders under the Ohio Constitution, and hence could not draw any money from the city treasury.[87] The dispute was decided in favor of the Negro trustees in *State* v. *City of Cincinnati,* 19 Ohio St. 178 (1850). The Supreme Court of Ohio held that the constitutional requirements for voting and public office did not apply to school trustees. Subsequent legislation eliminated the colored trustees from the city's school administration[88] but in 1856 the Negro residents of the city again obtained the right to elect their own trustees.[89]

The general school law of 1864, which was in force at the time of Ohio's ratification of the Fourteenth Amendment, authorized and required separate schools for colored children whenever their number in a district or in adjoining districts exceeded twenty; where the number of such children was less than twenty, or where distance made a separate school impracticable, a proportionate share in the school fund had to be appropriated for their education.[90]

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[87] See Special Report of the U. S. Commissioner of Education (1871), p. 371, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

[88] 51 Ohio Laws 508; 52 Ohio Laws 48.

[89] 53 Ohio Laws 117. See also Special Report, *supra*, p. 372.

[90] 61 Ohio Laws 31 (1864), section 4, amending section 31 of the school law of 1853 (51 Ohio Laws 429), which had similar provisions for colored schools.

In 1859 the Supreme Court of Ohio, in *Van Camp* v. *Board of Education of Logan,* 9 Ohio St. 406, held that mulatto children were not entitled to enter the white common schools. The dissenting opinion declared that "caste-legislation" was inconsistent with the theory of a free and popular government "that asserted in its bill of rights the equality of all men" (p. 415).

The Commissioner of Common Schools, in 1868, described the situation in the State as follows:

> Colored youths of legal school age, i. e., between the ages of 5 and 21 years, are entitled to the privileges of the public school fund. Colored youth cannot of legal right claim admittance to our common schools for white youth. The local school authorities may, however, admit a colored youth to the public schools for white youth, and as a matter of fact in the largest part of the State, the colored youth are admitted on equal terms with the white youth to the common or public schools.[91]

In 1871, the Supreme Court of Ohio held that the school segregation law of the State did not violate the Fourteenth Amendment. *State ex rel. Garnes* v. *McCann,* 21 Ohio St. 198. This appears to be the first case in which the highest court of a State passed on the effect of the Fourteenth Amendment on racial segregation in the schools. The court, discussing the question in terms of the "privileges and immunities" clause of the Amendment, concluded that school privileges derived from state law alone were not covered;

[91] See Report of the Superintendent of Public Instruction of Indiana for 1867–68, pp. 25–26, Ind. Doc. 1867–1868.

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the clause was limited to federal rights. In any event, according to the court, "separate but equal" facilities did not violate the "privileges and immunities" clause.

The decision in *State ex rel. Garnes* v. *McCann* played a prominent role in the discussion on schools which took place in the Constitutional Convention of 1873–74.[92] The Committee on Education submitted a proposed constitutional provision that contained no reference to segregation.[93] Mr. Baber offered an amendment providing for separate schools for the two races, "so as to give each the equal benefit of a common school education," but with a local option for mixed schools.[94]

In explanation, he said:

> * * * One reason why I offer this amendment is that I concur very much in the views expressed by the gentleman from Hamilton [Mr. Carbery] and other gentlemen, that, if ever the school system of this State fails, it will be in consequence of the insane desire for a central bureau of education at Washington, for civil rights bills, and other means of interfering with the schooling of the children under State authority. I protest against it. I believe that it is the exclusive right of the State, and yet at the same time I am disposed to be as liberal as anybody. * * * Now, at once to end this controversy, at once to put

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[92] The Constitution drafted by the Convention was rejected by the electorate in 1874. See 3 Page's New Annotated Ohio General Code 6584 (1926).

[93] Ohio Constitutional Convention, 1873–74, Debates, vol. 2, pp. 2186 *et seq.*

[94] *Id.*, p. 2238.

this matter into the hands of the school districts of the State—because, I understand, that in the northern parts of the State, and also in a good many other places, where colored children are allowed to be admitted into the schools without any controversy—where a large majority of the electors desire that to be done, let it be done without any taxpayer coming forward and bringing suit for the purpose of stopping it by injunction. But on the other hand, I say that, where the people do not desire it to be done, and especially in my own locality, in the city of Columbus, where they have a large separate school, and where all the friends of education much prefer it, I do not want to see any sort of intermeddling. * * *

He continued:

* * * Now, what I want to call the attention of the Convention to is, to the claim that this interferes with the Fourteenth Amendment, under which claim this Congress of the United States, in pursuance of a cause of usurpation that it has been promising ever since the time, now attempts to come into the State and interfere with the right of Ohio to control her schools. With regard to that amendment the court says: [Quoting from pp. 209–210 of the opinion in the *McCann case, supra.*]

* * * * *

They go on, and, by argument, show that this is a matter for the State, that it is not one of the rights and immunities of citizens of the United States, under which broad scope of power Congress may sweep away all our rights and privileges. * * *

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> Mr. ALEXANDER. I presume that the amendment [to the report of the Committee of Education] is intended to remedy some evil. I would consequently ask whether the evil that he intends to remedy is the admission of colored children to the schools or their exclusion therefrom?
>
> Mr. BABER. The evil I desire to remedy is in order to have the Constitution of Ohio stand up for its own citizens against Federal usurpation; that wherever they desire the admission of these children, I want them to come in; but when the people do not desire it, I do not want them forced to break up the common schools. Is the gentleman answered?
>
> Mr. ALEXANDER. Yes, sir.[95]

There was no further debate on this issue. The proposed amendment was not submitted to a vote by the Convention.

In 1887 the provision of the school law regarding segregated schools was repealed.[96]

LEGAL STATUS OF NEGROES

The law of 1849[96a] which provided for the establishment of colored schools, also repealed the "black laws" of 1804,[97] 1807[98] and 1834,[99] together with all provisions of other acts insofar as they created any disabilities or conferred any special privileges on account of color. There were excepted, however, the act of 1831 relating to juries and the poor law of 1831.

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[95] *Id.*, pp. 2238–39, 2240–41.

[96] 84 Ohio Laws 34.

[96a] 47 Ohio Laws 18.

[97] 2 Ohio Laws 63.

[98] 5 Ohio Laws 53.

[99] 32 Ohio Gen. Laws 22.

Until the adoption of the Fifteenth Amendment Negroes were barred from voting and from jury service.[1] A law making miscegenation a misdemeanor, passed in 1861,[2] was repealed in 1887 by the same act which abolished separate schools.[3]

OREGON

Oregon ratified the Fourteenth Amendment in October, 1866, but rescinded its ratification in October, 1868. There had been no racial distinctions in the schools of the state since their inception. The Constitution of 1857 excluded from the state all Negroes not already resident. Negroes were barred from the polls and juries. The legislature which ratified the Fourteenth Amendment shortly thereafter prohibited miscegenation.

RATIFICATION

In September, 1866, the Governor recommended that the Legislature ratify the Fourteenth Amendment as "a matter of the greatest importance."[4] In his Inaugural Address on September 12, he proclaimed that the "States' rights" theory was dead, slavery had perished, and that the fruits of victory must not be yielded up:

> Can any truly loyal man object to, or could the rebels themselves expect less, than the repudiation of the rebel debt, to pledging the national faith for the payment of the federal debt, to the securing in the full exercise

[1] Const. 1851, Art. V, sec. 1; Ohio, Rev. Stats., 1870, c. 62, sec. I.

[2] 58 Ohio Laws 6.

[3] 84 Ohio Laws 34.

[4] House J., 1866, App., p. 427.

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> of all their civil rights, of all persons in the republic * * *? The terms are eminently just and proper * * * [the proposed constitutional amendment] founded in justice and right * * * merits your highest admiration.[5]

The Senate voted for ratification on September 14.[6] The House, after a favorable report of its Judiciary Committee,[7] followed on September 19.[8]

In 1868, after the Republican Party had been defeated in the election, the Legislature rescinded its ratification. A Joint Resolution introduced in the Senate on September 16, 1868,[9] recited that the legislatures of the Southern states which had ratified the Amendment "were created by a military despotism against the will of the legal voters of the said states under the reconstruction acts (so called) of Congress, which are usurpatrous, unconstitutional, revolutionary and void." The resolution was adopted on October 5.[10] In the House the resolution was passed on October 15.[11]

SCHOOLS

In his message to the Legislature in 1866, in which he recommended adoption of the Fourteenth Amendment, the Governor discussed at length the subject of education.[12] He mentioned the "unjus-

[5] House J., 1866, pp. 29–30.
[6] Sen. J., 1866, pp. 35–36.
[7] House J., 1866, p. 72.
[8] *Id.*, p. 77.
[9] Sen. J., 1868, pp. 32–37.
[10] *Id.*, p. 131.
[11] House J., 1868, pp. 270–273.
[12] House J., 1866, App., pp. 432 *et seq.*

tifiable failure to meet the wants of the rising generation" and of the "wretched condition of our present common school system," and advocated a revision of the school laws and the creation of an independent department of public instruction. In his Inaugural Address,[13] he urged establishment of a general system of good common school education "within the reach of every child, rich or poor, within the State."

Schools were established while a territorial government existed. These were free to all children.[14] After Oregon became a state, the same provision was written into its school law of October 17, 1862.[15] The Constitution of 1857, under which Oregon was admitted in 1859, stated that

> Provision shall be made by law for the distribution of the income of the common school fund among the several counties of the state, in proportion to the number of children resident therein between the ages of four and twenty years.[16]

There was no legislation containing any reference to racial distinctions in the public schools. The school law of 1872[17] provided that public schools "shall be free to all persons between the ages of four and twenty years, residing [in the district]" (Sec. 46).

LEGAL STATUS OF NEGROES

The Oregon Constitution of 1857, in its Bill of Rights, provided that

[13] House J., 1866, p. 30.
[14] Ore. Stats., 1853–55, p. 466.
[15] Ore. General Laws, 1845–1864, c. 5, tit. II, sec. 24.
[16] Const. 1857, Art. VIII, Sec. 4.
[17] Ore. Laws, 1872, p. 145.

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> No free negro or mulatto, not residing in this state at the time of the adoption of this constitution, shall come, reside or be within this state, or hold any real estate, or make any contracts, or maintain any suit therein; * * *[18]

The Constitution also restricted the franchise to white males.[19] The Civil Code, adopted in 1862, likewise limited jury service to white males.[20]

In 1866 the Legislature which had a month earlier ratified the Fourteenth Amendment enacted a statute prohibiting marriage of whites with Negroes, Chinese, Kanakas, and Indians.[21]

PENNSYLVANIA

Pennsylvania ratified the Fourteenth Amendment in February, 1867, after extended debate from which it appears that both its supporters and opponents believed that the "privileges and immunities" and "equal protection" clauses were to be interpreted broadly. Provision for racially segregated schools had been made in 1854. In 1881 an inferior court held that these provisions violated the Fourteenth Amendment. *Commonwealth ex rel. Allen* v. *Davis,* 10 Weekly Notes of Cases 159 (1881). The law was repealed a month later. Racial segregation in homes for soldiers' orphans was required by a law enacted shortly after Pennsylvania ratified the Fourteenth Amendment. In 1867, almost concurrently with its ratification of the Fourteenth

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[18] Const. 1857, Art. I, sec. 35.

[19] Art. II, sec. 2.

[20] Ore. Gen. Laws, 1843–1872, Civ. Code, c. 12, title 1, sec. 918.

[21] Ore. Laws, 1866, p. 10.

Amendment, the Pennsylvania legislature prohibited racial discrimination by railroad companies. The sponsor of that measure indicated that Negro equality demanded integrated schools. Pennsylvania excluded Negroes from the franchise and from juries until 1870.

RATIFICATION

Pennsylvania ratified the Fourteenth Amendment in the legislative session which began January, 1867. Extensive debates took place both in the Senate (January 14, January 17) and in the House (January 23, 30).[22] On January 17, the Senate voted for ratification, 21 to 11.[23] On February 6, the House concurred by a vote of 62 to 34.[24]

Neither the message of Governor Curtin, in which he recommended ratification,[25] nor the Inaugural Address of his successor, Governor Geary,[26] discussed the Amendment in detail. Governor Curtin referred to the election of 1866, which, he said, showed that a large majority of the people favored the Amendment. To him, this was not surprising, since the Amendment was nothing but a restatement of long established principles:

> That every person, born in the United States and free, whether by birth or manumission, is a citizen of the United States,

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[22] Pennsylvania is the only state which published *verbatim* reports of legislative debates.

[23] Sen. J., 1867, pp. 125–126.

[24] House J., 1867, pp. 278–279.

[25] Sen. J., 1867, pp. 16–18; Pa. Leg. Rec., 1867, pp. 9–10.

[26] Sen. J., 1867, pp. 105–6.

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> and that no State has a right to abridge the privileges of citizens of the United States—these are principles which were never seriously doubted anywhere, until after the insane crusade in favor of slavery had been for some time in progress. What is called the decision of the Supreme Court of the United States, in the *Dred Scott* case, has made it expedient and proper to re-assert these vital principles in an authoritative manner, and this is done in the first clause of the proposed amendments.[27]

Both in the Senate and the House there were extended debates. These indicate that both the supporters of the Amendment and the opposition believed that the "privileges and immunities" and "equal protection" clauses should be interpreted broadly. Some supporters argued that the purpose of the first section of the Amendment was to implement the Declaration of Independence. Thus, Mr. Day stated in the House debate that

> We propose, in the first place, to write, in substance, the civil rights bill * * * Put all upon an equality before the law. Put it in black and white in the organic law that negroes have rights which white men are bound to respect—the rights to life, liberty and property; in short, the inalienable rights enunciated in the Declaration of Independence, not to be accepted as "glittering generalities," but as original, self-evident truths * * *[28]

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[27] *Id.*, p. 16.

[28] Pa. Leg. Rec., 1867, App., p. LXV. See also the speeches of Landon in the Senate (p. IX), and of Mann (p. XLVIII) and Kinney (p. LIV) in the House.

Others stated that it was designed to give full effect to the Thirteenth Amendment. Senator Bigham, for example, declared:

> * * * the whole of these four articles of this amendment are simply carrying out the last section of the amendment of two years ago. Everyone of them arose out of the condition of things in reference to that amendment abolishing slavery.[29]

Most of the speakers expressed their understanding of the effect of the Amendment in terms of broad principles rather than with regard to specific applications. Thus, according to Senator Taylor, the first section met the "universal demand" "to destroy all legal caste within our borders";[30] Senator Bigham said that since the Negroes' response to the call to arms, "it has been only a question of time how soon all legal distinction will be wiped out".[31] Senator Landon stated the object of the first section to be "complete justice to the colored race,"[32] and defined this more specifically as follows:

> * * * You ask me: What do you want for the colored man? I reply, do you let the white rebel go to school? I claim that the colored man shall go to school; do you protect the white man before the law, you shall protect the colored man before the same law; do you punish a crime in a colored man, you shall punish the same in

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[29] *Id.*, p. XVI. Similiarly, M'Creary in the House, *id.*, p. LXXI.

[30] *Id.*, p. XXII.

[31] *Id.*, p. XVII.

[32] *Id.*, p. IX.

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> a white man in the same way; and a virtue that will reward a white man shall be rewarded in the colored man.[33]

Mr. Jenks, opposing ratification, made the following statement in the House:

> By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color of persons who have been or may be born in and subject to the jurisdiction of the United States, which has found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal civil rights to all. In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to every one here declared a citizen, without distinction of race or color, every one being equally entitled to demand from the States and State authorities full security in the enjoyment of such advantages and securities.[34]

Representative Rhoads, also in opposition, said that the effect of the Amendment would be to recognize the Negro "as the equal, politically and socially, of the white man." [35]

One of the principal objections raised against the Amendment was that it granted wide powers to Congress. Senator Wallace said:

> * * * negroes are citizens, and no State shall say they are not the equal of the white

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[33] *Ibid.*

[34] *Id.*, p. XLI.

[35] *Id.*, p. LIV.

> man in every sense. Privilege means "everything that it is desirable to have." Immunity—"a privileged freedom from anything painful." By the one we obtain an actual good, by the other, the removal of an evil. When the power to enforce these privileges and immunities in favor of the negro is vested in Congress, is it possible to conceive of any of the dearest rights of which we are possessed, that Congress may not bestow upon him also? Equal protection of the law, and the rights of life, liberty and property, with the right to enforce them by appropriate legislation by Congress, gives the power to enact laws regulating and controlling the liberty or property of the citizen and providing for equal protection of the law. If this be the power granted, what further need have we of the State government? * * * [36]

According to Representative Jenks,

> By [the first section], in connection with the fifth section, the regulation of the civil relations of each State is placed under the control of the Federal Government, the States to be used simply as instruments to execute its will, and nearly their entire civil and criminal jurisdiction placed under the control of Congress.[37]

While the Fourteenth Amendment was being discussed in the House, the Senate had under consideration a bill prohibiting racial discrimina-

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[36] *Id.*, p. XIII.

[37] *Id.*, p. XLI. Some members denied that section 1 gave Congress the power to confer suffrage upon the Negroes. See Senator Landon, *id.*, p. IX; Representative Wright, *id.*, p. LXXXIV.

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tion by railway companies.[38] The sponsor of the bill was Senator Lowry, who had supported the ratification of the Fourteenth Amendment in the Senate. He stated that the bill was "one of many rights which we must bestow upon [the Negroes]",[39] and,

> In all things we must give the colored man on this continent an equal chance with ourselves in his struggle for life and for immortality. If he fills our pulpits, our schoolhouses, our academies, our colleges and our Senate chambers, I bid him God speed.[40]

SCHOOLS

The Constitution of 1790 provided for the establishment of schools throughout the State, "in such manner that the poor may be taught gratis," and for the promotion of the arts and sciences "in one or more seminaries of learning." (Art. VII, Secs. 1, 2.) These clauses were incorporated in the Constitution of 1838 (Art. VII, Secs. 1, 2), in effect when Pennsylvania ratified the Fourteenth Amendment. The school laws of the early 1800's were designed for a system of pauper schools.[41] A general system of tax-supported public schools was initiated by the school law of 1834.[42]

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[38] Pa. Leg. Rec., 1867 (Feb. 5), pp. 212 *et seq.*

[39] Pa. Leg. Rec., 1867, App., p. LXXXIV.

[40] *Ibid.*

[41] Wickersham, *A History of Education in Pennsylvania* (1886), pp. 282, *et seq.*

[42] Pa. Laws, 1833–34, No. 102. According to Wickersham, Thaddeus Stevens, then a member of the Pennsylvania legislature, in 1835 saved the law from repeal. *Op. cit.*, pp. 332 *et seq.*

In his Report to the Legislature for the year 1866–1867, the Superintendent of Common Schools stated that

> * * * Since 1834 our schools are open to all and free to all. * * *
>
> * * * * *
>
> In * * * other countries, sex, race, color is allowed to make a difference in educational privileges.
>
> A common school system recognizes no such unjust distinctions or discriminations in respect to education. The great principle that underlies such a system is, that since God made all minds capable of being educated, it is their right to be educated—to be educated to the highest degree practically attainable.[43]

The laws of Pennsylvania at that time provided for separate schools for colored children. The school law of 1854 [44] authorized and required the directors of the several districts

> to establish, within their respective districts, separate schools for the tuition of negro and mulatto children, whenever such schools can be so located as to accommodate twenty or more pupils; and whenever such separate schools shall be established, and kept open four months in any year, the directors or controllers shall not be

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[43] Report, p. XXXVII, Pa. Ex. Doc., 1867.

[44] Pa. Laws, 1854, No. 610, p. 617. In 1869, "An Act consolidating the wards of the city of Pittsburgh for educational purposes," Pa. Laws, 1869, No. 133, p. 150 (Feb. 12, 1869), provided for segregated schools. The clause in section 54 excluding colored persons was repealed in 1872. Pa. Laws, 1872, No. 999, p. 1048.

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> compelled to admit such pupils into any other school of the district: *Provided,* That in cities or boroughs, the board of controllers shall provide for such schools out of the general funds assessed and collected by uniform taxation for educational purposes (sec. 24).

Commenting on this provision, J. P. Wickersham, Superintendent of Common Schools from 1866 to 1881, said that

> * * * Previously, such [colored] children were received into any public school at which they presented themselves; but the prevailing prejudice against them was so great that many preferred rather to remain away from school altogether than to face it. The provision for separate schools was practically a boon to the colored people, although it probably grew out of an indisposition to permit their children to attend school with white children.[45]

In 1870 the Superintendent published the following rulings concerning the rights of colored children under section 24 of the school law of 1854:

> No. 180. The twenty colored children necessary to constitute a school of this class are to reside within reasonable distance of the proposed point. If that number, or even more, are scattered over the whole district but so far from each other that twenty cannot attend the same school, the school is not to be established.
>
> No. 181. If the requisite number (20) cannot be collected into one school, there

[45] *Op. cit.*, p. 506.

> is no provision in the law which excludes them from the white schools.
>
> No. 182. Colored schools are to have the same duration of instruction as the white schools, and are not to be closed in all cases at the end of 4 months.[46]

Ruling No. 181 was upheld by the Court of Common Pleas for Luzerne County in 1873, in *Commonwealth ex rel. Brown* v. *Williamson,* 10 Phila. 490. The court held that where there were less than 20 colored children in a district they must be admitted to the same public school as the whites. The court was of the opinion that the Fourteenth Amendment had no bearing on the case:

> In the case before us, we fail to discover that any great constitutional question is involved, or that any right of the relator, or his children, growing out of the fourteenth amendment to the Constitution of the United States, or under the civil rights bill, has been challenged, invaded, or denied (p. 492).

In 1881, in *Commonwealth ex rel. Allen* v. *Davis,* 10 Weekly Notes of Cases 156, the Court of Common Pleas of Crawford County held that the provision for separate schools (section 24 of the school law of 1854) violated the Fourteenth Amendment, and also that it was "virtually under the prohibition of the XIIIth Amendment," since it made a distinction which put a "badge of servitude" on the Negroes and involved "the very personification of caste" (p. 160).

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[46] *The Common School Laws of Pennsylvania and Decisions of the Superintendent* (1870).

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One month later, a law was enacted "to abolish all distinction of race or color in the public schools." [47]

Section 2 of that law expressly repealed section 24 of the school law of 1854.

In the Senate, the sponsor of the bill said that

> In proposing the repeal of the act of 1854, which, in terms would be prohibited by the present State or Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the fourteenth and fifteenth amendments of the Constitution of the United States should have been permitted to have remained on the statute book until this time. * * * It is to the discredit of the United States and of Pennsylvania that any discrimination on account of color should have existed in our statutes * * *.
>
> It is the right and heritage of all of our citizens, that their children shall participate in [the school law's] benefits without restriction. To uphold or permit a color line of distinction is not only unjust in itself, but in conflict with the plain provisions of the Constitution.[48]

He then stated that Acting School Commissioner Lindsey in 1872 had declared the provision for separate schools inoperative,[49] and continued:

> I have placed this enactment upon the ground of right, and as required by the provisions of the fundamental law.
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> * * * * *

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[47] Pa. Laws, 1881, No. 83, p. 76.

[48] Pa. Leg. Rec., 1881, p. 1943.

[49] This ruling is not incorporated in the various editions of *The Common School Laws of Pennsylvania and Decisions of the Superintendent.*

> I am happy to believe that, on the part of many, it has been more from inattention than design that this statute has been left unrepealed, and that, with the majority of law makers, a mere suggestion of its existence will be sufficient to induce its repeal.[50]

The Senate voted unanimously for the bill.[51] Mr. Landis, its sponsor in the House, stated that the measure was required by the Fifteenth Amendment.[52] In *Kaine* v. *The Commonwealth,* 101 Pa. St. 490 (1882), the Supreme Court of Pennsylvania held that under this statute any assignment of pupils to schools on the basis of color was unlawful.

The question of school segregation was discussed shortly after the ratification of the Fourteenth Amendment in connection with the establishment of homes for soldiers' orphans. The Senate, in March, 1867, passed a bill which provided for separate school and homes for the orphans of colored soldiers,

> subject to the same regulations and restrictions provided in relation to the education and maintenance of the orphans of our white soldiers and sailors.[53]

In the House, Representative M'Creary proposed an amendment eliminating segregation and authorizing the admission of Negro children to any such home. He stated that his amendment was justified by reasons of justice and equality; that

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[50] Pa. Leg. Rec., 1881, p. 1943.
[51] *Id.*, pp. 1943–44.
[52] *Id.*, p. 2190.
[53] Pa. Leg. Rec., 1867, pp. 598–9.

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if the homes were segregated many colored children could not be taken care of because their number in some areas did not warrant separate homes. He also stated that the same discrimination existed in regard to the public schools.[53a] His proposal met with opposition. One member said that

> We are bound to respect the rights of the negro race, so far as liberty, and property, and educating them is concerned * * *

but he owed it to his constituents to protest against this proposal.[54] Representative Meyers pointed out that

> * * * The Republican members of the Senate seemed to think that sufficient justice would be done to the orphans of colored soldiers by giving them the means of being educated in separate schools. Why should we not be satisfied with the action of the Senate and the committee, on this matter? [55]

Mr. M'Creary withdrew his amendment.[56] Throughout the debate on this and other proposed amendments to the segregation clause there was no reference to the Fourteenth Amendment.

LEGAL STATUS OF NEGROES

Article III, Section 1 of the 1838 Constitution restricted the franchise to white males, and continued in force until the Fifteenth Amendment was adopted.[57] Prior to 1867, juries were se-

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[53a] *Id.*, App., p. CCCXLII.
[54] *Id.*, pp. CCCXLIV–CCCXLV.
[55] *Id.*, p. CCCXLV.
[56] *Id.*, p. CCCXLVI.
[57] Pa. Laws 1870, No. 33, sec. 10 (April 6).

lected from "taxable citizens,"[58] but in April of that year, when the jury law was revised, the qualifications were narrowed to "electors."[59] In 1865, the Legislature had rejected a proposal "to extend to all American citizens of African descent, and all persons of color, the same privileges as are now extended to white citizens in attending places of public amusement, worship, and meeting * * *,"[60] and also a bill to prohibit racial discrimination by the railways of the commonwealth.[61] In 1867, shortly after it had ratified the Fourteenth Amendment, the Legislature adopted a bill forbidding racial segregation by railroad companies,[62] having rejected an amendment to permit separate cars.[63] The opposition argued that the bill meant "social equality,"[64] while its supporters stated that "social equality" differed from

> a man's natural, civil and political rights to life, liberty and property, and equal suffrage with which to protect them.[65]

An amendment incorporating the provisions of the proposed 1865 bill prohibiting racial discrimination in places of public amusement and worship was defeated.[66]

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[58] Purdon's Digest, 9th ed., 1700–1861, p. 580, sec. 8.
[59] Pa. Laws, 1867, No. 41, sec. 2.
[60] Pa. Leg. Rec., 1865, p. 146.
[61] *Id.*, p. 712.
[62] Pa. Laws, 1867, No. 21.
[63] Pa. Leg. Rec., 1867, p. 214.
[64] *Id.*, p. 217.
[65] *Id.*, App., p. CVI.
[66] *Id.*, pp. 585–6.

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RHODE ISLAND

RATIFICATION

Rhode Island ratified the Fourteenth Amendment on February 12, 1867,[67] by a vote of 26 to 2 in the Senate, and 60 to 9 in the House.[68]

SCHOOLS

Prior to 1866, the Rhode Island statutes provided that

> No person shall be excluded from any public school, in the district to which such person belongs, if the town is divided into districts, or if not so divided, from the nearest public school, on account of being over fifteen years of age, nor except by force of some general regulation applicable to all persons under the same circumstances, and in no case on account of the inability of himself, his parents, guardian or employer, to pay any rate bill, tax or assessment whatever.[69]

There existed two separate schools for colored children in Providence. These had been established in the 1830's, but by 1865 they were described as presenting a "vexed question", which had engaged the attention of the city's School Committee for many years.[70] At the end of 1866

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[67] Acts and Resolves, 1867, p. 161. There are no printed journals of the Rhode Island legislature for this time. The original journal references are 25 Senate Journal, 1865–68, and 41 House Journal, 1866–69, February 7, 1867.

[68] McPherson, *Reconstruction* (1871), p. 194.

[69] Rhode Island, Rev. Stats., 1857, Tit. XIII, C. 71, Sec. 1.

[70] 21st Annual Report on Public Schools, App., pp. 4–5. R. I. Doc., 1866, App. No. 3.

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it was reported that the legislature had abolished "caste schools" in accordance with the "rapidly changing sentiment of the people in regard both to slavery and the colored race."[71] On March 7, 1866, a law had been enacted providing that

> In deciding upon applications for admission to any school in this State, maintained wholly or in part at the public expense, no distinction shall be made on account of the race or color of the applicant.[72]

LEGAL STATUS OF NEGROES

The first constitution of the state, adopted in 1842, conferred suffrage upon all male citizens.[73] Eligibility for jury duty depended basically upon the right to vote.[74] There was no discrimination against the Negro as a witness.

Marriage between whites and Negroes was prohibited until 1881.[75]

SOUTH CAROLINA

The South Carolina legislature convened under the Reconstruction Constitution ratified the Fourteenth Amendment in July 1868, reversing the state's earlier rejection of December 1866. The same constitution, adopted in 1868, provided for

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[71] 22d Annual Report on Public Schools, App., p. 7, R. I. Doc., 1867.

[72] Rhode Island, Acts and Resolves, Jan. 1866, C. 609, Sec. 1.

[73] Rhode Island Constitution, 1842, Art. II, Sec. 1.

[74] Rhode Island, Rev. Stats., 1857, Tit. XXV, C. 172, Sec. 1.

[75] Rhode Island, Rev. Stats., 1857, Tit. XX, C. 134, Sec. 6, repealed, Public Laws, Jan. 1881, C. 846.

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a system of public schools and declared that all schools "supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color." Two governors of the state in 1868 interpreted this as permitting separate schools. Although the implementing legislation was silent on this specific question, it did provide for an enumeration of children classified according to race and sex. Two colleges in the state were opened to Negroes. In 1895, the state constitution was amended to provide expressly for racially segregated schools.

RATIFICATION

South Carolina rejected the Fourteenth Amendment in December, 1866. Among the arguments given by Governor Orr in his message transmitting the amendment to the Legislature and recommending its rejection were the following:

> Do not its first and last sections, if adopted, confer upon Congress the absolute right of determining who shall be citizens of the respective States, and who shall exercise and enjoy any and all of the rights, privileges and immunities of citizenship? * * * With this amendment incorporated in the Constitution, does not the Federal Government cease to be one of "limited powers" in all of the essential qualities which constitute such a form of Government? Nay, more; does not its adoption reverse the well-approved doctrine, that the United States shall exercise no powers, unless expressly delegated by the Constitution?[76]

[76] House Journal, 1866, p. 34.

The Committee on Federal Relations recommended rejection; its report contained no discussion or reasons for the recommendation.[77] Both Houses concurred.[78]

The Legislature convened under the Reconstruction Constitution ratified the amendment in July, 1868, without debate.[79]

SCHOOLS

In South Carolina there had been since 1834 a system of public schools supported by state appropriations, intended for the poor but open to the children of every "citizen."[80] Except in Charleston, however, appropriations were inadequate, and private education was the rule for children of those who could afford it. The public schools were open only to whites. After 1834, it was forbidden to teach slaves to read or write, and free persons of color were forbidden to maintain schools for either slaves or freedmen.[81]

During the early Reconstruction period schools for Negroes were established by philanthropic organizations, and in Charleston the public schools were reopened, with separate rooms for white and colored.[82]

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[77] South Carolina Reports and Resolutions, 1866, p. 220.

[78] House Journal, 1866, p. 284; Senate Journal, 1866, p. 230.

[79] Senate Journal, 1868, p. 12; House Journal, 1868, p. 50.

[80] Teaching slaves to read was prohibited. South Carolina Laws, 1834, ch. 5, sec. 1.

[81] Knight, *Public Education in the South* (1922), pp. 215–228.

[82] Special Report of the Commissioner of Education, p. 385, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

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The Constitution of 1868 contained the following provisions:

ARTICLE X

SEC. 3. The general assembly shall, as soon as practicable after the adoption of this constitution, provide for a liberal and uniform system of free public schools throughout the State, and shall also make provision for the division of the State into suitable school districts. There shall be kept open, at least six months in each year, one or more schools in each school district.

SEC. 4. It shall be the duty of the general assembly to provide for the compulsory attendance, at either public or private schools, of all children between the ages of six and sixteen years, not physically or mentally disabled, for a term equivalent to twenty-four months, at least: *Provided,* That no law to that effect shall be passed until a system of public schools has been thoroughly and completely organized, and facilities afforded to all the inhabitants of the State for the free education of their children.

SEC. 10. All the public schools, colleges, and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.

In his message to the Constitutional Convention of 1868, Governor Orr had urged that provision be made for education of the colored people, but did not refer to the question of mixed schools:

> Education is now the great desideratum of all the colored people of South Carolina.

> For obvious reasons it was the policy of the State, previous to emancipation, to exclude the slave population from the benefits and advantages of education. I will not discuss these reasons. But the relations of that population to the State are now materially changed. Hence it is of the utmost importance that the largest intelligence possible shall be communicated to that class. Men of intelligence have many more opportunities, through their reading and observation, of learning and appreciating the moral law and its requirements. Profound ignorance, almost universally couples with it crime and vice. Hence, the education of the black population—and, I am sorry to say, of many of the white population of the State—should command the earnest attention of this body.[83]

The Committee on Education had before it proposals for mixed schools,[84] and also a proposal stating merely that "* * * no discrimination * * * be made in favor of any class of persons."[85] The Committee reported a proposed article on education containing the above provisions in substantially the same form as finally adopted.[86] The article on education was debated fully,[87] with a later debate on the question of mixed schools.[88]

In the extensive debate on the requirement of compulsory education, the question of separate

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[83] Convention Proceedings, p. 51.
[84] *Id.*, pp. 71, 100.
[85] *Id.*, p. 88.
[86] *Id.*, pp. 265–6.
[87] *Id.*, pp. 685–709.
[88] *Id.*, pp. 889–94, 899–901.

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or mixed schools was raised. Mr. A. C. Richmond stated:

> * * * If the word "compulsory" remains, it will be impossible to enforce the law for sometime to come. We say the public schools shall be opened to all. Every school district will have its school houses and its teachers. There is to be a particular school fund, school districts, and school houses. * * * There must be schools to which colored children can go; but we wish to look into the propriety of compelling parents to send their children to school. I believe the efforts of the teachers, preachers, and all those interested in the welfare of the State, and the efforts of all those interested in the welfare of the colored people, will bring out nearly all the colored children. I believe nearly all the colored children of the State will go to school. We have societies that will help to furnish the books; we have preachers who are much interested; we have missionaries, all of whom are interested in this class of our people, and who will see to it that the colored children are educated, so that settles that point. The next point is, how are the white children going to school? By means of moral suasion nearly all the colored children will be brought to school; and by means of white schools, nearly all the white children will go to school and be educated. It will regulate itself. The word "compulsory" is used to compel the attendance of children in one or the other class of schools.[89]

In support of the Committee's recommendation, a member pointed out that

[89] *Id.*, pp. 690–1.

> If anyone chooses to educate their children in a private school, this law does not debar them from that privilege.[90]

Mr. F. L. Cardozo, of the Committee on Education, stated in support of the proposal that

> Before I proceed to discuss the question, I want to divest it of all false issues, of the imaginary consequences that some gentlemen have illogically thought will result from the adoption of this section with the word compulsory. They affirm that it compels the attendance of both white and colored children in the same schools. There is nothing of the kind, and no such construction can be legitimately placed upon it. It simply says all the children shall be educated; but how is left with the parents to decide. It is left to the parent to say whether the child shall be sent to a public or private school. The eleventh section has been referred to as bearing upon this section. I will ask attention to this fact. The eleventh section does not say, nor does the report in any part say there shall not be separate schools. There can be separate schools for white and colored. It is simply left so that if any colored child wishes to go to a white school, it shall have the privilege to do so. I have no doubt, in most localities, colored people would prefer separate schools, particularly until some of the present prejudice against their race is removed.
>
> We have not provided that there shall be separate schools; but I do not consider these issues as properly belonging to the question. * * *[91]

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[90] *Id.*, p. 694.

[91] *Id.*, p. 706.

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The later debate on the provision for mixed schools included Mr. Duncan's objection that the provision would impede the education of the poor whites:

> * * * Now, what is likely to be the result of retaining this section, and thereby opening the public schools to all? Simply, that they would be attended only by the colored children. If the attempt is made to enforce a mixture in this way, I have no idea that fifty white children in the State would attend the public schools. The freedmen's schools are now, if I mistake not, open to all; and yet I believe not one white pupil in the State attends them. The result would be exactly the same with our public schools. This is a state of affairs that we should certainly desire to avoid. In the first place, the poor white children would be deprived of any chance of education. They would continue ignorant and degraded and prejudiced. The whites who have means would send their children to private schools, but the poor whites would be as heretofore, unable to do so. * * *
>
> * * * Certainly, if we look at the condition of the country, we will see the necessity of adopting such measures as will secure the education of the white people as well as of the colored. It is estimated that from twenty to thirty per cent of the grown up white men of South Carolina are unable to read or write.[92]

Mr. Wright construed the section as permitting separate schools:

> * * * The gentleman who last resumed his seat has referred to the impropriety of

[92] *Id.*, pp. 890–893.

> allowing the children of the two races to attend school together. If I read the section aright, it contemplates no such thing. It simply says, "all schools, colleges, etc., supported by public funds, shall be open to all classes, without regard to race, color or previous condition." * * * This provision leaves it so that white and colored children can attend school together, if they desire to do so; but I do not believe that colored children will want to go to the white schools, or *vice versa.* I think there will be separate schools established, and there is no clause in our Constitution that prevents it; therefore I hope this clause will be adopted exactly as it is. * * * [93]

The final argument was made by Mr. Cardozo:

> I think the opinion of the members is so fully established on this subject, that elaborate argument is unnecessary. I shall briefly notice some of the points made by the gentleman from Newberry (Mr. B. O. DUNCAN.)
>
> His first point is, that this provision runs counter to the prejudices of the people. To my mind, it is inconsistent that such an argument should come from a member of the Convention, or from one who favored the reconstruction scheme of Congress. The whole measure of reconstruction is antagonistic to the wishes of the people of the State, and this section is a legitimate portion of that scheme. It secures to every man in this State full political and civil equality, and I hope members will not commit so suicidal an act as to oppose the adoption of this section.

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[93] *Id.*, pp. 893–894.

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The gentleman from Newberry said he was afraid we were taking a wrong course to remove these prejudices. The most natural method to effect this object would be to allow children; when five or six years of age, to mingle in schools together, and associate generally. Under such training, prejudice must eventually die out; but if we postpone it until they become men and women, prejudice will be so established that no mortal can obliterate it. This, I think, is a sufficient reply to the argument of the gentleman under this head.

We have carefully provided in our report that every one shall be allowed to attend a free school. We have not said there shall be no separate schools. On the contrary, there may be separate schools, and I have no doubt there will be such in most of the districts. In Charleston, I am sure such will be the case. The colored pupils in my school would not like to go to a white school. Without flattery, I think I may say I have not seen as good a public school in Charleston as my own. We have as able a corps of teachers as any in the country. They have come from the North, adopted teaching as their profession, and they will not, in point of efficiency, yield to any teachers in the State.

In sparsely settled country districts, where perhaps there are not more than twenty-five or thirty children, separate schools may be established; but for ten or fifteen white children to demand such a separation, would be absurd; and I hope the Convention will give its assent to no such proposition.[94]

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[94] *Id.*, pp. 900–901.

Mr. Cardozo's remark that "this section is a legitimate portion of" the reconstruction scheme is the only specific reference to the reconstruction acts in the debates on education. Throughout the Convention, however, references were made to the fact that "* * * We are to frame a Constitution in accordance with the reconstruction acts under which we are operating" and to the requirement that the Fourteenth Amendment be ratified.[95] Almost the next order of business after Mr. Cardozo's remarks was the adoption of an ordinance directing the legislature to be elected under the new constitution to ratify the Fourteenth Amendment.[96]

The provision in the South Carolina constitution was construed by Governor Orr in his message to the Legislature on July 7, 1868, as permitting separate schools.[97] His successor, Governor Scott, on July 10, 1868, also recommended the establishment of separate schools. He did not refer specifically to constitutional provisions, but stated that

> While the moralist and the philanthropist cheerfully recognizes the fact that "God hath made of one blood all nations of men," yet the statesman, in legislating for a political society that embraces two distinct, and, in some measure, antagonistic races, in the great body of its electors, must, as far as the law of equal rights will permit, take cognizance of existing prejudices among both.[98]

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[95] *Id.*, pp. 561, 218, 513, 833.
[96] *Id.*, pp. 904–6.
[97] House Journal, 1868, p. 44.
[98] *Id.*, p. 62.

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The 1870 legislation to provide for schools did not specify either separate or mixed schools,[99] although it did provide for an enumeration of the children in each school district, classified as male and female, white and colored (sec. 38).

"An Act to Incorporate the Claflin University" of December 18, 1869,[1] prohibited discrimination:

> SEC. 5. No instructor in said University shall ever be required by the Trustees to have any particular complexion or to profess any particular religious opinions as a test of office, and no student shall be refused admission to, or denied any of the privileges, honors, or degrees of, said University on account of race, complexion or religious opinions which he may entertain: Provided, nevertheless, That this Section, in reference only to religious opinions shall not apply to the theological department of said University.

South Carolina College was opened to Negroes at this time.[2]

In 1895 the Constitution was amended to require segregated schools. Act. XI (7).

TENNESSEE

Tennessee ratified the Fourteenth Amendment in July 1866 over opposition which feared the measure would give Negroes the right to vote, hold office, sit upon juries and intermarry with whites, and "obliterat[e] all distinctions in regard to races * * *." A year later the Legislature

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[99] South Carolina Acts, 1870, No. 238, p. 339.

[1] South Carolina Acts, 1869–70, No. 193.

[2] Knight, *op. cit.*, p. 373.

established a common school system reserved to whites, while making provision for Negro education only "as far as practicable." In 1869 separate schools were formally established. Two months before ratifying the Fourteenth Amendment, the Legislature had "defined" the rights of Negroes, repealing in large part the "Black Code," but retaining the right to exclude Negroes from juries and to maintain separate schools. The Negro was enfranchised in 1870, shortly before the Fifteenth Amendment became effective.

RATIFICATION

A special session was called to consider the Fourteenth Amendment. Governor Brownlow, in his Proclamation of June 19, 1866,[3] stated that the Amendment established

> equal protection of all citizens in the enjoyment of life, liberty and property.

His message to the Legislature on July 6, 1866,[4] summarized the first section of the Amendment in these terms:

> By the first section, equal protection in the enjoyment of life, liberty and property, is guaranteed to all citizens. Practically, this affects mainly the negro, who having been emancipated by the rebellion, and having lost that protection which the interest of the master gave him, became by the very laws of nature, entitled to the civil rights of the citizen, and to the means of enforcing those rights.

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[3] Sen. J., Called Session, 1866, p. 4.

[4] *Id.*, p. 8.

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> To deny this to him, would be to place his life, property and labor in the power of every unfriendly local authority, or evil disposed person, and would be an instance of barbarism unworthy of the age. It will also prevent unjust and oppressive discrimination by one State against the citizens of other States.

Representative Leftwich, a Tennessee member of Congress, in an open letter to the Legislature in opposition to the Amendment dated June 26, 1866,[5] stated as follows on the subject of equality:

> We have done very much for the negro in giving him freedom, and all the civil rights necessary to its full enjoyment. We do not object to seeing him, if he is able, come up to perfect equality with our race, but we *will not* consent to lowering our race to an equality with him.

In the Senate, a proposal to submit the matter of ratification to the people was defeated.[6] The Senate also voted against an amendment to the resolution proposing ratification. This amendment read as follows:

> *Provided,* that the foregoing proposed amendments * * * shall not be so construed as to confer the right of suffrage upon a negro, or person of color, or to confer upon such negro or person of color the right to hold office, sit upon juries, or to intermarry with white persons; nor shall said proposed amendments be so construed as to prohibit any State from enacting and enforcing

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[5] MacPherson's *Scrap Book, Fourteenth Amendment*, p. 16.

[6] Sen. J., Called Session, 1866, p. 18.

> such laws as will secure these ends, not inconsistent with the present Constitution of the United States, nor * * * to abridge the reserved rights of the States in the election and qualification of their own officers, and the management of their domestic concerns, as provided and secured by the present Constitution of the United States.[7]

The Senate voted for ratification on July 11, 1866.[7a]

For a while no quorum could be obtained in the House, because several members absented themselves. Finally, two members were apprehended, brought to the Legislature and counted as present. The ratifying resolution was passed on July 19, 1866.[8] Representative Jarvis filed a protest in which he stated that the Amendment "obliterates all distinctions in regard to races."[8a]

SCHOOLS

Legislation enacted in 1867[9] established a common school system for white children and provided for special schools for colored children "as far as practicable," *i. e.,* when their number in a district exceeded twenty-five; if their number was below fifteen, the money raised based upon their number was to be used for educating them in a manner to be determined by the board of education.

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[7] *Id.*, p. 23.

[7a] *Id.*, p. 24.

[8] House J., Called Session, 1866, pp. 23–25; McPherson's *Scrap Book, Fourteenth Amendment*, pp. 18–19.

[8a] House J., Called Session, 1866, pp. 37–38.

[9] Tenn. Laws, 1867, Chapter XXVII.

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The school law was revised in 1869 to provide as follows:

> SECTION 4. That the schools for white children and for colored children shall be kept separate and apart from each other and the School Commissioners from each district will observe strictly this requirement.
>
> SECTION 6. That the taxes levied and collected by the respective counties under the provisions of this Act shall not be used for any other purposes than that of education, and shall be denominated the Common School Fund for said county; provided the school fund raised by each county shall be equally distributed pro rata among the white and colored scholastic population of the county.[10]

The Constitution of Tennessee, adopted in 1870, prohibited white and colored children from attending the same public school (Article 11, section 12). The same prohibition was written into section 30, Chapter 25 of the Public Acts of 1873.

In his Annual Report for the school year 1873–74 the State Superintendent of Public Instruction discussed the question of segregated schools in connection with the supplemental Civil Rights Bill then pending before Congress.[11] He declared that without the provision for separate schools for colored children no system of public schools would have been adopted and that if segregation were prohibited, the entire system would be destroyed.

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[10] Tenn. Laws, 1869–1870, Chapter XXXIII.

[11] Report of the Superintendent of Public Instruction, 1873–74, pp. 25–30, II Sen. J., 1875, App.

In May, 1866, two months before the Tennessee legislature ratified the Fourteenth Amendment, it had enacted a measure to define the rights of "persons of color."[12] These included the rights

> to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit, and to have full and equal benefits of all laws and proceedings for the security of the person and estate, and [they] shall not be subject to any other or different punishment, pains or penalty, for the commission of any act or offense, than such as are prescribed for white persons * * *.

Negroes who were blind, deaf, dumb, lunatics, paupers, or apprentices were given "full and perfect benefit and application of all laws regulating and providing for white persons" in the same condition. It was expressly declared, however, that the statute was not to be construed as allowing Negroes to serve on juries, or requiring their education in the same schools with whites. The Act repealed all prior inconsistent legislation.

The Constitution of 1870, adopted shortly before the Fifteenth Amendment was declared in force, gave the Negro the right to vote.[13] Also included in the Constitution was a prohibition of intermarriage between whites and Negroes.[14]

TEXAS

The Texas legislature rejected the Fourteenth Amendment in October 1866, in part because it

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[12] Tenn. Laws, 1865–66, c. XL.

[13] Art. IV, sec. 1. The former constitution, adopted in 1835, had restricted suffrage to whites. Art. IV, sec. 1.

[14] Art. XI, sec. 14.

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was thought to give Congress the power to "declare almost any right or franchise whatever, to be the privilege or immunity of a citizen of the United States * * *." In February 1870 the Amendment was ratified without debate. Although the Constitution of 1866 contemplated a separate system of schools for Negroes, no provision for Negro education was then made. The Constitution of 1870 was silent on segregation; legislation in 1870 and 1871 indirectly authorized separate schools, and in 1873 such schools were made mandatory.

RATIFICATION

The 1866 legislature refused to ratify the Fourteenth Amendment, in part because of its disfranchisement of those engaged in rebellion and also because it was thought to grant Congress the power to give to the freedmen rights which the legislature believed they should not have. In the House, the report of the Committee on Federal Relations, recommending rejection, stated in part

> The first section proposes to deprive the States of the right which they have possessed since the revolution of 1776 to determine what shall constitute citizenship of a State, and to transfer that right to the Federal Government. Its object is, provided the section shall become a part of the Constitution, under the color of a generality, to declare negroes to be citizens of the United States, and therefore, citizens of the several States, and as such entitled to all "the privileges and immunities" of white citizens; in these privileges would be embraced the exercise of suffrage at the polls,

> participation in jury duty in all cases, bearing arms in the militia, and other matters which need not be here enumerated. It is unnecessary to appeal to the fact that in most of the original free States, negroes have been by law, and in all of them by immemorial usage, excluded from these "privileges and immunities," now sought to be forced on the Southern States, to show that the amendment proposed in this section contemplates and intends a violation not only of justice, but of the common instincts of our nature. * * *.
>
> There is scarcely any limit to the power sought to be transferred by this section from the States to the United States. Congress might declare almost any right or franchise whatever, to be the privilege or immunity of a citizen of the United States and it would immediately attach to every citizen of every State, whether white man or descendant of African. To estimate the comprehensive scope of the power herein sought for Congress—that body might declare miscegenation a privilege or immunity. * * *[15]

The Amendment was rejected on October 13, 1866, by a vote of 70 to 5.[16]

The report of the Senate Committee on Federal Relations was similar.[17] The Amendment was rejected by the Senate on October 27, 1866, by a vote of 27 to 1.[18]

After the adoption of the Constitution of 1870, the first legislature elected thereunder ratified

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[15] House Journal, 1866, p. 578.

[16] *Id.*, p. 584.

[17] Senate Journal, 1866, pp. 417–423.

[18] *Id.*, p. 471.

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the Fourteenth Amendment at a provisional session in February 1870, without discussion.[19]

SCHOOLS

In Texas there had been no occasion to consider public education for Negroes prior to 1865. There had been constitutional and statutory provision for public education, but those had not in practice led to an effective system of free public education even for white children.[20] The first Constitution, in 1836, recognized the obligation of the government for education, providing in Section 5 that

> It shall be the duty of congress, as soon as circumstances will permit, to provide by law a general system of education.

The 1845 Constitution was more detailed:

ARTICLE X

> Sec. 1. A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools.
>
> Sec. 2. The legislature shall, as early as practicable, establish free schools throughout the State, and shall furnish means for their support by taxation on property * * *.

By a statute enacted in 1854 there was set aside a fund of $2,000,000 United States 5% bonds,

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[19] Senate Journal, Prov. Sess., Feb., 1870, p. 29; House Journal, Prov. Sess., Feb., 1870, p. 33.

[20] See Knight, *Public Education in the South* (1922), p. 261.

the interest of which was to be allotted to counties on the basis of the "free white population" between the ages of six and sixteen years in each county, for the payment of teachers only.[21] By 1860 there were 1,218 public schools in the State, not free, but with the patrons paying tuition.[22] During the War the school fund was dissipated.[23]

The Constitution of 1866 provided that the public-school fund be set aside for the education of the "white scholastic" population, and contemplated a separate system for "Africans" to be supported from taxes on them.[24] In fact, the legislature of 1866 made no provision for education of Negroes. The act authorizing the sale of public school lands belonging to counties specified that the interest on the proceeds be applied to "payment of the tuition of all the white scholastic population" in the county.[25] Allotments from the public school fund were to be on the basis of "the free white population."[26] Another "Act to provide for the education of the indigent white children" by payment of tuition provided that Africans or descendents of Africans and their property were exempted from local taxation for the purpose of this act.[26a] The few schools for Negroes were under the supervision of the Freedmen's Bureau.[27]

[21] Texas Laws, Fifth Legislature, 1853–54, c. 18, p. 17.

[22] Knight, *op. cit.*, pp. 258–61.

[23] Superintendent's Report, Convention Journal I, p. 65.

[24] Art. X, secs. 1, 2, 7.

[25] Laws of Texas, 1866, ch. 79, p. 74.

[26] Laws of Texas, 1866, ch. 146, p. 170.

[26a] Laws of Texas, 1866, c. 154, p. 195.

[27] Special Report of the Commissioner of Education (1871), p. 390, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

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The Constitutional Convention which was elected pursuant to the Reconstruction Act of 1867 was advised by the Governor that

> It is not my province to make recommendations for your action; but I trust that it will not be considered improper for me to suggest that, in the constitution you are about to form, it is expected—
>
> That you will declare that the pretended act of secession and all laws that have been enacted in aid of the late rebellion, or repugnant to the Constitution and laws of the United States, are and were null and void from their inception; and that you will at once repeal all laws that make any discrimination against persons on account of their color, race or previous condition;
>
> * * * * *
>
> That you will secure equal civil and political rights to every inhabitant of the State who has not forfeited these rights by participation in the late rebellion, or by conviction for crime;
>
> * * * * *
>
> That you will make a liberal provision, by taxation upon property, for the immediate establishment of Free Public Schools for the education of every child in the State; * * *.[28]
>
> * * * * *

Insofar as education is concerned, the Convention had before it a report of the Superintendent of Public Schools outlining the history and status of education in the State and recommending a reservation of public lands solely for school purposes, a constitutional provision to protect the

[28] Constitutional Convention Journal, I, pp. 14–15.

school fund, and additional state control over the educational system:

> Thus, while the paramount law ordains that there *must* be a system of free primary schools, open to the entire youth of the State, it may properly refer to the Legislature the settlement of the details thereof; the construction of buildings, the salary of teachers, the method of instruction, the question of separate or mixed schools, the plan of supervision, and the whole apparatus of the law.[29]

The Constitution, as adopted, contained the following provisions, recommended by the Convention's Committee on Education:

ARTICLE IX

> Section 1. It shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State between the ages of six and eighteen years.
>
> * * * * *
>
> Sec. 4. The legislature shall establish a uniform system of public free schools throughout the State.
>
> Sec. 5. The legislature, at its first session, (or as soon thereafter as may be possible,) shall pass such laws as will require the attendance on the public free schools of the State of all the scholastic population thereof, for the period of at least four months of each and every year:

[29] *Id.*, I, p. 71.

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Provided, That when any of the scholastic inhabitants may be shown to have received regular instruction, for said period of time in each and every year, from any private teacher having a proper certificate of competency, this shall exempt them from the operation of the laws contemplated by this section.

* * * * *

Sec. 9. The legislature shall at its first session (and from time to time thereafter, as may be found necessary), provide all needful rules and regulations for the purpose of carrying into effect the provisions of this article. It is made the imperative duty of the legislature to see to it that all the children in the State, within the scholastic age, are, without delay, provided with ample means of education. The legislature shall annually appropriate for school purposes, and to be equally distributed among all the scholastic population of the State, the interest accruing on the school-fund, and the income derived from taxation for school purposes; * * *

The original Report of the Committee on Education, consisting of a proposed constitutional provision, contained no reference to separate or mixed schools.[30] An amendment to the report to require separation was tabled by a vote of 36 to 30.[31] Another, by Mr. Schuetze of the Committee on Education, was adopted by a vote of 48 to 12.[32] A proposed proviso to permit mixed schools where separate schools were not established was tabled

[30] *Id.*, I, pp. 609–14.
[31] *Id.*, I, p. 896.
[32] *Id.*, I, p. 898.

by a vote of 40 to 20.[33] Proposals to specify that separation be discretionary were tabled by votes of 38 to 22 [34] and 38 to 27,[35] and the Schuetze amendment again approved, 52 to 14.[36] The proposed article was subsequently recommitted to the Committee on Education.[37] That Committee reported back that it would not change its original report, which contained no reference to separation.[38] The article was adopted as originally reported.[39]

Governor Davis in his message of April 29, 1870, recommended some provision for education, but made no reference to Negroes or to the Amendment:

> Next in importance to the measures necessary to the establishment of law and order, you will find the question of providing for the education of the children of the State. No better civilizer has been found than a liberal system of education * * *
>
> * * * there is a special necessity for education in our country where the government depends upon the people themselves. The success of Republican institutions and universal suffrage is assured by universal education.[40]

The legislature on August 13, 1870, enacted a law concerning public schools which made no direct

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[33] *Ibid.*
[34] *Ibid.*
[35] *Id.*, I, p. 912.
[36] *Ibid.*
[37] *Id.*, II, p. 146.
[38] *Id.*, II, p. 229.
[39] *Id.*, II, pp. 417–21.
[40] Senate Journal, April 1870, p. 16.

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reference to the question of separate schools. Among other matters, it provided that the County Court should act as a board of school directors and that "they may make any separation of the students or school necessary to insure success, so as not to deprive any student or students of scholastic benefits, except for such misconduct as demands expulsion." [41]

The Act of 1871 was similarly indirect, in providing that

> * * * the Board of Education for this State shall prescribe no rule or regulation that will prevent the directors of the school districts from making any separation of the students that the peace and success of the school and the good of the whole may require.[42]

In 1873 the trustees were directed to prepare separate lists of white and colored children, and to separate "the children" and so arrange "the schools and school houses that good order, peace and harmony may be maintained in the schools." [43]

The Constitution of 1876 specified that

> Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both. (Article VII, Sec. 7)

LEGAL STATUS OF NEGROES

The failure to provide education prior to 1870 was a part of the general treatment of freed-

[41] Texas Laws, 1870, ch. 68, p. 113.
[42] Texas Laws, 1871, ch. 54, sec. 3, p. 58.
[43] Texas Laws, 1873, ch. 63, pp. 84, 90.

men as a separate class."[44] An 1866 act concerning "persons heretofore known as slaves, and free persons of color" gave them the rights to contract, sue, inherit, buy and sell property, and to "have and enjoy the rights of personal security, liberty, and private property." However, they could not marry whites, serve on juries, hold office, vote, and, except in limited instances, testify in court.[45] Another statute enacted the same year provided that

> every Railroad Company heretofore incorporated or which may hereafter be incorporated, by the Legislature of this State, shall be required to attach to each passen-

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[44] The Attorney General of the State resigned in 1868 because he was unwilling to take an oath which recognized as "laws" of Texas the Constitution of 1866 and the Acts of the Legislature of 1866. He prepared several opinions on their unconstitutionality, copies of which were printed for distribution to the members of the Convention (Convention Journal, I, p. 129). In his opinion on the "pretended legislation" of 1866 he listed 22 statutes and two joint resolutions which he declared to be unconstitutional, as aimed directly at the freedmen and opposed to the Civil Rights Act and the Thirteenth Amendment. The law defining "persons of color" was objectionable because its "sole object * * * was to defeat equality before the law—justice; to discriminate on account of race." The law defining the rights of "persons of color" was "Subject to the same objection. It was, he said, restrictive, giving them no more rights than free persons of color had during the existence of African slavery; it takes special care not to declare them to be 'citizens.'" He described as in violation of the United States Constitution the laws concerning schools, that providing for separate railroad cars, and those restricting jury service and the militia to whites. (*Id.*, I, p. 953 ff.)

[45] Laws of Texas, 1866, ch. 128, p. 131.

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> ger train run by said Company, one car for the special accommodation of Freedmen.[46]

In 1871, the latter act was superseded by one that declared

> That the equality of all persons before the law is herein recognized, and shall ever remain inviolate, nor shall any person ever be deprived of any right, privilege or immunity, nor be exempted from any burdens or duty on account of race, color or previous condition.
>
> SEC. 2. That all public carriers in this State are hereby prohibited, in accordance with the above and foregoing section, from making any distinctions in the carrying of passengers * * *[47]

In the same year Negroes were made eligible to testify in court.[48]

VERMONT

RATIFICATION

The Republican state convention on June 20, 1866, indicated some dissatisfaction that the Fourteenth Amendment did not go farther than it did, stating:

> That, while approving the constitutional amendment lately proposed by Congress as a present practical measure toward securing just ends, we yet insist that every scheme of restoration is imperfect that is not based upon equal and exact justice to all, and the equal rights, personal, civil,

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[46] Laws of Texas, 1866, ch. 102, p. 97.

[47] Laws of Texas, 1871, 2d Sess., ch. 21, p. 16.

[48] Laws of Texas, 1871, 1st Sess., ch. 104, p. 108.

> and practical, of all loyal citizens, irrespective of color or race; * * *.[49]

The Governor referred the Amendment to the Legislature in his address of October 12, 1866.[50] While the Amendment was under discussion in the House, it was again suggested that the Amendment was not strong enough. It was regretted

> that the amendment was so imperfect as it was; that the first article which seems to make such abundant provision for securing every right of every citizen of the United States in each of the States, should in the last article make provision for recognizing the disfranchisement of 4,000,000 of citizens, principally in the States yet to be admitted. He thought the principles enunciated in the first article could and ought to be interpreted as securing each and every political and civil right to each citizen;

Mr. Hubbard stated that if this were not so, he would propose a joint resolution addressed to Congress seeking such an amendment.[51] Mr. Woodbridge explained

> that if it was not all that ought to be given it was all that could now be done. It made Southern and Northern representation in Congress on nearly equal terms. It encouraged Southerners to educate and enfranchise blacks.[52]

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[49] *Appleton's Annual Cyclopaedia*, 1866, pp. 761–2.

[50] House J., 1866, pp. 32–34.

[51] (Windsor) Vermont Journal, Oct. 27, 1866, p. 2, col. 1.

[52] *Ibid.*

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The Legislature ratified the Amendment, 28 to 0 in the Senate,[53] and 196 to 11 in the House.[54]

SCHOOLS AND LEGAL STATUS OF NEGROES

The public school system in Vermont dates from its beginnings as a state, and seems never to have had racial segregation.[55] No laws discriminating against the Negro have been found. In reply to an inquiry from the Superintendent of Public Instruction of Indiana, in 1868, the Vermont Superintendent of Schools wrote:

> I am happy to say that the negro in Vermont is under no disabilities, nor has he ever been. Neither constitution nor statute recognizes any distinction based upon race or color.[56]

VIRGINIA

Virginia rejected the Fourteenth Amendment in January, 1867 with only one dissenting vote. In October, 1869, it was ratified without debate. Negro education, proscribed before the war, was at the time of ratification restricted to a few schools established by benevolent societies and supported by the Freedmen's Bureau. The Constitution of 1870, drafted in 1867 and 1868, was

---

[53] Sen. J., 1866, p. 75. The Journal states that the Appendix contains the report of the Senate Committee recommending ratification. The Appendix, however, does not contain that report.

[54] House J., 1866, p. 139.

[55] See Vt. General Stats., 1863, tit. 13, c. 22; Vt. Revised Laws, 1880, tit. 10.

[56] See Report of the Indiana Superintendent of Public Instruction, 1867–1868, p. 24. Ind. Doc., 1867–68.

silent on segregation in schools. The statute creating a uniform school system in 1870 specified segregation.

RATIFICATION

Governor Pierpoint in a message of December 3, 1866, recommended ratification of the Fourteenth Amendment.[57] As to the scope of the Amendment, he said:

> There is no ambiguity in the language of the proposed amendment: it is before you for your mature consideration—for adoption or rejection: you are fully acquainted with all the circumstances which led to its proposal. The congress of the United States has made its acceptance a condition precedent to the admission of representatives, in the councils of the nation, from states now unrepresented.[58]

The General Assembly rejected the amendment by a vote of 74 to 1 in the House [59] and 27 to 0 in the Senate.[60]

Ratification in 1869, after the Amendment had been adopted, was perfunctory. Governor Walker's message of October 5, 1869, stated merely that

> The 5th section of the act of congress of March 2d, 1867, among other things, declares "That when said state, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the constitution of the United States proposed by the thirty-ninth congress, and

[57] Senate Journal, 1866–67, pp. 28–34.
[58] *Id.*, p. 29.
[59] House Journal, 1866–67, p. 108.
[60] Senate Journal, 1866–67, p. 103.

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known as Article Fourteen, and when said article shall have become a part of the constitution of the United States, said state shall be declared entitled to representation in congress, and senators and representatives shall be admitted therefrom, on their taking the oath prescribed by law." This law is still in full force, and Virginia was named in the preamble to the act as one of the states to which it was to be applied. It will be necessary, therefore, for you to comply with the condition therein named, although Article Fourteen has already been ratified by the requisite number of states, and has been officially proclaimed as a part of the constitution of the United States. A copy of the resolution of congress proposing Article Fourteen to the legislature of the several states is herewith submitted.[61]

Action in the Senate was in accord with the recommendation:

Mr. Herndon, from the select committee to whom was referred the governor's message, submitted the following report:

"The committee to whom was referred the governor's message, with instructions to report what action, if any, should now be taken upon the subjects therein mentioned, respectfully report that, after a conference with the house committee on the same subject, they agreed to report the two accompanying bills, one ratifying the fourteenth amendment to the constitution of the United States, and the other ratifying the fifteenth amendment to the same, with a recommendation that they do pass.

(Signed) CHARLES HERNDON, *Chairman*

* * * * *

[61] Senate Journal, 1869, p. 18.

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* * * * *

[61] Senate Journal, 1869, p. 18.

> No. 1, A bill to ratify the joint resolution of congress passed June 16th, 1866, proposing an amendment to the constitution of the United States of America, was taken up, read the first and ordered to be read a second time; and on motion of Mr. Herndon (two-thirds concurring), was read the second time, and was ordered to be engrossed and read a third time; and being forthwith engrossed, was, on his further motion (two thirds concurring), read the third time; and the question on the passage of the bill was put and determined in the affirmative—ayes 36; noes 4.[62]

Similar action followed in the House:

> A message was received from the senate by Mr. Patterson, who informed the house of delegates that the senate had passed No. 1 senate bill, entitled, "An act to ratify the joint resolution of congress, passed June 16th, 1866, proposing an amendment to the constitution of the United States of America;" in which they respectfully request the concurrence of the house of delegates.
>
> The speaker laid before the house senate bill No. 1, as requiring immediate attention. It was read the first and second times.
>
> On motion of Mr. Crenshaw, the rule was suspended requiring its reference to a committee.
>
> Mr. Budd moved that senate bill No. 1 be read a third time this day, which was agreed to, two-thirds of the members elect to the house of delegates concurring.
>
> The bill was read a third time and passed—yeas 126; nays 6.[63]

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[62] *Id.*, pp. 26–27.

[63] House Journal, 1869, p. 37.

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SCHOOLS

Public schools in the ante-bellum period were predominantly of the "pauper" type. A permanent public-school fund, the so-called literary fund, was established in 1810,[64] and a year later its purpose was defined to be the "education of the poor".[65] Beginning in 1818, a fixed annual sum from the income of the fund was appropriated for the education of poor children.[66] In some cities and towns, and perhaps a dozen counties, the so-called free-school system was adopted, which was supported by local taxation.[67]

Negroes, both slave and free, were prevented by law from obtaining any education. The Code of 1819[68] prohibited "all meetings or assemblages of slaves, of free negroes or mulattoes mixing and associating with such slaves, at any meeting-house or houses, or any other place or places, in the night, or at any school or schools for teaching them reading and writing, either in the day or night." The penalty for any violation was twenty lashes. Schools for free Negroes, which had been tolerated in Richmond, Norfolk and other cities[69] were suppressed in 1831. All meetings of free Negroes or mulattoes for teaching purposes were declared unlawful as-

[64] Va. Laws 1809–10, ch. 14.

[65] Va. Laws 1810–11, ch. 8.

[66] Va. Laws 1817–18, ch. 11.

[67] Va. Code 1849, ch. 82. The preceding chapter dealt with "schools for indigent children" (ch. 81). See Knight, *Public Education in the South* (1922), p. 209.

[68] Va. Rev. Code 1819, ch. 111, sec. 15.

[69] Special Report of the U. S. Commissioner of Education (1871), p. 394, House Exec. Docs., 41st Cong., 2d Sess., vol. 13, No. 315.

semblies, and any colored participant was liable to corporal punishment; white persons teaching such groups were punishable by fine and imprisonment.[70] These laws were incorporated with a few changes in the Criminal Code.[71]

Beginning in 1861, schools for freedmen were established by benevolent associations [72] and later supported by the Freedmen's Bureau.[73]

The Virginia Constitution of 1870, approved by popular vote on July 6, 1869, was drawn up in a convention held in 1867 and 1868. It provided

> That all citizens of the State are hereby declared to possess equal civil and political rights and public privileges (I, 20).

It required the General Assembly to establish a free school system, but did not refer to the question of separation:

> The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all the counties of the State by the year eighteen hundred and seventy-six, or as much earlier as practicable (VIII, 3).

In the convention, proposals to require separate schools were rejected.[74] A contrary proposal to require mixed schools was also rejected.[75]

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[70] Va. Laws 1831, ch. 39, secs. 4–6.
[71] Va. Code 1849, ch. 198, secs. 31–32.
[72] Special Report, p. 395.
[73] *Id.*, pp. 396 *et seq.*
[74] Convention Journal, pp. 299, 301, 308, 336.
[75] *Id.*, pp. 333, 340.

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The General Assembly in enacting "An Act to Establish and Maintain a Uniform System of Public Free Schools," approved July 11, 1870,[76] specifically provided for segregation:

> The public free schools shall be free to all persons between the ages of five and twenty-one years, residing within the school district; * * * provided, that white and colored persons shall not be taught in the same school, but in separate schools, under the same general regulations as to management, usefulness, and efficiency. * * * (Sec. 47.)

This was repeated in subsequent acts.[77] In 1902 a Constitution was adopted, containing a provision that

> White and colored children shall not be taught in the same school (Sec. 140).

WEST VIRGINIA

The West Virginia legislature ratified the Fourteenth Amendment in January, 1867. Segregation, authorized from the establishment of the school system in 1863, was required after 1866, and embodied in the 1872 constitution. The constitutional provision was later held not to violate the Fourteenth Amendment. *Martin* v. *Board of Education,* 42 W. Va. 514 (1896). As a prerequisite to admission to the Union, West Virginia had instituted in 1863 a gradual emancipation of slaves, but Negroes were not permitted to vote, serve on juries, or marry whites; restric-

[76] Va. Laws, 1869–70, ch. 259, p. 402.

[77] Va. Laws, 1871–72, ch. 370; Va. Laws, 1876–77, ch. 38.

tions on their competence as witnesses, however, were removed in 1866.

RATIFICATION

The Governor submitted the Fourteenth Amendment for ratification on January 15, 1867. He stated that it left the question of Negro suffrage open and urged its ratification.[78] Upon the reading of the Governor's message in the Senate, a joint resolution ratifying the Amendment was introduced; by vote, the ordinary reference to committee was omitted, and the resolution passed by a vote of 15 to 3.[79] The House of Delegates, which on January 15 had tabled a resolution ratifying the Amendment,[80] passed the Senate's proposal on January 16, by a vote of 43 to 11.[81]

SCHOOLS

The Free Schools Act of 1863, passed at the first session of the Legislature after the admission of West Virginia as a state, provided separate schools for colored children, but did not in terms prohibit their education together with whites.[82] In 1866, the Legislature passed a school law requiring segregation,[83] and reaffirmed this on February 27, 1867, six weeks after it had ratified the Fourteenth Amendment.[84] The Constitution of 1872 expressly incorporated a segregation require-

[78] Sen. J., 1867, p. 19.
[79] *Id.*, p. 23.
[80] House J., 1867, pp. 7–8.
[81] *Id.*, p. 11.
[82] W. Va. Acts, 1863, c. 137, sec. 17.
[83] W. Va. Acts, 1866, c. 74, sec. 26.
[84] W. Va. Acts, 1867, c. 98, sec. 19.

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ment.[85] This provision was upheld in 1896 against challenge under the Fourteenth Amendment. *Martin* v. *Board of Education,* 42 W. Va. 514.

The Report of the Superintendent of Schools dated December 8, 1866, contains the following remark:

> Owing to the fact that these freedmen are widely separated, their school privileges are necessarily limited.[86]

LEGAL STATUS OF NEGROES

When the Constitution of West Virginia was first submitted to Congress for approval, it contained a provision that no slave or free Negro could enter the state to take up permanent residence. This was changed to apply to slaves only, and a further provision added that all children born of slaves after July 4, 1863, were to be free; all children of slaves under 10 years of age at that time would become free upon attaining the age of 21; and all children of slaves between 10 years and 21 years of age would become free upon attaining the age of 25.[87] Voting was restricted by the Constitution to white males.[88] Negroes were excluded from juries by statute until the decision in *Strauder* v. *West Virginia,* 100 U. S. 303. However, Negroes were permitted to appear as witnesses in the same manner as

[85] Art. XII, section 8.

[86] Report of Superintendent of Schools, p. 15, House J., 1867, Appendix.

[87] Const., 1863, Art. XI, section 7. See also 12 Stat. 634.

[88] Const., 1863, Art. III, section 1.

whites.[89] Miscegenation was prohibited under a Virginia statute, which was carried over into the laws of West Virginia.[90]

WISCONSIN

In February, 1867, Wisconsin ratified the Fourteenth Amendment. A minority report in the Senate objected that the Amendment transferred to Congress legislative powers theretofore reserved to the states. Wisconsin schools had been open to all children since the admission of the state in 1849. In 1866 it was held that a law enacted in 1849 conferred the franchise on Negroes.

RATIFICATION

The Fourteenth Amendment was presented to the Legislature by Governor Fairchild in his address of January 9, 1867, in which he urged ratification.[91]

The Senate referred the Amendment to its Committee on Federal Relations, which reported favorably on January 22.[92] The majority report contained no discussion of the scope of the Amendment, but the minority commented at length, stating in part:

> The apparent object of the proposed amendments is to declare the Africans lately in servitude in the southern states of

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[89] W. Va. Acts, 1866, c. 89.
[90] W. Va. Code, 1870, c. 149, section 8.
[91] Sen. J., 1867, pp. 32 *et seq.*
[92] *Id.*, p. 96.

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> this republic, citizens, and to give to the Congress of the United States the power to make them citizens of the several states wherein they reside, and thereby to extend to them the right of suffrage, and, also, to give to Congress the power to legislate for the citizens of the several states. The object accomplished, if the amendments are ratified, will be a surrender of certain rights and powers which the several states of the union now hold by their sovereign power in trust over the persons and property of their citizens to the federal government, so as to make it the arbiter between the states and the citizens and resident [sic] thereof.[93]
>
> * * * * *
>
> The first section, in connection with the fifth, will give to the federal government the supervision of all the social and domestic relations of the citizens in the state and to subordinate state governments to federal power.[94]

The minority report also questioned the authority of Congress as it was then constituted to propose the Amendment.

The Senate voted for ratification on January 23, by a vote of 22 to 10.[95] The Assembly followed on February 7, by a vote of 69 to 10.[96]

There was some debate in both houses. Senator Hadley, in expressing his approval of the first section, "thought it already provided for in the

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[93] *Ibid.*

[94] *Id.*, p. 98.

[95] *Id.*, p. 119.

[96] Assembly Journal, 1867, p. 224.

constitution."[97] General Hobart, in the Assembly, made a statement to the following effect:

> No State shall deprive any person of life, liberty or property without due process of of law, or the equal protection of law.—He could see no objection to this proposition; and none could be urged, unless it tended to give too much power to the Supreme Court of the United States. It would prevent any attempt at secession in the future. * * * Under this proposition all persons will be equal before the law.[98]

Assemblyman Dyer explained:

> The first [section] defines some of the rights of citizenship, and prohibits the abridgment of the privileges and immunities of the citizen. This, it may be said, is already in the constitution, and it is true, that instrument does, in effect, guaranty to the citizen, the enjoyment of life, liberty and property. But its provisions in that respect have been disregarded; State legislation in hostility to them has been tolerated and encouraged, and it is well to provide anew and with greater emphasis that the immunities of the citizen shall never be abridged nor his equal protection of the laws be denied.[99]

SCHOOLS

Wisconsin does not appear to have made any distinction between whites and Negroes in the

[97] (Madison) Wisconsin State Journal, January 24, 1867, p. 2, col. 3.

[98] *Id.*, February 6, 1867, p. 2, col. 1.

[99] *Id.*, p. 2, col. 2.

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field of education. The original State Constitution of 1848 provided that

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable, and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years, and no sectarian instruction shall be allowed therein.[1]

The school legislation of the State has been free of any reference to race or color.[2]

LEGAL STATUS OF NEGROES

The Constitution of 1848 limited suffrage to white males and to certain Indians.[3] Eligibility for jury service was restricted by statute to qualified voters.[4]

In 1866, the Wisconsin Supreme Court held that Negroes were entitled to vote by virtue of a law enacted in 1849.[5] *Gillespie* v. *Palmer,* 20 Wis. 544.

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[1] Art. X, Sec. 3.

[2] See Chapter 19, Revised Statutes 1849; Chapter XXIII, Revised Statutes 1858; Chapter XXIII, Revised Statutes, 1871.

[3] Art. III, sec. 1; see also, Wis. Rev. Stats., 1858, tit. II, c. 7, sec. 1.

[4] Wis. Rev. Stats., 1858 and 1871, c. 118, sec. 1.

[5] Wis. Laws, 1849, c. 137.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 1[1]

OLIVER BROWN ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

BRIEF FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

This brief is filed in response to the Court's invitation to the Attorney General of the United States to participate in the further argument of these cases on the questions of relief. It is now the settled law of the land that segregation of white and colored children in the public schools of a State or of the District of Columbia is unconstitutional. There remain for consideration and decision only the questions as to the decrees that should be entered in these cases in order to achieve compliance with the Court's ruling.

[1] Together with No. 2, *Harry Briggs, Jr., et al.* v. *R. W. Elliott, et al.*; No. 3, *Dorothy E. Davis, et al.* v. *County School Board of Prince Edward County, et al.*; No. 4, *Spottswood Thomas Bolling, et al.* v. *C. Melvin Sharpe, et al*; and No. 5, *Francis B. Gebhart, et al.* v. *Ethel Louise Belton, et al.*

The views of the Government on these questions are set forth in this brief. At the outset it may be helpful to state, in summary fashion, our answers to the questions formulated by the Court (347 U. S. 483, 495–96):

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice? *No.*
>
> (b) or may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? *Yes.*
>
> 5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
>
> (a) should this Court formulate detailed decrees in these cases? *No.*
>
> (b) if so, what specific issues should the decrees reach? ---
>
> (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees? *No.*
>
> (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so, what

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general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees? *Yes. The provisions suggested for inclusion in the decrees are outlined at pp. 27–29, infra.*

I

THIS COURT HAS FULL POWER TO DIRECT SUCH RELIEF AS WILL BE MOST EFFECTIVE AND JUST

Question 4 need not detain the Court long. The Government, in its brief submitted on the previous reargument, reviewed the authorities bearing on the scope of the Court's remedial powers (Br. 152–167), and concluded that the Court has "undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision" (Br. 167). We noted that Congress has expressly empowered the Court, in fashioning effective relief in cases coming before it, to enter "such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances" (28 U. S. C. 2106). This provision reflects the breadth and flexibility of judicial remedies which are available to the Court. The shaping of appropriate relief in the present cases, as all will agree, involves considerations of a most sensitive and

difficult nature. But, as was stated in our earlier brief (p. 154), "we believe there can be no doubt of the Court's *power* to grant such remedy as it finds to be most consonant with the interests of justice."

II

THE VINDICATION OF THE CONSTITUTIONAL RIGHTS INVOLVED SHOULD BE AS PROMPT AS FEASIBLE

The fashioning of relief in these cases does not call for the formulation or application of new or unusual legal principles. On the contrary, the task confronting the Court is one which presents itself whenever it has been judicially found that legal rights have been, and are continuing to be, violated. The question is always one of determining how, in the light of the facts presented and within the limits of the power possessed by it, the Court can best insure the removal of the condition of illegality in a manner comporting not only with the interests of the parties but also, to the extent it may be involved, with the public interest.

In many instances the solution to this problem is quite simple. The balancing of the relevant considerations may lead inescapably to the conclusion that the legitimate interests of all concerned require only immediate termination of the unlawful conduct. In such circumstances a court of equity normally does no more than to enter a decree enjoining that conduct. It is where the

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scales are not so clearly tipped in that direction that the shaping of the appropriate remedy involves difficulties.

The Court recognized, in restoring these cases to the docket for further argument (347 U. S. at 495), that "the formulation of decrees in these cases presents problems of considerable complexity." These problems must be viewed in proper perspective. The starting point must be a recognition that we are dealing here with basic constitutional rights, and not merely those of a few children but of millions. These are class actions. Under the Court's decision the maintenance of segregated schools is in violation of the constitutional rights not only of the individual plaintiffs but of all other "similarly situated" colored children upon whose behalf the suits were brought. Relief short of immediate admission to nonsegregated schools necessarily implies the continuing deprivation of these rights. The "personal and present" right (cf. *Sweatt* v. *Painter,* 339 U. S. 629, 635) of a colored child not to be segregated while attending public school is one which, if not enforced while the child is of school age, loses its value. Hence any delay in granting relief is *pro tanto* an irretrievable loss of the right.

The unconstitutionality of racial segregation in public schools is no longer in issue. However, in considering whether any delay in granting full relief is justifiable, it must be borne in mind that continuation of school segregation has harmful

effects both on the individuals concerned and on the public. The right of children not to be segregated because of race or color is not a technical legal right of little significance or value. It is a fundamental human right, supported by considerations of morality as well as law. "To separate [colored children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (347 U. S. at 494). Racial segregation affects the hearts and minds of those who segregate as well as those who are segregated, and it is also detrimental to the community and the nation.

In the absence of compelling reasons to the contrary, therefore, there should be no unnecessary delay in the full vindication of the constitutional rights involved in these cases, and if any delay is required, it should be kept to a minimum.

III

THE PUBLIC INTEREST REQUIRES AN INTELLIGENT, ORDERLY AND EFFECTIVE SOLUTION OF THE PROBLEMS THAT MAY BE ENCOUNTERED IN COMPLYING WITH THIS COURT'S DECISION IN PARTICULAR AREAS

No objective examination of the problems of relief can overlook the fact that the impact of the Court's decision holding racial segregation in public schools to be unconstitutional goes far beyond the areas and parties involved in these cases. As a binding precedent the decision requires the termination of segregation in school

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systems in more than one-third of the States and in the District of Columbia.

Because public education is, as the Court has recognized (347 U. S. at 493), "perhaps the most important function of state and local governments," there is a public interest to be served in permitting the transition to be carried out in an orderly manner, so as to avoid needless dislocation or other impairment of the effective operation of the school systems concerned. A prime consideration in dealing with the problems of desegregation must be that the systems of public education in the United States should not be adversely affected. Public education is one of the glories of the United States, and an indispensable source of its power. The richest resources of the United States are its citizens, and, as the Court has observed (347 U. S. at 493), education "is the very foundation of good citizenship."

It must be recognized that racial segregation in public schools is not a separate and distinct phenomenon. It is part of a larger social pattern of racial relationships. The Court's decision in these cases has outlawed a social institution which has existed for a long time in many areas throughout the country—an institution, it may be noted, which during its existence not only has had the sanction of decisions of this Court but has been fervently supported by great numbers of people as justifiable on legal and moral grounds. The Court's holding in the present cases that segregation is a denial of constitutional rights involved an

express recognition of the importance of psychological and emotional factors; the impact of segregation upon children, the Court found, can so affect their entire lives as to preclude their full enjoyment of constitutional rights. In similar fashion, psychological and emotional factors are involved—and must be met with understanding and good will—in the alterations that must now take place in order to bring about compliance with the Court's decision. The practical difficulties which may be met in effecting transition to nonsegregated public school systems should therefore be taken into account in determining the most effective means for ending school segregation in particular areas. The Court itself has recognized, in restoring these cases to the docket for further argument on the questions of relief, that these difficulties cannot be resolved by a single stroke of the judicial pen.

Broadly speaking, therefore, the decrees in these cases should be framed to require a transition which achieves the most expeditious compliance with the constitutional mandate and at the same time permits the intelligent, orderly, and effective solution of the problems that may be encountered in desegregating school systems in particular areas.

IV

THE NATURE AND EXTENT OF THE PROBLEMS THAT THE DESEGREGATION OF PUBLIC SCHOOL SYSTEMS MAY ENTAIL WILL VARY FROM AREA TO AREA

As the Court has noted (347 U. S. at 495), there is a "great variety of local conditions,"

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which will undoubtedly affect the nature and extent of the changes in public school systems and practices required to bring about compliance with its decision. Without elaborating in detail the structure and organization of the educational systems of the States and the District of Columbia, it is not difficult to outline some of the kinds of problems which may arise in making a transition to nonsegregated systems.

1. The implementation of any program for the desegregation of public school facilities will be, of course, the responsibility of no single individual or administrative body. Indeed, of all governmental activities, education is undoubtedly the most decentralized, its administrative and financial base being shared between the states and their political subdivisions. And the extent of local participation is brought into perhaps sharper focus by the fact that of the approximately 120,000 governmental units tabulated by the Census Bureau in 1951, more than 70,000 were school districts.[2]

The division of authority between state and local school officials customarily is delineated by the state legislature. In most jurisdictions, the state board of education and school superintendent have the statutory duty of making the broad policy decisions affecting the state school system as a whole, enforcing state laws relating to the

[2] U. S. Department of Commerce, *Statistical Abstract of the United States* (1952), p. 355.

operation of schools and, in general, insuring that all school units meet certain minimal standards. Local authorities, within the framework of state educational policy as embodied in statutes, regulations and directives, exercise control over the intimate details of school management within their district or other operating unit.

The problems that will confront authorities on the state level thus will be principally ones of revising state laws and regulations which were tailored to fit the needs of a segregated school system. In South Carolina, for example, the statutory formula now employed in the distribution of state funds for teachers' salaries requires that minimum enrollment and average daily attendance in each district be determined separately for each race.[3] In several jurisdictions, the law provides for school officials whose duties are limited to the supervision of Negro schools;[4] in others, the legislature has provided for entirely separate Negro and white school districts encompassing the same area.[5]

[3] South Carolina Code (1952), §§ 21-251, 290. Cf. D. C. Code (1951 ed.), §§ 31-1110, 31-1112.

[4] See e. g., D. C. Code (1951 ed), §§ 31-670, 31-671; Anno. Code of Maryland (Flack ed., 1951), Art. 77, §§ 42 (4), 208.

[5] See e. g., Mississippi Code (1942 ed.) 6276. In some states separate Negro school districts are maintained even in the absence of a legislative requirement. In Delaware, for example, there are at least 42 such districts. It has been reported that at the next session of the Delaware General Assembly, legislation will be introduced to merge them with white school districts. See *Southern School News*, September 3, 1954, page 3.

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2. Because local school authorities have considerable discretion respecting many facets of school administration, and because there is a wide variety in local conditions, it can be expected that, even within the same state, no two school districts will be faced with precisely the same problems in accomplishing an effective transition to nonsegregated school systems.

(a) In districts where there is more than one school, adjustments in the method employed for allocating students to particular schools may have to be made. In the majority of such districts, children are given little, if any, choice as to the school they are to attend. Instead, each school in the district is assigned a particular attendance area and the pupil must enroll in the facility within whose attendance boundaries he resides.

Many factors are taken into consideration in drawing these boundaries, foremost among them being the size and character of the school, the geographical distribution of the school population in the district, and the ease and safety of public travel to and from school. In the case of segregated school systems, boundaries are formulated separately for white and colored facilities, with the result that the overall objective of making the maximum use of total school facilities and minimizing travel difficulties is seldom achieved. Changes in the racial character of a neighborhood frequently cause overcrowding in some schools while others operate at far below capacity.

Similarly, children of both races are often compelled to travel long distances to reach the segregated schools to which they are assigned.

The extent of the boundary alterations required, in the reformulation of school attendance areas on a non-racial basis, will vary. This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis. In the neighborhoods where there is little or no mixture of the races, and where school facilities have been fully utilized, it was found that the elimination of the racial factor did not work any material change in the territory served by each school. In biracial neighborhoods, however, the objective of securing maximum utilization of facilities, on a non-racial basis, could be achieved only by making radical revisions in the area covered by the formerly Negro and white schools.

In connection with the formulation of new attendance boundaries, school districts may be called upon to review or alter prevailing practices regarding pupil transfers. Because it is almost impossible to fix boundaries which do not work a hardship on any pupils, many communities now permit enrollment outside the attendance area of residence in exceptional circumstances. Pupils on the secondary school level occasionally are allowed to attend a school at a distance from their homes because it offers courses of instruction not otherwise available. Specialized needs of

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mentally or physically handicapped children may cause them to be grouped together for instructional purposes. And pupils not possessing an adequate knowledge of the English language sometimes are placed in separate schools until that knowledge is acquired. While the allowance of transfers and special assignments for reasons of this character is fully warranted and undoubtedly will be continued, some districts may be confronted with efforts by students to attend schools in other areas for the sole and unjustifiable purpose of avoiding enrollment in a biracial facility.

(b) At the same time that procedures are devised for the assignment of pupils to schools on a basis not involving distinctions of color, some districts may have to readjust the use of their facilities. In low population rural areas now maintaining two schools solely by reason of the dual system, educational and economic considerations may dictate consolidation. There are several ways in which this consolidation might be accomplished. Where existing structures are small or otherwise inadequate, a new school might be constructed to accommodate all children. Another solution might be to close one of the schools and transfer its pupils to the other.

In areas where there is a considerable disparity in the quality and curricula of the former white and Negro schools, the problem of readjustment may be more troublesome. Parents will

be understandably reluctant to send their children to schools markedly inferior to those previously attended, or which do not provide courses of instruction that would have been begun or continued if no transfer had been required. While the long-range answer to a substantial part of this problem may be the improvement of substandard schools, or the construction of new ones, school administrators may have to devise stopgap methods—not involving continuation of racial segregation—to protect the interests of children now in school.

(c) Teachers may have to be reassigned and changes made in the method of their selection, with due regard to the safeguarding of seniority and tenure rights. In areas which now have separate eligibility lists for white and colored teachers, new lists combining applicants of both races may be established.[6] Salary differentials

[6] This step was taken in both the District of Columbia and in Baltimore. In the former, under the segregated system, Negro and white applicants for teaching positions took separate examinations conducted by separate boards of examiners. Performance on these qualifying examinations determined position on the eligibility lists maintained for applicants of each race and the lists in turn provided the sole basis of appointment. In June 1954, the boards of examiners were merged into a single board under the direct chairmanship of the superintendent of schools, teacher examinations were held on an integrated basis for the first time, and eligibility lists were consolidated. For each level of

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may have to be eliminated.[7] And, on the supervisory level, in communities maintaining separate supervisors for Negro schools a general realignment of duties may be necessary.[8]

(d) Most rural and some urban areas provide transportation to and from schools. Communities which have maintained separate transportation facilities for the two races may have to reorganize schedules and routes. And some localities may discover that there will be a need

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instruction, there is now but a single list on which no reference is made to the race of any of the named individuals.

In Baltimore, the compilation of separate lists involved not only the grade received on a written examination, administered to white and colored alike, but in addition the results of an oral interview and the evaluation of the applicant's previous experience. In combining the lists, Baltimore did not disturb these criteria; nor was a change made in the established practice of selecting any one of the five highest ranking qualified individuals to fill a vacancy.

[7] In 1952, the average annual salaries of white and Negro classroom teachers in 12 Southern states were $2,740 and $2,389, respectively. A part of this differential may be explained by the fact that the average amount of college training possessed by the white teachers was slightly higher. And between 1940 and 1952, the gaps in both salary and training averages were substantially diminished. See Ashmore, *The Negro and The Schools* (1954), pp. 158–159.

[8] Baltimore's dual system, for example, had five assistant school superintendents serving on a systemwide basis and one assistant superintendent for Negro schools.

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for additional vehicles or, conversely, that less equipment will be necessary.[9]

(e) A few school districts may have to compensate for differences in the educational backgrounds of newly integrated pupils. In localities where the segregated Negro facilities were inferior, colored students may find it difficult to pursue satisfactorily the same studies as white students in the same grades. School authorities faced with that problem may desire to give tests to determine the grade to which each student should be assigned. Or such tests might be employed for the purpose of selecting students for additional and intensified instruction in subjects in which they are deficient.

3. Because, as has been noted, the responsibility for the financial support of public education is distributed between the state and its subdivisions, the economic burdens incident to the implementation of integration also will fall upon several levels of government. These burdens, however, will flow largely from the present inequality, in a physical sense, of separate Negro schools. As a consequence, even if the dual system were to continue, many areas would be faced

[9] The requirement of additional equipment will be generally restricted, of course, to places where present facilities have not been sufficient to provide adequate transportation for all pupils. It cannot therefore be regarded as, in any real sense, a problem arising from the elimination of segregation.

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with the necessity of making substantial outlays for capital improvements.

Indeed, the financial cost of an "equalization" program for separate schools unquestionably would be far greater. No matter how small the Negro population in the particular area, it would have to be provided with facilities and equipment equivalent in all respects to those provided in white schools. In similar circumstances, a non-segregated school system may find that the educational needs of all children will be satisfied by merely closing down the former Negro school and transferring its pupils to other facilities.

While, placed in perspective, economic considerations would seem to furnish less of an obstacle to the maintenance of integrated schools than to "separate but equal" schools, it should be noted that if expenditures per classroom unit are to be continued at current levels for white children, an additional annual expenditure of over 160 million dollars will be required in the states involved and the District of Columbia. In respect to pupil transportation services, the estimated capital outlay is 40 million dollars. And the estimated cost of "equalizing" Negro schools is in excess of two billion dollars.[10]

4. In addition to problems of a purely administrative or fiscal character, school authorities

[10] These estimates have been furnished by the Office of Education, U. S. Department of Health, Education and Welfare.

may have to cope with a certain amount of popular hostility towards the elimination of segregation in public schools. This results from the fact that in each of the areas involved the dual system has existed for generations and is accepted by many as being a part of the "way of life" of the area. And the fear has been expressed in some quarters that the opposition to any departure from the existing pattern will manifest itself in the withdrawal of state aid to education and in other action on state and local levels designed to prevent or impair the effective operation of public schools on a nonsegregated basis.

We do not believe that there is warrant for presuming that responsible officials and citizens will tolerate violations of the Constitution.[11] The solutions to these problems, like all others in a democracy, will emerge from the "sober second

[11] The well-publicized student disturbances which occurred recently in some localities certainly provide no basis for such a presumption. For one thing, these disturbances were isolated; in the overwhelming majority of the areas which have begun or completed compliance with this Court's decision, the adjustment has been remarkably free of untoward incident. Moreover, it appears to be the fact that the misconduct was in substantial measure incited by a small number of reckless and irresponsible individuals and groups, many from without the community, who took full advantage of some students' immaturity. And, as is so often true in such circumstances, where school and law enforcement authorities made clear their determination neither to countenance nor to capitulate to lawlessness, the disturbances ended as abruptly as they had started.

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thought of the community, which is the firm base on which all law must ultimately rest." (Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 25.) Popular hostility, where found to exist, is a problem that needs to be recognized and faced with understanding, but it can afford no legal justification for a failure to end school segregation. Racial segregation in public schools is unconstitutional and will have to be terminated as quickly as feasible, regardless of how much it may be favored by some people in the community. There can be no "local option" on that question, which has now been finally settled by the tribunal empowered under the Constitution to decide it.[12]

While general community hostility cannot serve as justification for avoiding or postponing compliance with the constitutional mandate, it is relevant in determining the most effective method for ending segregation in the particular

[12] "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." *Buchanan* v. *Warley,* 245 U. S. 60, 80–81.

In any event, this would not be the proper occasion or time to adjudicate possible attempts to evade or circumvent this Court's decision. Such questions, like all other questions of constitutional law, must be resolved when they arise concretely, in a factual setting, and when this Court can have the benefit of findings of fact and the judgment of the lower courts.

locality. School administrators will have an obvious concern in obtaining public support and acceptance of the transition. The extent of the difficulties which may be encountered will depend, of course, upon the state of local opinion, which in turn is influenced by such varied factors as the economic structure, geographical location, and relative numbers of whites and Negroes in the community. There is, however, a general recognition of the need for thoughtful advance preparations to resolve the problems of desegregation with as few disruptions as possible. If any lesson can be derived from past experiences in ending segregated school systems, it is the importance of public confidence in the ability of school administrators to accomplish the adjustment without, in the process, losing sight of or sacrificing the basic and continuing educational needs of all the children affected.[13]

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[13] In presenting his program for integration for the approval of the Board of Education, the Superintendent of Schools of the District of Columbia laid emphasis on the consideration of the educational growth and welfare of the school child. Thus, in justification of the proposal that each presently enrolled pupil be granted a limited option to remain in the school he now attends even though he does not reside within its new attendance boundaries, the Superintendent enumerated the ways in which this would provide "stability, continuity and security in the educational experiences of pupils during the transition period." (See brief for respondents in No. 4, p. 13.)

While we do not describe the District of Columbia pro-

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In some areas it may be found advisable to preface the desegregation process with programs, not extending for more than a few months, designed to promote interracial understanding among students, teachers, and parents. Such preparatory measures were taken in many of the localities which have abolished segregated school systems in recent years. In one New Jersey community, for example, funds were appropriated to allow several selected teachers to attend a special workshop on human relations conducted at a state university. In addition, an extension course on the same subject was offered by school authorities during the year preceding desegregation and was well attended by teachers. In other areas civic, P-TA, religious, and fraternal groups took the initiative in establishing a favorable climate for making the transition. It was found that the efforts of these groups were instrumental in reducing many of the pre-existing racial tensions in the community, with the result that

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gram in detail here, since this is undertaken in the brief for respondents in No. 4, we think it reflects credit upon those responsible for its formulation and execution. In every significant respect, the plan evidences painstaking care on the part of school officials to realize the expressed objective of an expeditious transition calculated "to make the best use of the total resources of the school system in plant and personnel, to serve the best interest of all the pupils, and to promote the general welfare of the community." (See brief for respondents in No. 4, p. 11.)

integration was accomplished speedily and with little or no serious friction or incident.[14]

V

THE FORMULATION AND EXECUTION OF PROGRAMS FOR TRANSITION TO NONSEGREGATED SCHOOL SYSTEMS SHOULD BE UNDERTAKEN BY THE RESPONSIBLE SCHOOL AUTHORITIES UNDER THE SUPERVISION OF THE COURTS OF FIRST INSTANCE

For the reasons which have been summarized, it is clear that no single formula or blueprint is readily susceptible of application to all localities which must end segregation in their school systems. The measures essential to bringing about an expeditious, orderly, and effective transition in any given area will depend on the special conditions and problems in that area. And since there is wide variance in local conditions, what may be practicable in one community may be wholly inappropriate in another.

A prerequisite to the formulation, initiation, and supervision of any practicable program for ending segregation is a knowledge of the special problems and needs of the particular community. It is the responsible school authorities and the courts of first instance in each area who will have the greatest familiarity with local conditions and

[14] The transitional experiences of twenty-four communities in six states which within the past ten years desegregated their public school systems are the subject of a study conducted under the auspices of the Fund for the Advancement of Education of the Ford Foundation. Williams and Ryan, *Schools in Transition* (1954).

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who will be in the best position to evaluate their significance and effect in accomplishing desegregation in as short a period as feasible. For this reason, this Court should not, either itself or with the assistance of a special master appointed by it,[15] delineate the precise steps that each of the defendants should take in ending segregation in the public school systems. Instead, the primary responsibility for both devising and carrying out programs for the expeditious accomplishment of the required transition should be placed upon the defendants, to be exercised under the continuing direct supervision of the district courts or appropriate state courts.

This Court, we believe, should lay down standards for the guidance of the lower courts in carrying out its decision. A remand for further proceedings, without more, would add to the uncertainty and doubt which already exist and would only serve to make the process of adjustment more difficult.

Specifically, the lower courts should be instructed to require the defendants either to admit

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[15] While we do not believe that the Court should appoint a special master to hear evidence, there can be no question of its power to do so. In the 1948 revision of the Judicial Code, Congress expressly repealed R. S. 698 [28 U. S. C. (1946 ed.) 863] which had provided that "[u]pon the appeal of any cause in equity, * * * no new evidence shall be received in the Supreme Court." Act of June 25, 1948, c. 646, § 39, 62 Stat. 992. We find nothing to suggest that the legislative purpose was other than to remove the restriction entirely.

the plaintiffs, and other Negro children similarly situated, forthwith to public schools on a non-segregated basis or to propose promptly, for the court's consideration and approval, an effective program for accomplishing the transition as soon as practicable. In passing upon the acceptability of proposed programs, the criterion should be whether the defendants have sustained the burden of showing that their particular program will bring about the total elimination of racial considerations in the admission of pupils to public schools as rapidly as local conditions allow. And in determining whether the projected plan represents the most expeditious means of accomplishing an effective transition, the courts should be permitted to take into account the scope of the administrative adjustments that are called for and the particular conditions existing in the community. Where there are no solid obstacles to desegregation, delay is not justified and should not be permitted. It is only where the lower court finds, upon clear and convincing evidence, that the defendants have met the burden of showing that immediate (i. e., at the beginning of the next school term) completion of the desegregation program is impracticable, that any delay is justifiable. And, in such a situation, the district court should fix the shortest practicable period for completing desegregation.

Although it would be helpful if this Court could

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specify outside limits for the period of desegregation, we do not think it would be feasible to do so at this time. Apart from the fact that there is no way of judging at this point what integration will involve in the particular area, maximum periods tend to become minimum periods. This Court should not enter any order which might have the practical effect of slowing down desegregation where it could be swiftly accomplished. The Court, however, should make it clear that any proposal for desegregation over an indefinite period will be unacceptable, and that there can be no justification anywhere for failure to make an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible.

Further, the lower courts should be instructed to be insistent that any interval permitted for the accomplishment of desegregation is being fully utilized. Any period during which little or nothing is being done to further the transition would serve no useful purpose and, indeed, would only intensify the difficulties. Whether time will be useful will depend on how it is used; delay solely for the sake of delay is intolerable. Where a period of time is allowed for transition, it should be for the sole purpose of enabling necessary constructive measures to be taken, and not for the purpose of permitting postponement *per se*.

If the program for desegregation formulated by the defendants will remove, as expeditiously as possible, state-imposed or state-supported racial classifications of pupils in public schools, the lower courts should not substitute their judgment respecting the administrative features of the program for that of the school authorities. The Constitution prohibits the maintenance of segregaged school systems. It does not compel the adoption of any specific type of nonsegregated system. The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools. The essence of the Court's decision in these cases is that there be no governmental action which enforces or supports school segregation.

This Court, we believe, should not in its present decrees give blanket approval to any particular programs for desegregation. The determination of the necessity for, and constitutionality of, any specific plan should not be made *in vacuo*. Flexibility in responding to developing circumstances may become important. The experience in carrying out a plan, once it is begun, may alter the assumptions on which it was based. For example, it may develop, after a plan is in operation, that it can be carried out more quickly than was anticipated at the outset, as has been demon-

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strated by the experience in the District of Columbia.

VI

THE CASES SHOULD BE REMANDED TO THE LOWER COURTS WITH DIRECTIONS TO CARRY OUT THIS COURT'S DECISION AS RAPIDLY AS THE PARTICULAR CIRCUMSTANCES PERMIT

For the reasons outlined above, the Government suggests that the Court should enter decrees (a) declaring that racial segregation in public schools is unconstitutional and that all provisions of law requiring or permitting such segregation are invalid, and (b) remanding the cases to the appropriate courts of first instance for such further proceedings and orders as are necessary and proper to carry out this Court's decision.[16] The decrees should contain specific provisions substantially as follows:

(1) That the lower court shall forthwith enter orders directing the defendants to submit within 90 days a plan for ending, as soon as feasible, racial segregation of pupils in public schools subject to their authority or control.

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[16] In the Delaware case, No. 5, *Gebhart* v. *Belton*, the Attorney General of Delaware, in his brief for petitioners (pp. 17–18), now agrees that the judgment of the state Supreme Court should be affirmed. Accordingly, since the respondents did not file a cross-petition for certiorari, it would appear that in the Delaware case this Court should simply enter an order of affirmance.

(2) That, unless a satisfactory plan is submitted to and approved by the lower court, it shall forthwith enter appropriate orders, by way of injunction or otherwise, directing admission of the plaintiffs and other children similarly situated to nonsegregated public schools at the beginning of the next school term.

(3) That, upon submission of a plan by the defendants, the lower court shall promptly hold a hearing to determine whether it provides for transition to a nonsegregated school system as expeditiously as the circumstances permit. The defendants shall have the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required. In approving any proposed program, the court shall make such modifications as may be required, and shall fix the earliest practicable date for completion of the program. And no program shall be sanctioned which does not call for the immediate commencement of the procedures necessary to the accomplishment of the transition.

(4) That during the period, if any, allowed for completion of the program for transition to a nonsegregated system, the lower court shall require the defendants to submit detailed periodic reports showing the progress made in ending segregation. The court shall enter such fur-

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ther orders as may be required from time to time in order to insure against unnecessary delay in the execution of the program.

(5) That this Court shall retain jurisdiction for the purpose of making such further orders, if any, as may become necessary for carrying out its mandate. To this end the lower courts should be required to submit information reports to this Court at specified intervals showing in detail the actions taken in bringing about compliance with the requirements of the Constitution. (The Court may wish to appoint a special master to review such reports and to make appropriate recommendations thereon to this Court and to the lower courts.)

CONCLUSION

The responsibility for achieving compliance with the Court's decision in these cases does not rest on the judiciary alone. Every officer and agency of government, federal, state, and local, is likewise charged with the duty of enforcing the Constitution and the rights guaranteed under it. And, ultimately, it is the obligation of every citizen to respect and abide by the law, once it is authoritatively declared. We have no doubt that the American people and the officials through whom they act will meet these responsibilities

in the spirit, to quote the words of the President, of "patience without compromise of principle."[17]

Respectfully submitted.

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NOVEMBER 1954.

[17] New York Times, June 30, 1954, p. 19.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 1 [1]

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

Pursuant to the Court's request at the oral argument, the Government submits this supplemental memorandum dealing with the "class action" character of the suits at bar.

I

The instant suits are class actions under Rule 23(a)(3) of the Federal Rules of Civil Procedure [2]

We note at the outset that the plaintiffs instituted their suits in the district courts, not only on their

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[1] Together with No. 2, *Harry Briggs, Jr., et al.* v. *R. W. Elliott, et al.*; No. 3, *Dorothy E. Davis, et al.* v. *County School Board of Prince Edward County, et al.*; No. 4, *Spottswood Thomas Bolling, et al.* v. *C. Melvin Sharpe, et al.*; and No. 5, *Francis B. Gebhart, et al.* v. *Ethel Louise Belton, et al.*

[2] No. 5, which arose in the state courts, was brought, of course, pursuant to Delaware procedure.

own behalf, but also on behalf of persons similarly situated;[3] that the suits were treated as class actions in the various courts below;[4] and that they were described as such in this Court's opinion of last term, 347 U. S. at 495. This treatment, in our view, was correct.

The authority to institute a class action is conferred by Rule 23(a) in the following terms:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

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[3] See No. 1, R. 4, 7; No. 2, R. 5, 10-11; No. 3, R. 6, 9-10, 23.

[4] This is evident from the findings, opinions, and lower-court decrees. See No. 1, R. 244; No. 2, R. 190, 210; No. 3, R. 617-618, 624.

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Subdivision (1) deals with a type of class action traditional under equity practice—the situation where the members of the class have a joint or common interest predicated upon a jural relation between or among them.[5] A familiar example is a suit by representatives of an unincorporated association. Subdivision (2) has to do with individual plaintiffs and a claim to a common fund or *res*. Subdivision (3), which is here pertinent, relates to the situation in which each member of the class has an individual or personal right, in no way dependent for its assertion upon the joinder of other members of the class, in which a class action is permitted on the ground that "there is a common question of law or fact affecting the several rights and a common relief is sought." Its purpose is to provide a device, in appropriate circumstances, for the avoidance of multiplicity of actions.

It would appear that the conditions for a class suit under subdivision (3) are satisfied here. There is no dispute that the members of the class are numerous. There is no suggestion that the individual plaintiffs fail to represent the interests of all. It is plain that the rights are several and simi-

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[5] This is not to suggest that multi-party litigation involving persons having rights or duties which are *several* in character is strictly a recent development. The Chancellor not infrequently exercised his powers when the nature of the interest involved was neither joint nor common but the issue was one presenting a common question of law or fact. As to the avoidance of multiplicity of actions as a ground of equity jurisdiction, see generally, Pomeroy, *Equity Jurisprudence*, Sec. 243 *et seq.* (5th ed.); *Chafee, Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297.

lar; each member of the class has a constitutional right not to be segregated in public school because of his race or color. These individual rights have already been adjudicated upon the basis of common questions of law and fact. And, in each case, declaratory and injunctive relief was requested for the benefit of all of the members of the class, and not merely on behalf of the named plaintiffs.

Thus, almost without exception, the lower federal courts have entertained class suits instituted on behalf of persons adversely affected by racial discrimination. As stated in *Kansas City, Mo.* v. *Williams,* 205 F. 2d 47, 52 (C. A. 8), certiorari denied, 346 U. S. 826 (representative suit by three Negroes challenging discrimination in the operation of a public recreational facility):

> Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as a discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudication under rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A., than are other several rights. And the District Courts, where the question has so arisen, have practically unanimously so recognized. See, e. g., Gonzales v. Sheely, D. C. Ariz., 96 F. Supp. 1004; Wilson v. Board of Sup'rs of La. State University, etc., D. C. La., 92 F. Supp. 986; Johnson v. Board of Trustees

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of University of Kentucky, D. C., E. D. Ky., 83 F. Supp. 707; Davis v. Cook, D. C., N. D. Ga., 80 F. Supp. 443; Lopez v. Seccombe, D. C., S. D. Cal., 71 F. Supp. 769—to give but a few examples. See also Alston v. School Board of City of Norfolk, 4 Cir., 112 F. 2d 902, 997, 130 A. L. R. 1506; City of Birmingham v. Monk, 5 Cir., 185 F. 2d 859.[6]

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[6] For other instances of representative suits challenging segregation, see *Carter* v. *School Board*, 182 F. 2d 531 (C.A. 4); *Mendez* v. *Westminster School District*, 64 F. Supp. 544 (S.D. Cal.), affirmed, 161 F. 2d 774 (C.A. 9); *Draper* v. *City of St. Louis*, 92 F. Supp. 546 (E.D. Mo.), appeal dismissed, 186 F. 2d 307 (C.A. 8); *Thomas* v. *Hibbitts*, 46 F. Supp. 368 (M.D. Tenn.); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W.D. Ky.). Cf. *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C.A. 6) (class action by non-union employees of a carrier to enjoin discrimination against their rights to acquire seniority, in violation of Railway Labor Act).

Of course, a case involving discrimination is but one of many factual situations in which Rule 23(a)(3) may provide an appropriate means of dealing in a single action with individual claims of right asserted by a large number of persons similarly situated. See, *e.g.*, *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (C.A. 7) (representative suit by two of 900 gasoline jobbers against oil companies, charging antitrust violations); *National Hairdressers' and Cosmetologists' Assn.* v. *Philad Co.*, 41 F. Supp. 701 (D. Del.), affirmed, 129 F. 2d 1020 (C.A. 3) (representative suit seeking declaration that process used by several thousand members of a national hairdressers' association does not infringe defendant's patent and an injunction against infringement suits by defendant); *Gramling* v. *Maxwell*, 52 F. 2d 256 (W.D. N.C.) (representative suit by single taxpayer on behalf of himself and several hundred similarly situated to enjoin State Commissioner of Revenue from collecting unlawful tax). Another example familiar to the Court is provided by representative suits asserting rights under the Selective Training and Service Act of 1940. See *Trailmobile Co.* v. *Whirls*, 331 U.S. 40.

II

The decrees may extend to persons in the respective classes who have not individually appeared in the proceedings

To state that a suit meets the requirements of a class action under Rule 23 does not in and of itself necessarily determine whether relief should in terms extend to all members of the class or should be limited to those who individually identify themselves with the proceeding, either as original or intervening complainants.[7] Thus, Professor Moore takes the position that, when the suit is under subdivision (3) of the rule (*i e.*, when the rights are several in nature), the action is "an invitation to joinder," rather than a "command performance," and that the "decree . . . binds only those actually before the court." 3 Moore, *Federal Practice*, 3443, 3465 (2d ed.). Other commentators are of the view that this unduly restricts the function of the class action; that, so interpreted, subdivision (3), which offers the greatest promise of facilitating disposition of important questions involving a substantial number of parties, accomplishes little more than the rules as to permissive joinder and intervention (Rules 20, 24(b)); and that, in appropriate cases, relief may go beyond the parties actually before the court. Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. Rev. 684, 701 *et seq.*; *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Col. L.

[7] We deal under Point III with the question of timely intervention.

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Rev. 818. The *Restatement, Judgments,* Section 86, declares:

> A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action.
>
> Comment *a* . . . [This] rule . . . applies where an action is brought by one . . . whose interests are similar to those of a large number of others, so that it is proper and convenient for him to speak on behalf of all. . . .

This Court has not passed directly upon the point, though it may be noted that the discussion in *Hansberry* v. *Lee,* 311 U. S. 32, addressed to the question whether a state court judgment may be binding upon absent members of a class, emphasizes the requirement of adequate representation but suggests no narrow strictures upon the method of defining the class.[8] The requirement made by the

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[8] "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are ~~not~~ in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." [311 U.S. at 42-43.]

Restatement that the action be "properly" brought or defended would appear to embrace the due process requirements of fair notice and adequate representation emphasized in *Hansberry*. It is significant that one of the effects of the rule enunciated in the *Restatement* would be to hold absent members of a class, who were properly represented, bound by an unfavorable result. The problem here—whether the benefits of a decree should be extended to absent members of a plaintiff class—is certainly of a lesser order, since there can be no question that the defendants had their full day in court. ". . . there is by no means complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree. Clearly, the defendant has been afforded his day in court; he has had the opportunity to present his case fully in his own right, and he has lost. He has no more reason to relitigate the entire controversy against the absentee members than he has to do so against the immediate plaintiff." Kalven and Rosenfield, *op. cit.*, at 713.

A considerable number of cases in the lower federal courts follow Professor Moore's view and hold that in a class action based upon the existence of a common question, relief will be limited to those who come before the court. Perhaps, the leading cases in this category are *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (C. A. 2) (class action by bondholders for damages), and *Pentland* v. *Dravo Corp.*, 152 F. 2d 851 (C. A. 3), (representative suit to obtain overtime compensation under

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Fair Labor Standards Act [9]). Generally, the cases which hold that judgment will bind only the parties before the court have been actions for damages. The consideration that damages will vary from plaintiff to plaintiff has apparently been a practical consideration in inducing the holding that the effect of the decision will be confined to those who come into the proceeding. See *Oppenheimer* at 390; *Pentland* at 855.[10] In the situation presented by the *Pentland* case, the court was concerned, moreover, with the fact that separate defenses might be available as against some members of the plaintiff class.[11]

In "common question" cases in which relief of an equitable nature is sought, the courts have manifested a greater disposition to extend the benefits of the decree to absent members of a successful plaintiff class. *Gramling* v. *Maxwell*, 52 F. 2d 256 (W. D. N. C.), to which Mr. Justice Harlan referred at the oral argument, is an apt illustration.

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[9] As the opinion in *Penland* shows, there have been numerous "common question" class suits under the Fair Labor Standards Act.

[10] Cf. *McGrath* v. *Tadayasu Abo*, 186 F. 2d 766 (C.A. 9), certiorari denied, 342 U.S. 832, in which determination of particular circumstances affecting each plaintiff was required.

[11] Thus, the court observed (p. 853):

> But because an employer fails to obey the law as to employee A, it does not follow that he has not obeyed it as employees B, C or D. B may not be engaged in interstate commerce or the production of goods for commerce, while A may. Employee C may be a salaried worker or a supervisor who does not come under the Act. Employee D may have been paid the statutory minimum and not have worked any overtime at all.

That suit was brought before a three-judge district court to restrain the North Carolina Commissioner of Revenue from collecting a tax on peddlers of fruits and vegetables. The ground of challenge was that the tax, which was not applicable to those purveying fruits and vegetables grown in North Carolina, was a burden on interstate commerce. The complainant, who owned 100 trucks, each of which would have been subject to a $50 license tax, sought an injunction on his own behalf and others similarly situated. Holding that the tax was unconstitutional, the court concluded that the injunction against attempted collection should run in favor of all members of the class, irrespective of the fact that some of its members would not have had standing (because of the absence of the requisite jurisdictional amount) to sue individually in the federal courts (pp. 260-263). In reaching this conclusion, the court emphasized the function of equity in avoiding an unnecessary multiplicity of litigation.[12]

In *System Federation No. 91* v. *Reed*, 180 F. 2d 991 (C. A. 6), a representative suit by railroad employees to enjoin discrimination against the

[12] In this connection, the opinion refers to Pomeroy's treatise. See note 5, *supra*. In his discussion of representative suits by taxpayers whose "only community . . . is in the questions at issue to be decided," Pomeroy declares that the decisions of many able courts have "demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals, even if it were attainable by any means." Pomeroy, *op cit.*, pp. 529-537.

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acquisition of seniority rights by non-union employees, the decree forbade discrimination "against the plaintiffs and the classes represented by them" (p. 993). Subsequent to entry of the decree, a member of the class who was not a named plaintiff was permitted to come into the case and to apply for a citation of contempt (p. 998).

The same approach is reflected in numerous suits for injunctive relief challenging racial discrimination.

Mendez v. *Westminster School District,* 64 F. Supp. 544 (S. D. Cal.), affirmed, 161 F. 2d 774 (C. A. 9), was a class action against public school authorities to compel the admission of five named plaintiffs and some 5000 other Mexican children similarly situated. The court determined that the plaintiffs were entitled to injunctive relief restraining further discriminatory practices against "pupils of Mexican descent in the public schools of defendant school districts" (p. 551).

Draper v. *City of St. Louis,* 92 F. Supp. 546. (E. D. Mo.), appeal dismissed, 186 F. 2d 307 (C. A. 8), was a class action to compel admission of Negroes to a swiming pool maintained by the city. The court entered a decree prohibiting the defendant from denying admission to the named plaintiff and others of the Negro race.

Gonzales v. *Sheely,* 96 F. Supp. 1004 (D. Ariz.), was a class action to enjoin the segregation of students of Latin or Mexican descent within a school district. The court indicated that an injunction to this effect should issue.

Davis v. *Cook*, 80 F. Supp. 443 (N. D. Ga.), reversed on other grounds, 178 F. 2d 595 (C. A. 5), certiorari denied, 340 U. S. 811, was a class action brought by a Negro teacher on behalf of himself and all other Negro teachers and principals similarly situated to require the defendants to cease discriminating against Negro principals and teachers in respect to salaries. The district court determined that the named plaintiff was entitled to the relief sought for himself and for the "principals and teachers he represents." *Thomas* v. *Hibbitts*, 46 F. Supp. 368 (N. D. Tenn.), is to the same effect.

Wilson v. *City of Paducah*, 100 F. Supp. 116 (W. D. Ky.), was a representative suit brought to compel the admission of Negroes to a municipal junior college. The district court entered summary judgment on the motion of the named plaintiffs. Some ten months thereafter, two individuals who were not named in the original action moved to intervene, alleging that they had been denied admission to the college solely by reason of their race. The city contended that the original complaint did not establish the suit as a class action and that the judgment had not conferred rights upon individuals other than the named plaintiffs. It further contended that the motion to intervene was not timely. The court rejected both contentions, holding (1) that the question as to the class nature of the action had been disposed of on the motion for summary judgment and was *res judicata*, and (2) that the applicants, being members of the class,

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were entitled to intervene in order to secure to themselves the benefits afforded by the decree.

In light of the preceding discussion, we believe that there is no legal barrier to extending the relief in the instant cases to persons "similarly situated." As earlier noted, the defendants have had full opportunity to litigate the issues. The rights of the unnamed members of the classes do not differ in character from those of the named plaintiffs. There is no question of separate defenses. It appears, moreover, that to give truly effective relief to the few will actually require effective relief for the many. We conclude that the power of equity is sufficient to avoid the multiplicity of litigation which would doubtless follow from a decree limited to a relatively few plaintiffs, and that this Court may, and should, fashion decrees protecting the constitutional rights of children similarly situated.

III

In any event, members of the class who have not yet intervened are still eligible to do so

"Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common" (Federal Rules of Civil Procedure, Rule 24(b)). The timeliness of an application is a matter for the discretion of the court. "In exercising its discretion the court shall consider whether the intervention

will unduly delay or prejudice the adjudication of the rights of the original parties" (*ibid.*).[13]

Consistently with this rule, the district courts might entertain applications for intervention in the instant cases. Such applications, if made, would not delay or prejudice adjudication of the rights of the original parties; presumably, they would be made only to secure to unnamed members of the described classes the benefits of the relief ultimately decreed. If this Court should conclude that the decrees entered in these cases are to run only to named parties, it becomes particularly important that a liberal policy be adopted in permitting intervention by other members of the class, many of whom have undoubtedly assumed that the decrees would not be so restricted. Compare the liberal intervention policy followed in *Pentland* v. *Dravo Corp., supra,* 152 F. 2d at 856, and *McGrath* v. *Tadayasu Abo, supra,* 186 F. 2d at 769-770, and suggested in *Guaranty Trust* v. *York,* 143 F. 2d 503, 529, reversed on other grounds, 326 U. S. 99. And see Kalven and Rosenfield, *op. cit.,* 8 U. of Chi. L. Rev. at 695 (". . . the basic function of the class suit is achieved only if the decree is held open to permit the absentee members of the class to come under the decree after the decision . . ."). This Court might insure the adoption of such a policy by an appropriate direction to the district courts.

If the Court should conclude that the decrees

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[13] Rule 23, relating to class actions, is silent on the question of timeliness of intervention.

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should run to all members of the described classes, we presume that any member of a class would be entitled to vindicate his rights under the decree and to seek such ancillary orders as might prove necessary for that purpose. See *System Federation No. 91* v. *Reed* and *Wilson* v. *City of Paducah*, discussed *supra*.

Respectfully submitted,

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APRIL, 1955.

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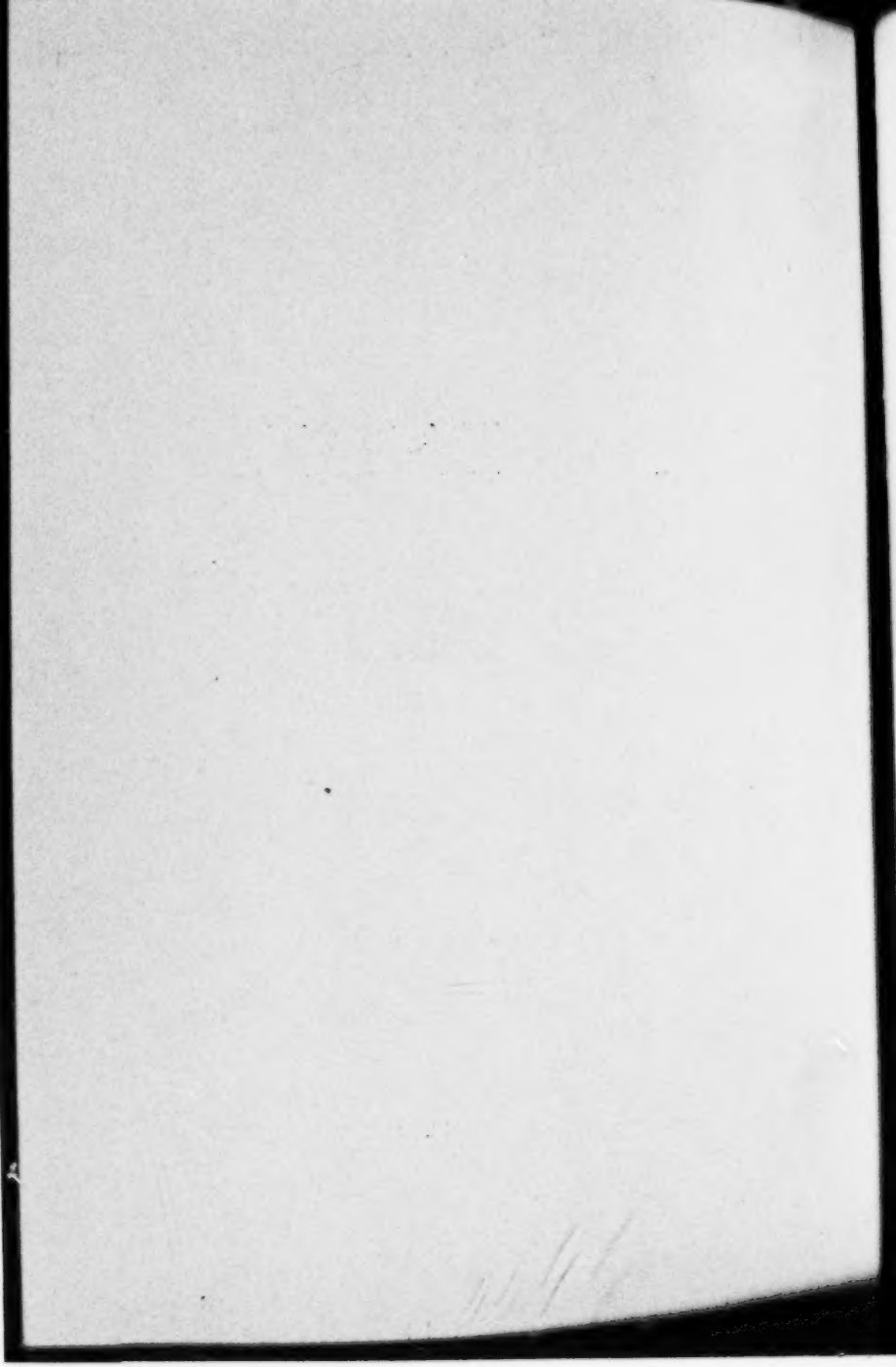

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JOINT APPENDIX

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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4949-50

SPOTTSWOOD THOMAS BOLLING, a minor by Sarah Bolling, his mother and next friend,
WANAMAKER VON BOLLING, a minor, by Sarah Bolling, his mother and next friend,
SARAH LOUISE BRISCOE, a minor, by William Briscoe, her father and next friend,
ADRIENNE JENNINGS, a minor, by James C. Jennings, her father and next best friend,
BARBARA JENNINGS, a minor, by James C. Jennings, her father and next best friend,
SARAH BOLLING, personally, 1732 Stanton Terrace, Southeast, Washington, D. C.,
WILLIAM BRISCOE, personally, 1232 Eaton Road, Southeast, Washington, D. C.,
JAMES C. JENNINGS, personally, 1139 Stevens Road, Southeast, Washington, D. C., and
CONSOLIDATED PARENT GROUP, INC., a corporation, 1113 Montello Avenue, Northeast, Washington, D. C.,
Plaintiffs,

vs.

C. MELVIN SHARPE, 929 E Street, Northwest, Washington, D. C.,
ADELBERT W. LEE, 3211 Pennsylvania Ave., Southeast, Washington, D. C.,
LENORE W. SMITH, 3249 Newark Street, Northwest, Washington, D. C.
JAMES A. GANNON, 1915 Biltmore Street, Northwest, Washington, D. C.

VELMA G. WILLIAMS, 2700 Georgia Avenue, Northwest, Washington, D. C.,

ALBERT E. STEINEM, Colorado Building, Washington, D. C.,

ELVIRIA Z. MAGDEBURGER, 1612 Missouri Avenue, Northwest, Washington, D. C.,

PHILLIP T. JOHNSON, 1742 Sixth Street, Northwest, Washington, D. C.,

WOOLSEY W. HALL, 1330 Wallach Place, Northwest, Washington, D. C., being and constituting the Board of Education of the District of Columbia, and

HOBART M. CORNING, Superintendent of Schools, Franklin Administration Building,

NORMAN J. NELSON, First Assistant Superintendent of Schools, Divisions 1-9, Franklin Administration Building,

GARNET C. WILKINSON, First Assistant Superintendent of Schools, Divisions 10-13, Franklin Administration Building,

LAWSON J. CANTRELL, Associate Superintendent, Divisions 1-9, Franklin Administration Building, and

ELEANOR P. McAULIFFE, Principal, Sousa Junior High School, Defendants.

COMPLAINT

1. This is an action for an interlocutory injunction and a permanent injunction restraining defendants and each and every one of them from excluding minor plaintiffs from enrollment and instruction in the Sousa Junior High School solely because of their race or color, and from denying minor plaintiffs admission as students in said Sousa Junior High School solely because of their race or color, and from applying and so construing Statutes enacted by the Congress of the United States, providing for education of children in the District of Columbia, so as to require the exclusion of these minor plaintiffs from the Sousa Junior High School,

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and the denial of their admission thereto solely because of their race or color, and restraining the defendants and each and every one of them from taking steps which may lead to the criminal prosecution of the adult plaintiffs for failure to send their children, minor plaintiffs in this cause, to other schools in the District designated by the defendants as a part of the exclusion of these minor plaintiffs from the Sousa Junior High School solely on account of race or color, and seeking a declaratory judgment to the effect that Statutes enacted by Congress regulating public education in the District of Columbia do not require the exclusion of these plaintiffs from said Sousa Junior High School on the ground of race or color alone.

2. (a) The jusisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the due process of law clause of the Fifth Amendment to the Constitution of the United States; Article I, section 9, clause 3, of the Constitution of the United States, relating to the Bill of Attainder; and the Charter of the United Nations, Chapter I, Article I, section 3 and Chapter IX, Articles 55 and 56, relating to the promotion, encouragement and observance of human rights without racial distinctions, as hereinafter more fully appears. The matter in controversy exceeds the sum or value of Three Thousand ($3,000) Dollars, exclusive of interests and costs.

2. (b) The jurisdiction of this Court is also invoked under Title 28, United States Code, section 1343, which provides for the original jurisdiction of this Court in suits involving civil rights. This action is authorized by Title 8, United States Code, section 43, to be commenced by any citizen of the United States, or other person within the jurisdiction thereof, to redress the deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States, and Title 8, United States Code, section 41, provides for the equal rights of citizens and of

all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

2. (c) The jurisdiction of this Court is also invoked under the general jurisdiction provision of the District of Columbia Code (1940), Title 11, section 301, and the jurisdiction of this Court as a Court of the United States under District of Columbia Code (1940), Title 11, section 305.

2. (d) The jurisdiction of this Court is also invoked under Title 28, United States Code, sections 2201 and 2202, relating to declaratory judgments.

3. Minor plaintiffs, Spottswood Thomas Bolling, Wanamaker Von Bolling, Sarah Louise Briscoe, Adrienne Jennings and Barbara Jennings, are Negroes, are residents of and domiciled in, the District of Columbia, are within the statutory age limits of eligibility to attend the public schools of said District of Columbia, possess all qulifications and satisfy all requirements for admission to the junior high schools in said District, and do now attend a junior high school in said District.

4. Adult Plaintiffs, Sarah Bolling, William Briscoe and James C. Jennings, are residents of, and domiciled in, the District of Columbia, are parents of minor plaintiffs, are taxpayers of the United States and of the District of Columbia, are required by law to send their respective children to the public schools of said District, and are subject to criminal prosecution for failure so to do. The Consolidated Parent Group, Inc., is a corporation organized under the laws of the District of Columbia which has for its objective, as outlined in its Constitution, "to seek, by every lawful means, to promote abolition of racial segregation and other discriminatory practices now invoked upon minority groups in the public schools and recreational areas of the District of Columbia; and to engage, as a non-profit organization, in educating the community towards these goals."

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5. All plaintiffs bring this action in their own behalf, and, there being common questions of law and fact affecting the rights of all Negro citizens of the United States residing in the District of Columbia similarly situated, who are so numerous as to make it impracticable to bring all before the Court, and a common relief being sought, as will hereinafter more fully appear, bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, as a class suit on behalf of themselves and of all Negro citizens of the United States residing in the District of Columbia similarly situated and affected, as will hereinafter more fully appear. The interests of all members of the class above referred to are fairly and adequately represented in this suit.

6. (a) Defendants C. Melvin Sharpe, Adelbert W. Lee, Lenore W. Smith, James A. Gannon, Velma G. Williams, Albert E. Steinem, Elviria Z. Magdeburger, Phillip T. Johnson and Woolsey W. Hall now constitute the Board of Education of the District of Columbia. The Board of Education of the District of Columbia has, under law, control of the public schools of the District of Columbia, and is empowered to determine all questions of policy relating to the schools, to appoint specified executive officers and define their duties, and to direct expenditures. (District of Columbia Code, Title 31, sections 101 and 103, June 20, 1906, 34 Stat. 316, 317, Chapter 3446, section 2; January 26, 1929, 45 Stat. 1139, Chapter 105).

6. (b) Defendant Hobart M. Corning is the superintendent of all the public schools in the District of Columbia, who, under law, has direction of, and supervision in, all matters pertaining to the instruction in all the schools under the Board of Education, controls personnel in all the schools, and performs such other duties necessary for the operation of the public school system as may be authorized by the Board of Education. (District of Columbia Code, Title 31, sections 105 and 106, June 20, 1906, 34 Stat. 317, Chapter

3446, section 3; April 22, 1932, 47 Stat. 134, Chapter 131, Section 1).

6. (c) Defendant Norman J. Nelson is first assistant suintendent of schools, Division 1-9, who, under law, has general supervision over the white schools of the District of Columbia, under the direction of the superintendent of schools. (Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 18st Congress, 1st Session.)

6. (d) Defendant Garnet C. Wilkinson is first assistant superintendent of schools, Division 10-13, who, under law, has sole charge of all employees, classes and schools in which colored children are taught, under the direction of the superintendent of schools. (Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session.)

6. (e) Defendant Lawson J. Cantrell is associate superintendent of schools, Divisions 1-9, who has immediate charge of, and responsibility for, the general direction and supervision of instruction, organization and management of the white junior and vocational high schools of the District of Columbia, under the direction of the first assistant superintendent of schools, Division 1-9, including Sousa Junior High School.

6. (f) Defendant Eleanor P. McAuliffe is principal of Sousa Junior High School and has direct administrative and supervisory jurisdiction of pupils, teachers, and clerical, custodial and maintenance personnel, as well as the operation of the school, under the direction of the Associate Superintendent of schools, Division 1-9, who, under law, has junior and vocational high schools of the District of Columbia.

6. (g) All defendants are sued in their official capacities.

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7. On the 11th day of September, 1950, the minor plaintiffs, possessing all qualifications for admission to the Sousa Junior High School, presented themselves at the said junior high school for registration therein, within the time and at the place specified for such registration, and were refused admission by defendant Eleanor P. McAuliffe, Principal of Sousa Junior High School, solely because of their race or color.

On the 27th day of October, 1950, the minor plaintiffs, through their parents and attorneys, requested defendant Lawson J. Cantrell to admit said minor plaintiffs to Sousa Junior High School and were refused admission by the said defendant, solely because of their race or color.

On the 31st day of October, 1950, the minor plaintiffs, through their attorneys, requested defendant Norman J. Nelson to admit said minor plaintiffs to Sousa Junior High School and were refused admission by the said defendant, solely because of their race or color.

On the 31st day of October, 1950, the minor plaintiffs, through their attorneys, requested defendant Hobart M. Corning to admit said minor plaintiffs to Sousa Junior High School and were refused admission by the said defendant, solely because of their race or color.

On the 31st day of October, 1950, the minor plaintiffs appealed through their attorneys, to the Board of Education of the District of Columbia, the administrative body having the final authority on admission to public schools in the District of Columbia, and requested admission to Sousa Junior High School.

On November 1, 1950, the defendant Board voted to uphold the actions of its subordinates described above, and to deny and exclude minor plaintiffs from enrollment and instruction in Sousa Junior High School solely because of their race or color.

8. The defendants, and each of them, have pursued and are pursuing, the policy, practice, custom and usage of deny-

ing minor plaintiffs and other Negro children similarly situated admission to and excluding them from attendance as pupils at the Sousa Junior High School, and from enjoyment of the educational opportunities afforded therein solely because of their race or color, thus depriving minor plaintiffs and other Negro children similarly situated of their liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

9. The defendants, and each of them, pursued and are pursuing, the policy, practice, custom and usage of denying minor plaintiffs and other Negro children similarly situated admission to and excluding them from attendance as pupils at the Sousa Junior High School, and from enjoyment of the educational opportunities afforded therein solely because of their race or color, in violation of Title 8, United States Code, section 41, which provides that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subjected to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

10. The defendants, and each of them, have pursued and are pursuing, the policy, practice, custom and usage of denying minor plaintiffs, and other Negro children similarly situated, admission to and excluding them from attendance as pupils at the Sousa Junior High School, and from enjoyment of the educational opportunities afforded therein solely because of their race or color, in violation of Title 8, United States Code, section 43, which provides for a civil action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws.

11. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to

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the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School, for no other reason than because of their race or color, thus depriving minor plaintiffs of their liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the Untied States.

12. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School for no other reason than because of their race or color, in violation of Title 8, United States Code, section 41, which provides that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

13. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School for no other reason than because of their race or color, in violation of Title 8, United States Code, Section 43, which provides for a civil action for the deprivation of any rights, privileges or immunities secured by the Constitution and laws.

14. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School for no other reason than because of their race or color, in violation of Article I,

Section 9, Clause 3, of the Constitution of the United States which forbids a Bill of Attainder.

15. The defendants, and each of them, have pursued, and continue to pursue, the policy, practice, custom and usage of excluding minor plaintiffs and other Negro children similarly situated from attendance at, and denying them admission to, the Sousa Junior High School and the educational opportunities afforded therein, in violation of the Charter of the United Nations, Chapter I, Article I, section 3, which submits that the purpose of the United Nations is directed to the solution of economic, social, cultural, and humanitarian problems, and includes promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion; and Chapter IX, Article 55, which provides that the subscribers of the Charter with respect to the enumerated principles shall promote, respect and observe human rights and fundamental freedoms without racial, liguistic, religious or sex distinctions; and Chapter IX, Article 56, which pledges all member signatories to take joint and separate action for the achievement of the purposes set forth in the foregoing sections. 59 Statutes 1035 ff, U.S. Code, Congressional Service, 79th Congress, 1945, p. 964 et seq.

16. A present actual case or controversy exists between plaintiffs and defendants. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering irreparable injury in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage,

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vexation and inconvenience to plaintiffs and other Negroes similarly situated.

WHEREFORE, the plaintiffs respectfully pray:

1. That this Court enter a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the defendants are without right in construing the statutes having to do with public education in the District of Columbia so as to require said defendants to exclude the minor plaintiffs from attendance at the Sousa Junior High School and denying to them the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment to the Constitution of the United States, by Title 8, United States Code, sections 41 and 43, and by Article I, section 9, clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder and by the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56, and further stating that the said defendants are required by the Constitution and laws of the United States to admit said minor plaintiffs to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

2. That this Court enter an interlocutory injunction restraining defendants, and each of them, their successors in office, and their agents and employees from precluding the admission of minor plaintiffs, and other Negro children similarly situated to the Sousa Junior High School, for no other reason than because of their race or color, upon the grounds that said refusal of admission as applied to minor plaintiffs, or other Negro children similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment to the Constitution of the United

States, Title 8, United States Code, sections 41 and 43, Article I, section 9, clause 3, of the constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

3. That this Court enter an interlocutory injunction requiring defendants, and each of them, their successors in office, and their agents and employees to admit the minor plaintiffs to attendance at the Sousa Junior High School, and other Negroes similarly situated to said Sousa Junior High School in conformity with their rights as secured to them by the due process of law clause of the Fifth Amendment to the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

And plaintiffs respectfully pray further that upon a full hearing hereof:

4. That this Court enter a permanent injunction restraining defendants, and each of them, their successors in office, and their agents and employees from precluding the admission of minor plaintiffs and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race and color, upon the grounds that said refusal of admission as applied to minor plaintiffs or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment to the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

5. That this Court enter a permanent injunction requiring defendants, and each of them, their successors in office, and their agents and employees to admit the minor plain-

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tiffs to attendance to the Sousa Junior High School in conformity with the rights as secured to them by the due process of law clause of the Fifth Amendment to the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Section 9, clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Section 55 and 56.

6. That this Court allow plaintiffs their costs herein, and grant them such further, other, additional or alternative relief as may appear to the Court to be equitable and just in the premises.

Sarah Bolling, personally, and as mother and next of friend of Spottswood Thomas Bolling and Wanamaker Von Bolling, minors.
William Briscoe, personally, and as father and next of friend of Sarah Louise Briscoe, minor.
James C. Jennings, personally, and as father and next of friend of Adrienne Jennings and Barbara Jennings, minors.
Gardner L. Bishop, President, Consolidated Parent Group, Incorporated.

Plaintiffs.

George E. C. Hayes, 613 F Street, Northwest, Washington, D. C. National 2702.
Harry B. Merican, 1815 17th Street, Northwest, Washington, D. C.
James M. Nabrit, Jr., 330 College Street, Northwest, Washington, D. C.
Attorneys for the plaintiffs.
Julian R. Dugas, Sr.
George M. Johnson
Herbert O. Reid, Sr.
James A. Washington, Jr.
Of Counsel.

DISTRICT OF COLUMBIA, SS:

We, Sarah Bolling, William Briscoe, James C. Jennings and Gardner L. Bishop, personally and respectfully in our reperesentative capacities, as hereinbefore indicated, being first duly sworn, depose and state that we have read the foregoing Complaint by us subscribed and know the contents thereof, and that all matters stated therein to our own personal knowledge are true, and those alleged upon information and belief we believe to be true.

Sarah Bolling, personally, and as mother and next of friend of Spottwood Thomas Bolling and Wanamaker Von Bolling, minors.

William Briscoe, personally, and as father and next of friend of Sarah Louise Briscoe, minor.

James C. Jennings, personally, and as father and next of friend of Adrienne Jennings and Barbara Jennings, minors.

Gardner L. Bishop, President, Consolidated Parent Group, Incorporated.

Subscribed and sworn to before me this 7th day of November, 1950.

Don Lockett Young, Notary Public, D. C.

Filed Nov. 9, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4949-50

SPOTTSWOOD THOMAS BOLLING, a minor, by Sarah Bolling, his mother and next friend,

WANAMAKER VON BOLLING, a minor, by Sarah Bolling, his mother and next friend,

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SARAH LOUIS BRISCOE, a minor, by William Briscoe, her father and next friend,
ADRIENNE JENNINGS, a minor, by James C. Jennings, her father and next friend,
BARBARA JENNINGS, a minor, by James C. Jennings, her father and next friend,
SARAH BOLLING, personally, 1732 Stanton Terrace, Southeast, Washington, D. C.,
WILLIAM BRISCOE, personally, 1323 Eaton Road, Southeast, Washington, D. C.,
JAMES C. JENNINGS, personally, 1139 Stevens Road, Southeast, Washington, D. C.,

and

CONSOLIDATED PARENT GROUP, INC., a corporation, 1113 Montello Avenue, Northeast, Washington, D. C.,
Plaintiffs,

vs.

C. MELVIN SHARPE, 929 E Street, Northwest, Washington, D. C.,
ADELBERT W. LEE, 3211 Pennsylvania Ave., Southeast, Washington, D. C.,
LENORE W. SMITH, 3249 Howard Street, Northwest, Washington, D. C.,
JAMES A. GANNON, 1915 Biltmore Street, Northwest, Washington, D. C.,
VELMA G. WILLIAMS, 2700 Georgia Avenue, Northwest, Washington, D. C.,
ALBERT E. STEINEM, Colorado Building, Washington, D. C.,
ELVIRIA Z. MAGDEBURGER, 1612 Missouri Avenue, Northwest, Washington, D. C.,
PHILIP T. JOHNSON, 1742 Sixth Street, Northwest, Washington, D. C.,

WOOLSEY W. HALL, 1330 Wallach Place, Northwest, Washington, D. C.,
being and constituting the Board of Education of the District of Columbia

and

HOBART M. CORNING, Superintendent of Schools, Franklin Administration Building,

NORMAN J. NELSON, First Assistant Superintendent of Schools, Divisions 1-9, Franklin Administration Building,

GARNET C. WILKINSON, First Assistant Superintendent of Schools, Divisions 10-13, Franklin Administration Building,

LAWSON J. CANTRELL, Associate Superintendent, Divisions 1-9, Frankling Administration Building,

and

ELEANOR P. McAULIFFE, Principal, Sousa Junior High School,

Defendants.

MOTION FOR INTERLOCUTORY INJUNCTION

The plaintiffs, by their attorneys, George E. C. Hayes, Harry B. Merican and James M. Nabrit, Jr., move this Court for an order granting an interlocutory injunction against the defendants, their successors in office, their agents, employees and servants, attorneys, and all persons in active concert or participation with them, pending this suit, and until further order of this Court, in accordance with the prayers numbered 2 and 3 as set forth in the complaint filed herein.

In support of this motion the plaintiffs attach their verified complaint, and in addition, state:

1. Unless restrained, the defendant will continue to ex-

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clude the plaintiffs, and other Negro children on whose behalf they sue, from admission to Sousa Junior High School, solely because of their race or color.

2. Irreparable injury, loss and damage has been caused the minor plaintiffs by the defendants' acts of excluding said minor plaintiffs from, and denying them admission to, the Sousa Junior High School on September 11, 1950, the opening date for the public schools of the District of Columbia; and the defendants, by continuing to exclude minor plaintiffs from attendance at, and admission to, the Sousa Junior High School, are causing further irreparable injury, loss and damage to the minor plaintiffs by denying to them the educational instruction and opportunities to which they are constitutionally entitled during the current school year.

3. If the defendants continue to exclude minor plaintiffs from, and deny them admission to, the Sousa Junior High School, and the educational opportunities afforded therein any judgment this Court may later render on final determination of this action will be ineffective to repair the injury, damage and loss currently being suffered, and the final judgment of this Court will not therefore give the minor plaintiffs the full and complete remedy to which they are entitled for a violation of their rights under the Constitution and laws of the United States.

4. If this interlocutory injunction be granted, the injury, if any, to the defendants, if final judgment be in their favor, will be inconsequential and may adequately be indemnified by bond.

George E. C. Hayes, 613 F Street, N. W.; Harry B. Merican, 1815 17th St., N. W.; James M. Nabrit, Jr., 330 College Street, N. W., Attorneys for plaintiffs.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4949-50

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Plaintiffs,

v.

C. MELVIN SHARPE, ET AL.,
Defendants.

MOTION TO DISMISS

The defendants move to dismiss the above-entitled cause on the ground that the complaint fails to state a claim upon which relief can be granted.

(s) Vernon E. West, Corporation Counsel, D. C.;
(s) Oliver Gasch, Assistant Corporation Counsel, D. C.; (s) Milton D. Korman, Assistant Corporation Counsel, D. C.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4949-50

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Plaintiffs,

v.

C. MELVIN SHARPE, ET AL.,
Defendants.

ORDER

Upon consideration of the complaint, of the motion of the defendants to dismiss the above-entitled cause, of the memoranda of points and authorities in support of and in opposition to said motion, and of the arguments of counsel for the plaintiffs and for the defendants, it is, by the Court, this 9th day of April, 1951,

ORDERED, that the above-entitled cause be, and it is hereby, finally dismissed.

(s) Walter M. Bastian, Judge.

Copy of the foregoing form of Order mailed to George E. C. Hayes, Esq., attorney for plaintiffs, 613 F Street, N.W., Washington, D. C., this 9th day of April, 1951.

Milton D. Korman, Assistant Corporation Counsel, D. C., attorney for defendants.

Filed Apr. 10, 1951. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4949-50

SPOTTSWOOD THOMAS BOLLING, et al.,
Plaintiffs,

vs.

C. MELVIN SHARPE, et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given this 10th day of April, 1951, that the plaintiffs, Spottswood Thomas Bolling, et al., hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 9th day of April, 1951, in favor of the defendants, C. Melvin Sharpe, et al., against said Spottswood Thomas Bolling, et al.

George E. C. Hayes, attorney for plaintiffs.

Serve: Milton D. Korman, Esq., Assistant Corporation Counsel, D. C., attorney for defendants.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, et al., Petitioners,

vs.

C. MELVIN SHARPE, et al.

ORDER ALLOWING CERTIORARI—Filed November 10, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. Case is assigned for argument immediately following No. 191.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 413 8 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

GEORGE E. C. HAYES
JAMES M. NABRIT, JR.
Counsel for Petitioners

JULIAN R. DUGAS
GEORGE M. JOHNSON
HARRY B. MERICAN
HERBERT O. REID, JR.
JAMES A. WASHINGTON
DORSEY E. LANE
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Spottswood Thomas Bolling, et al., pray that a writ of certiorari issue to review the judgment of the United States District Court for the District of Columbia in the above-entitled cause which is now pending before the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY STATEMENT OF MATTERS INVOLVED

On the 11th day of September, 1950, and during the time when respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Columbia attended solely by white children, all of the minor petitioners, Negroes between the

ages of 7 and 16 years, citizens of the United States, residents of and domiciled in the District of Columbia, within the statutory age limits for eligibility to attend the public schools of the District of Columbia and subject to the compulsory school attendance law of the District of Columbia, accompanied by their parents, adult petitioners, presented themselves to respondent Eleanor P. McAuliffe, the principal of Sousa Junior High School, for enrollment and instruction therein. The adult petitioners are taxpayers and citizens of the District of Columbia, and are required by law to send their respective children, minor petitioners, to the specific public schools designated by the respondents, and are subject to criminal prosecution for failure so to do. Act of February 4, 1925, 43 Stat. 806, 807, Ch. 140, Art. I, Sec. 1 and 7 (D. C. Code 1951 Ed., Title 31, Sec. 201, 207). Each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of his race or color.

On the 27th day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Lawson J. Cantrell, Associate Superintendent of Schools in charge of the vocational and junior high schools in the District of Columbia, Divisions 1-9 (now Division I), restricted to white pupils. Again each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of his race or color.

On the 31st day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Norman J. Nelson, First Assistant Superintendent of Schools, Divisions 1-9, restricted to white pupils, and to respondent Hobart M. Corning, Superintendent of all the public schools in the District of Columbia, and each denied and excluded each minor petitioner from enrollment and instruction at Sousa Junior High School solely because of his race or color.

On the 1st day of November, 1950, the respondent Board of Education of the District of Columbia upheld the actions

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of the other respondents and itself denied and excluded minor petitioners from enrollment and instruction at Sousa Junior High School solely because of their race or color.

Having exhausted their administrative remedies, thereafter and on November 9, 1950, petitioners, on their own behalf and on behalf of others similarly situated, filed a complaint (R. pp. 2-11) and brought a class suit in the United States District Court for the District of Columbia, against the respondents in their respective official capacities. The action sought a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the defendants are without right in construing the statutes having to do with public education in the District of Columbia so as to require said defendants to exclude the minor plaintiffs from attendance at the Sousa Junior High School and denying to them the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment to the Constitution of the United States, by Title 8, United States Code, sections 41 and 43, and by Article I, section 9, clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder and by the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56, and further stating that the said defendants are required by the Constitution and laws of the United States to admit said minor plaintiffs to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

The action further sought an interlocutory and a permanent injunction restraining defendants, and each of them, their successors in office, and their agents, and employees from precluding the admission of minor plaintiffs and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race and color, upon the grounds that said refusal of

admission as applied to minor plaintiffs or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment to the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

The action also sought an interlocutory and a permanent injunction requiring defendants, and each of them, their successors in office, and their agents and employees to admit the minor plaintiffs to attendance to the Sousa Junior High School in conformity with the rights as secured to them by the due process of law clause of the Fifth Amendment to the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Section 9, clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Section 55 and 56.

Subsequently, the respondents, through their attorneys, filed a motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted (R. p. 17). On April 9, 1951, the Honorable Walter M. Bastian granted the motion to dismiss (R. p. 18). The District Judge was of the opinion that he was bound by the holdings of the United States Court of Appeals for the District of Columbia in *Carr, et al.* v. *Corning*, 86 App. D.C. 173, 182 F. (2d) 14 (1950), and *Browne, et al.* v. *Magdeburger, et al.*, 86 App. D. C. 173, 182 F. (2d) 14 (1950).

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. p. 19), and briefs were filed therein. This case has not been set down for oral argument, nor has it been submitted for judgment

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on the briefs, and no orders with respect thereto have been entered by that Court.

BASIS OF JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254 (1) and 2101 (e).

2. The jurisdiction for the United States Circuit Court of Appeals for the District of Columbia was invoked under Title 28, United States Code, Section 1291.

3(a). The jurisdiction of the District Court for the District of Columbia was invoked under Title 28, United States Code, Section 1331. This action arises under the due process of law clause of the Fifth Amendment to the Constitution of the United States; Article I, section 9, clause 3, of the Constitution of the United States, relating to the Bill of Attainder; and the Charter of the United Nations, Chapter I, Article I, section 3 and Chapter IX, Articles 55 and 56, relating to the promotion, encouragement and observance of human rights without racial distinctions, as hereinafter more fully appears. The matter in controversy exceeds the sum or value of Three Thousand ($3,000) Dollars, exclusive of interests and costs.

3(b). The jurisdiction of the District Court for the District of Columbia was also invoked under Title 28, United States Code, section 1343, which provides for the original jurisdiction of this Court in suits involving civil rights. This action is authorized by Title 8, United States Code, section 43, to be commenced by any citizen of the United States, or other persons within the jurisdiction thereof, to redress the deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States, and Title 8, United States Code, section 41, provides for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as hereinafter more fully appears.

3(c). The jurisdiction of the District Court for the District of Columbia was also invoked under the general jurisdiction provision of the District of Columbia Code (1940), Title 11, section 301, and the jurisdiction of this Court as a Court of the United States under District of Columbia Code (1940), Title 11, section 305.

ASSIGNMENT OF ERROR

The District Court of the District of Columbia erred in granting respondents' motion to dismiss minor petitioners' complaint on the ground that it failed to state a complaint on which relief could be granted.

QUESTIONS PRESENTED

The questions presented here are:

1. Whether or not the Board of Education of the District of Columbia, in interpreting and enforcing certain Acts of Congress so as to require white and colored pupils to attend separate schools, deprives Negro minor petitioners of rights secured to them by the Constitution of the United States.

2. Whether or not the respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, deprived them of liberty and property in violation of the Fifth Amendment of the Constitution of the United States.

3. Whether or not the respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, deprived them of their civil rights in violation of Title 8, United States Code, Sections 41 and 43.

4. Whether or not the respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, deprived them of educational opportunities in violation of the Charter of the United Na-

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tions, Chapter 1, Article 1, Section 3, and Chapter IX, Article 55, and Chapter IX, Article 56.

5. Whether or not segregation of the races for educational purposes in the District of Columbia is constitutionally permissible.

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

Constitutional Provisions:

Fifth Amendment of the Constitution of the United States, Article 1, Section 9, Clause 3, of the Constitution of the United States.

Treaty:

Article 1(3), 2(2), 55(c) and 56 of The United Nations Charter, 59 Stat. 1035 et seq.

Statutes:

(A) Title 8, United States Code, Sections 41 and 43.

(B) Act of June 11, 1878, 20 Stat. 107, Chap. 180, Sec. 6, as amended June 20, 1906, 34 Stat. 316, Chap. 3446, Sec. 2 (D. C. Code 1951 Ed., Title 31, Secs. 1110, 1111, 1112, 1113).

(C) Act of June 20, 1906, 34 Stat. 316, Chap. 3446, Sec. 2 (D. C. Code 1951 Edition, Title 31, Sec. 1109).

(D) Act of June 20, 1906, 34 Stat. 316, Chap. 3446, Sec. 7, as amended by Act of June 4, 1924, 43 Stat. 370, Chap. 250, Art. 3 (D. C. Code 1951 Edition, Title 31, Sec. 115).

(E) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of Oct. 6, 1949, Public No. 353, 81st Congress, 1st Session.

(F) Act of February 4, 1925, 43 Stat. 806, 807, Chap. 140, Art. I, Secs. 1 and 7 (D. C. Code 1951 Edition, Title 31, Sec. 201, 207).

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT

First, the questions involved are of grave public concern. The petitioners here allege that respondents refused to admit certain Negro children to a public school in the District of Columbia solely because of their race or color, and that such action on the part of the respondents deprived them of their rights under the Federal Constitution. The constitutional issues thus raised are recognized by the government of the United States to be of national and international concern and interest. See: The Report of the President's Committee on Civil Rights, "To Secure These Rights" (1947); The President's Commission of Higher Education, 1 Higher Education for American Democracy (1947); Government's Briefs in *Henderson* v. *United States*, 339 U. S. 816 (1949), *Sweatt* v. *Painter*, 339 U. S. 629 (1949), and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 636 (1949).

Secondly, since the issues here are so related to those posed in three cases now pending before this Court and consolidated for oral argument, it would appear to be within the public interest to consider simultaneously the petitioners' cause as well. *Brown, et al.* v. *Board of Education of Topeka, et al.; Briggs, et al.* v. *Elliott, et al.; Davis, et al.* v. *County School Board, et al.*, Nos. 8, 101, and 191, October 8, 1952, Per Curiam.

Thirdly, although the questions raised have been considered in whole or in part by the United States Court of Appeals for the District of Columbia Circuit, and decided adversely to the contentions of the petitioners, *Wall* v. *Oyster*, 36 App. D.C. 50 (1910); *Carr, et al.* v. *Corning*, 86 App. D.C. 173, 182 F. (2d) 14 (1950), the important Federal questions which are involved have never been submitted to this Court for consideration and judgment. Rules of the Supreme Court of the United States, Rules 38 and 39.

Fourthly, the facts of this case would appear to require

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an early interposition by this Court in order to avoid further delay and further irreparable damage by a continuation of the denial to the minor petitioners of the educational instruction and opportunities to which they are entitled. The Conqueror, 166 U.S. 110, 113-114 (1897).

CONCLUSION

The petitioners respectfully request that for the foregoing reasons this Court grant this writ of certiorari and such other and further relief in the premises as may be just and proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, Et Al.,
Petitioners

V.

C. MELVIN SHARPE, Et Al.,
Respondents

BRIEF FOR PETITIONERS

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In The

Supreme Court of the United States

October Term, 1952

No. 413

Spottswood Thomas Bolling, Et Al.,
Petitioners

V.

C. Melvin Sharpe, Et Al.,
Respondents

BRIEF FOR PETITIONERS

OPINION BELOW

The final decree of The United States District Court for the District of Columbia is unreported, but appears in the Record (R. p. 19).

JURISDICTION

The final decree of the District Court was entered on April 9, 1951 (R. p. 19). The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was given on April 10, 1951 (R. p. 20). Briefs were filed by petitioners and respondents in the United States Court of Appeals for the District of Columbia Circuit. Before argument, before submission of the case for judgment on the briefs, and before judgment petitioners filed a Petition for Writ of Certiorari in this Court, asking that this Court review the judgment of the United States District

Court for the District of Columbia before judgment by the United States Court of Appeals for the District of Columbia Circuit. Certiorari was granted by order of this Court dated November 10, 1952.

This is an appeal from a decree in a civil action denying an injunction and, denying an application for a declaratory judgment holding that the action of respondents, under color of law, in refusing admission of minor petitioners to Sousa Junior High School solely on the basis of race or color was in violation of the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and also in violation of Title 8, United States Code, Section 43, and further was in violation of the Charter of the United Nations, Chapter 1, Article 1, Section 3, Article IX, Sections 55 and 56, and, denying an application for a declaratory judgment holding that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color in affording them educational opportunities and, dismissing petitioners' complaint on the ground that it failed to state a cause of action on which relief could be granted. The jurisdiction of this Court to review by writ of certiorari before judgment in the United States Court of Appeals is conferred by Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED

1. Whether the Federal Government in providing educational opportunities for pupils of the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color.

2. (a) Whether Acts of Congress which provide educational opportunities for pupils in the District of Co-

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lumbia compel their segregation solely on the basis of race or color.

(b) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia compel their segregation solely on the basis of race or color, whether these acts are unconstitutional.

(c) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia permit segregation solely on the basis of race or color, whether to the extent that this legislation is thus permissive its implementation by actions of respondents is unconstitutional.

3. Whether the actions of respondents in refusing to admit minor appellants to Sousa Junior High School solely on the basis of race or color violated petitioners' rights guaranteed them by the Constitution and Laws of the United States.

4. Whether the United States District Court for the District of Columbia erred, in denying petitioners' application for an injunction and for a declaratory judgment, and in granting respondents' motion to dismiss petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

TREATY AND STATUTES INVOLVED

Treaty:

Article 1(3), 2(2), 55(c) and 56 of the United Nations Charter, 59 Stat. 1035 et seq.

Statutes:

(A) Title 8, United States Code, Sections 41 and 43.

(B) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Sec. 6, as amended June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 2 (D. C. Code 1951 Ed., Title 31, Secs. 1110, 1111, 1112, 1113).

(C) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 2 (D. C. Code 1951 Ed., Title 31, Sec. 1109).

(D) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Sec. 7, as amended by Act of June 4, 1924, 43 Stat. 370, Chapter 250, Art. 3 (D. C. Code 1951 Ed., Title 31, Sec. 115).

(E) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of Oct. 6, 1949, Public No. 353, 81st Congress, 1st Session.

(F) Act of February 4, 1925, 43 Stat. 806, 807, Chapter 140, Art. 1, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs. 201, 207).

STATEMENT OF THE CASE

On the 11th day of September, 1950, and during the time when respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Columbia attended solely by white children, all of the minor petitioners, Negroes between the ages of 7 and 16 years, citizens of the United States, residents of and domiciled in the District of Columbia, within the statutory age limits for eligibility to attend the public schools of the District of Columbia and subject to the compulsory school attendance law of the District of Columbia, accompanied by their parents, adult petitioners, presented themselves to respondent Eleanor P. McAuliffe, the principal of Sousa Junior High School, for enrollment and instruction therein. The adult petitioners are taxpayers and citizens of the District of Columbia, and are required by law to send their respective children, minor petitioners, to the specific public schools designated by the respondents, and are subject to criminal prosecution for failure so to do. Act of February 4, 1925, 43 Stat. 806, 807, Ch. 140, Art. I, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs 201, 207). Each minor petitioner was denied and ex-

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cluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 27th day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Lawson J. Cantrell, Associate Superintendent of Schools in charge of the vocational and junior high schools in the District of Columbia, Divisions 1-9 (now Division 1), restricted to white pupils. Again each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 31st day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Norman J. Nelson, First Assistant Superintendent of Schools, Divisions 1-9, restricted to white pupils, and to respondent Hobart M. Corning, Superintendent of all the public schools in the District of Columbia, and each denied and excluded each minor petitioner from enrollment and instruction at Sousa Junior High School solely because of race or color.

On the 1st day of November, 1950, the respondent Board of Education of the District of Columbia upheld the actions of the other respondents and itself denied and excluded minor petitioners from enrollment and instruction at Sousa Junior High School solely because of their race or color.

Having exhausted their administrative remedies, thereafter and on November 9, 1950, petitioners, on their own behalf and on behalf of others similarly situated, filed a complaint (R. p. 1) and brought a class suit in the United States District Court for the District of Columbia, against the respondents, members of the School Board and officials of the public school system of the District of Columbia, in their respective official capacities. The action sought a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the respondents are without right in construing the statutes having to do with public education in the District of Columbia so as to re-

quire said respondents to exclude the minor petitioners from attendance at the Sousa Junior High School and in denying to the minor petitioners the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, by Title 8, United States Code, Sections 41 and 43, and by Article I, Section 9, Clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder, and by the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56, and further stating that the said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

The action further sought an interlocutory and a permanent injunction restraining respondents, and each of them, their successors in office, and their agents, and employees from precluding the admission of minor petitioners and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race or color, upon the grounds that said refusal of admission as applied to minor petitioners or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

The action also sought an interlocutory and a permanent injunction requiring respondents, and each of them, their successors in office, and their agents and employees to ad-

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mit the minor petitioners to attendance in the Sousa Junior High School in conformity with their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

Subsequently, the respondents, through their attorneys, filed a motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted (R. p. 18). The Honorable Walter M. Bastian, Judge in the United States District Court for the District of Columbia, refused either to grant an injunction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, or to issue a declaratory judgment that said denial was in violation of petitioners' rights under the Constitution and laws of the United States, or to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School free of any racial distinctions, and on April 9, 1951, granted the motion to dismiss (R. p. 19). The District Judge at the close of oral argument stated that he was bound by the holding of the United States Court of Appeals for the District of Columbia Circuit in *Carr, et al.* v. *Corning*, 86 App. D. C. 173, 182 F. (2d) 14 (1950), and *Browne, et al.* v. *Magdeburger, et al.*, 86 App. D. C. 173, 182 F. (2d) 14 (1950).

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. p. 20), and briefs were filed therein. This case has not been set down for oral argument, nor has it been submitted for judgment on the briefs, and no orders with respect thereto have been entered by that Court.

ERRORS RELIED UPON

The District Court erred:

1. In refusing to enter a declaratory judgment holding that the respondents are without right in excluding minor petitioners from Sousa Junior High School under color of law upon the ground that these actions violate rights secured by the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and by Title 8, United States Code, Sections 41 and 43, and by the Charter of the United Nations, Chapter I, Article I, Section 3, and Article IX, Sections 55 and 56; and in refusing to hold that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

2. In refusing to restrain respondents from denying admission of minor petitioners to Sousa Junior High School for no other reason than because of their race or color, upon the ground that this action is in violation of their rights secured under the due process clause of the Fifth Amendment, and Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and the Charter of the United Nations, Chapter I, Article I, Section 3, Article IX, Sections 55 and 56.

3. In refusing to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School in conformity with their rights under the Constitution and laws of the United States, and in refusing to hold that Acts of Congress do not compel racial segregation in the public schools of the District of Columbia, for they would then violate Article I, Section 9, Clause 3 of the Constitution of the United States, and respondents were in error in applying and construing said statutes so as to require the exclusion of minor petitioners from Sousa Junior High School solely on the basis of race or color.

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4. In granting respondents' motion to dismiss petitioner's complaint on the ground that it failed to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT

1. The Fifth Amendment of the Constitution of the United States precludes the Federal Government from imposing distinctions or restrictions based on race or color alone in affording educational opportunities to pupils in the District of Columbia. Therefore, respondents, as school officials in the District of Columbia, have no constitutional power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color.

2. (a) The Acts of Congress which provide educational opportunities for pupils in the District of Columbia do not compel their segregation solely on the basis of race or color.

(b) If these Acts of Congress are interpreted as compelling segregation in the public schools of the District of Columbia of minor petitioners solely on the basis of race or color then these Acts of Congress are bills of attainder, prohibited by Article I, Section 9, Clause 3 of the Constitution of the United States as well as violative of the due process clause of the Fifth Amendment.

(c) If these Acts of Congress are interpreted as not compelling segregation but as permitting segregation in the public schools of the District of Columbia of minor petitioners solely on the basis of race or color, then to the extent that these Acts are implemented by the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, this action of respondents implementing this legislation is unconstitutional.

3. The denial of admission of minor petitioners to Sousa Junior High School solely on the basis of race or color deprives them of their civil rights in violation of Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, in violation of

the Charter of the United Nations, Chapter I, Article I, Section 3, and Chapter IX, Articles 55, 56.

4. The court below erred in not granting petitioners the relief prayed for and in granting respondents' motion to dismiss minor petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

ARGUMENT

I.

THE ACTION OF RESPONDENTS IN EXCLUDING MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR AND IN REFUSING TO PERMIT ADULT PETITIONERS TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR DEPRIVES PETITIONERS OF THEIR LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

A. Respondents' Actions in Regulating and Administering the Educational System of the District of Columbia Pursuant to and Under Color of Congressional Authority Are Limited by the Provisions of the Due Process Clause of the Fifth Amendment.

Article I, Section 8, Clause 17, of the Constitution of the United States grants to Congress the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. Pursuant to this power, Congress by legislation has provided a system of education for the District of Columbia and acting pursuant to and under color of this legislation respondents regulate and administer said system of education. Congressional legislation providing

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the system of education and the acts of respondents in regulating and administering the educational system of the District of Columbia, beyond question, are subject to the limitations of the due process clause of the Fifth Amendment. In *Capital Traction Company* v. *Hof*, 174 U. S. 1, 5 (1899) this Court observed:

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within the State; . . . so long as it does not contravene any provision of the Constitution of the United States."

In *Callen* v. *Wilson*, 127 U. S. 540, 550 (1888), this Court observed:

> ". . . There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property . . ."

One of the constitutional guarantees, which petitioners may not lawfully be deprived of the benefit of, is that as citizens no distinctions be made between them and other citizens because of race or color alone.

This Court, in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, (1943) said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . ."

In that same case, in a concurring opinion where this Court upheld the deprivation of the liberty of 70,000 Japa-

nese under a war-time curfew law, Mr. Justice Murphy said at page 111:

> ". . . The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.
>
> "Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments . . ."

Another constitutional guarantee, which minor petitioners may not lawfully be deprived of, is the right to go to Sousa Junior High School without any limitations based solely upon race or color.

Mr. Justice Murphy, in a concurring opinion in *Ex Parte Endo*, 323 U. S. 283, 308 (1944), said:

> ". . . For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction."

In the instant case minor petitioners would have a right to go to Sousa Junior High School but for respondents' action in excluding them solely because of their race or color, an action forbidden by the due process clause of the Fifth Amendment.

Final determination of what constitutes due process of law is for the judiciary, not Congress. *Baltimore & Ohio R. R. Co.* v. *U. S.*, 298 U. S. 349 (1938).

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B. The Educational Rights Which Petitioners Assert Are Fundamental Rights Protected by the Due Process Clause of the Fifth Amendment from Unreasonable or Arbitrary Restrictions.

Minor petitioners assert *rights to enjoy the educational opportunities* provided in the District of Columbia unrestricted by reason of their race or color and adult petitioners assert rights to enroll their children in public schools in the District of Columbia, unrestricted by reason of race or color. These educational rights are fundamental rights protected by the Fifth Amendment against unreasonable or arbitrary restrictions.

This Court held in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400 (1923), that:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men. . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision of the courts." (Emphasis supplied)

Again in *Meyer* v. *Nebraska*, *supra*, at page 400, this Court stated:

> "The American people have always regarded education and the acquisition of knowledge as matters of

> supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station of life; and nearly all the states, . . . enforce this obligation by compulsory laws."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-5 (1925), this Court held:

> "Under the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State: those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

Meyer v. *Nebraska* and *Pierce* v. *Society of Sisters* involved the protection given to educational rights by the Fourteenth Amendment against unreasonable or arbitrary State restrictions. It is clear, however, that these rights are similarly protected by the Fifth Amendment from unreasonable or arbitrary Federal restrictions.

In *Farrington* v. *Tokushige*, 273 U. S. 284, 298, 299 (1927), this Court said:

> "Enforcement of the Act probably would destroy most, if not all, of them; and certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution pro-

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tects him as well as those who speak another tongue.

"The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents, and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, . . . Bartels v. Iowa, . . . Pierce v. Society of Sisters . . . While that amendment declares that no State shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the Fifth Amendment—'no person shall . . . be deprived of his life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress . . . Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Courts have indicated a respect for opinion of legal scholars and teachers. See: *Georgetown College* v. *Hughes*, 130 F. (2d) 810 (1942). With this in mind, petitioners call attention of the Court to the brief of the Committee of law professors, at pages 36-38, filed as Brief, Amicus Curiae in the Supreme Court of the United States, *Sweatt* v. *Painter, et al.*, No. 44, October Term, 1949, from which we quote in part:

"(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation. While there are many instruments of transmission of culture—the family, the church, business institutions, political and social groups and the schools—in our society the school seems to have emerged as the most important . . .

"(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer

lies not, however, in simply indoctrinating them with the principle of racial equality. . . . 'Education in America must be education for democracy. If education is life and growth, then it must be life within a social group. . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience.'

"(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed, so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life. In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent."

C. The Official Action of Respondents Excluding Minor Petitioners from Admission to Sousa Junior High School Solely Because of Race or Color Is Immediately Suspect and Must Be Tested by Standards Laid Down by This Court to Determine Whether Petitioners' Rights Protected by the Fifth Amendment Have Been Violated.

Segregation of the races by government fiat is incompatible with our national policy. In *Hurd* v. *Hodge*, 334 U. S. 24 (1948), not only did the Court reaffirm this national policy limiting government enforced racial distinctions, but this Court declared that it would correct any

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courts in the District of Columbia, pursuant to its supervisory power over them, which took any action contrary to this national policy. *Consequently in the light of the Fifth Amendment cases herein cited and in view of the national public policy limiting government enforced distinctions based solely on race or color, this Court has placed upon the government the burden of justifying racial distinctions imposed upon its citizens.* As this Court said, speaking through Mr. Justice Black in the *Korematsu* v. *U. S.*, 323 U. S. 214, 216 (1944)—

> *"It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. *Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."* (Emphasis supplied.)

In the Japanese cases this Court has evolved certain definite standards by which government enforced racial distinctions among its citizens must be tested.

1. *The restrictions must be justified by an affirmative showing of peculiar circumstances, present emergency, or pressing public necessity.*

(a) In *Meyer* v. *Nebraska, supra,* this Court invalidated a Nebraska statute restricting the teaching of foreign languages, as infringing educational rights protected by the due process clause of the Fourteenth Amendment. At page 402 the Court said:

> "The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

(b) In *Farrington* v. *Tokushige, supra,* this Court invalidated an Act of the Legislature of Hawaii restricting the operation of foreign language schools, as infringing

educational rights protected by the due process clause of the Fifth Amendment. At page 298, this Court said:

> "Apparently all are parts of a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason."

In *Hirabayashi* v. *U. S., supra,* this Court upheld a military order confining Japanese-Americans to their homes at night as not infringing on the liberty of persons protected by the due process clause of the Fifth Amendment. At page 101, this Court said:

> "Our investigation here does not go beyond the inquiry whether, in the light of all relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."

Again at page 108, Mr. Justice Douglas concurring said:

> "Detention for a reasonable cause is one thing. Detention on account of ancestry is another."

(d) In *Korematsu* v. *U. S., supra,* this Court upheld a military order excluding Japanese-Americans from a military area as not infringing on the liberty protected by the due process clause of the Fifth Amendment.

Again at page 218, this Court said:

> "True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 P. M. to 6 A. M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."

In the instant case, no reason is given in justification of the restriction on the educational rights of petitioners. The only apparent reason is the race or color of petitioners, a reason sternly interdicted by this Court.

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2. *The restrictions must be for a purpose which government has authority to effect.*

(a) In *Pierce* v. *Society of Sisters, supra,* this Court invalidated a state statute the purpose of which was to compel general attendance at public schools by normal children, between eight and sixteen." (page 531) In concluding that the State had no authority to effect this purpose, this Court said at page 535:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

In the instant case the apparent purpose of the action of respondents complained of, is, as to public education in the District of Columbia, to compel Negroes to attend only schools attended by Negroes and to accept instruction by Negro teachers only. It is submitted that the Federal Government has no authority to effect such a purpose.

3. *The restrictions must be clearly authorized and if implied authority is relied upon it must appear that the restriction is clearly and unmistakably indicated by the language used in granting the authority.*

(b) In *Ex Parte Endo, supra,* this Court invalidated the detention in a Relocation Center of a loyal Japanese-American because no authority to detain was expressly granted or necessarily implied. At page 297 this Court said:

> "We are of the view that Mitsye Endo should be given her liberty. In reaching that conclusion we do not reach the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it had no authority to subject citizens who are concededly loyal to its leave procedure."

At page 300, it is said:

> "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Again at page 300 this Court said:

> "Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed."

And at page 301, 302, this Court points out:

> "Neither the Act nor the orders use the language of detention. The purpose and objective of the Act and of these orders are plain. We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purpose of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."

In the instant case it is clear from what is said under Point II of this brief that the respondents have no express authority to exclude minor petitioners from Sousa Junior High School solely because of their race or color. No lan-

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guage of exclusion is found in any Congressional Acts relating to public education in the District of Columbia. It is to be assumed that these Acts were passed for educational purposes and objectives. *It is submitted that no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race or color and the exclusion of minor petitioners from Sousa Junior High School by respondents solely because of race or color.* On the contrary, there is abundant authority for the proposition that governmentally enforced racial segregation is in conflict with educational purposes and objectives in our democratic society.

4. *The restrictions must have a reasonable relation to an authorized purpose within the competency of the government to effect.*

In *Hirabayashi* v. *U. S., supra,* Mr. Justice Douglas said in his concurring opinion at page 106:

> "Where the orders under the present Act have some relation to 'protection against espionage and against sabotage' our task is at an end."

In *Korematsu* v. *U. S., supra,* this Court said at page 218:

> "But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."

In the instant case, the exclusion of minor petitioners from Sousa Junior High School solely because of race or color has no reasonable relation to any educational purpose suggested by respondents, for they have suggested no purpose. It is submitted that no purpose, within the competency of the government to effect can be advanced in this case.

D. Petitioners Sustain Injury as the Direct Result of the Action of Respondents in Excluding Minor Petitioners from Sousa Junior High School Solely Because of Race or Color.

The exclusion of minor petitioners from admission to Sousa Junior High School, solely because of race or color is a deprivation of *petioners' constitutional rights to acquire useful knowledge, to choose a particular public school, and to enjoy public educational opportunities without government enforced limitations or restrictions based solely on race or color.* That injury continues and is not removed or even lessened by reason of the fact that minor petitioners "do now attend a junior high school in said District", allocated by respondents for the instruction of Negro children. Beyond question the deprivation of a constitutional right is injurious per se. See *Cummings* v. *Missouri*, 4 Wall. 277 (1866), where this Court observed that "liberty" includes "freedom from outrage on feelings as well as restraints on the person."

All of the injury shown by petitioners under Point II of this brief, in reference to a Bill of Attainder supports the contentions here made. Any deprivation of a freedom of choice solely on the basis of race or color is violative of petitioners' civil rights and thus injurious. To be compelled to attend school because of the compulsory school law, D. C. Code 1951 Ed., Title 31, Secs. 201, 207, and then to be compelled to accept segregation on the basis of race or color and to have one's feelings outraged is injurious per se. The deprivation of a civil right is an injury. *Giles* v. *Harris*, 189 U. S. 475, 485 (1903).

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II.

THE ACTS OF CONGRESS WHICH PROVIDE EDUCATIONAL OPPORTUNITIES FOR PUPILS IN THE DISTRICT OF COLUMBIA DO NOT COMPEL THEIR SEGREGATION SOLELY ON THE BASIS OF RACE OR COLOR.

A. The Language of the Acts of Congress Which Provide Educational Opportunities for Pupils in the District of Columbia Does Not Compel Segregation of Negroes from Whites.

These Acts are:

(a) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R.S.D.C. Section 281), which provides:

> Education of colored children. "It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia."

(b) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R.S.D.C. Section 282), which provides:

> Placement of children in schools. "Any white resident shall be privileged to place his or her child or

ward at any one of the schools provided for the education of white children in the District of Columbia he or she may think proper to select, with the consent of the Board of Education; and any colored resident shall have the same rights with respect to colored schools."

(c) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R.S.D.C. Sction 283), which provides:

Board of Education may accept and apply donations for colored schools—Accounting. "The Board of Education is authorized to receive any donations or contributions that may be made for the benefit of the schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the Board of Education to account for all funds so received."

(d) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1940, Sections 31-1112, was R.S.D.C. Section 306), which provides:

"Proportionate amount of school moneys to be set apart for colored schools. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education in the District of Columbia, such a proportionate part of all moneys received or expended for school or educational purposes, including the cost of sites, buildings, improvements, furniture and books, and all other expenditures on account of schools, as the colored children between the ages of 6 and 17 years bear to the whole number of children, white and colored, between the same ages, for the purpose of establishing and sustaining public schools for the education of colored children; and such proportion shall be ascertained by the

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last reported census of the population made prior to such apportionment, and shall be regulated at all times thereby."

(e) Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of June 4, 1924, 43 Stat. 370, Chapter 250, Section 3 (now District of Columbia Code, 1951 Ed., Title 31, Section 115), which provides:

> Principals of schools—Duties. "Principals of normal, high and manual training schools shall each have entire control of his school, both executive and educational, subject only in authority to the superintendent of schools for the white schools and to the colored first assistant superintendent for the colored schools, to whom in each case he shall be directly responsible."

(f) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 (now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R.S.D.C. Section 310), which provides:

> Facilities for educating colored children to be provided. "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools in the District of Columbia, as, in its opinion, will best accommodate the colored children in the District of Columbia."

(g) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, Title 31, Sections 669-670, 671, which provides:

> Number of First Assistant Superintendents—Sphere of supervision—Duties. "There shall be two First Assistant Superintendents of Schools, one white First Assistant Superintendent for the white schools, who, under the direction of the Superintendent of Schools, shall have general supervision over the white schools; and one colored First Assistant Superintendent for the

colored schools, who, under the direction of the Superintendent of Schools, shall have sole charge of all employees, classes and schools in which colored children are taught. The First Assistant Superintendents shall perform such other duties as may be prescribed by the Superintendent of Schools."

Boards of examiners—Composition—Designation of members. "Boards of examiners for carrying out the provisions of the statutes with reference to examinations of teachers, shall consist of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the white schools for the white schools and of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the colored schools for the colored schools. The designations of members of the supervisory or teaching staff for membership on these boards shall be made annually by the Board of Education on the recommendation of the Superintendent of Schools."

Appointment of chief examiners—Compensation. "There shall be appointed by the Board of Education, on the recommendation of the Superintendent of Schools, a chief examiner for the Board of Examiners for white schools. An Associate Superintendent in the colored schools shall be designated by the Superintendent of Schools as chief examiner for the board of examiners for the colored schools. All members of the respective boards of examiners shall serve without additional compensation."

It is quite clear from an examination of the above Acts of Congress that they possess no language of a mandatory character. The language is capable of an interpretation that it is a recognition by the Congress of the fact that separate private schools existed in the District long before public schools were supported by Congress. Only precise and concrete language requiring segregation of the races could overcome the historical fact that this language was approved by the Congress that opposed every type of racial distinction by Government.

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The history as well as the language of these various acts demonstrates an intention by the legislature at least to guarantee minimum opportunities to the colored children at a time when serious objections were made to any public education for them. Certainly there were those members of Congress who probably believed that for the newly freed Negro public education might best be secured by continuing separate schools for an adjustment period. All that this means is that the legislature sought to give the school officials a discretionary power. It seems doubtful that this Court today would conclude that such a delegation of power by Congress would be constitutional even if such an intent be found to exist. As Judge Edgerton, dissenting, said in *Carr* v. *Corning, supra,* at page 192:

> "When the Fifth Amendment was adopted, Negroes in the District of Columbia were slaves, not entitled to unsegregated schooling or to any schooling. Congress may have been right in thinking Negroes were not entitled to unsegregated schooling when the Fourteenth Amendment was adopted. But the question what schooling was good enough to meet their constitutional rights 160 or 80 years ago is different from the question what schooling meets their rights now."

Respondents can point to no law in the District of Columbia which would be violated by the admission of these minor petitioners to the Sousa Junior High School. In Ex Parte Endo, *supra,* this Court said at page 299-300:

> "We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an Order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation

> which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

There can be no doubt that if Congress had intended such a result as compulsory segregation of the races in education it would have said so in plain and unmistakable language.

An inspection of the constitutions and laws [1] of the states where segregation by law is in vogue should serve to illuminate the proposition that where the law making body intended a compulsory segregated educational pattern it expressly and clearly said so. As early as 1875 the Constitution of Alabama contained the following phrase: "But separate schools shall be provided for the children of the citizens of African descent." Alabama Const. 1875, Article XII, Section 1. It now provides, in its Constitution of 1901, that "no child of either race shall be permitted to attend a school of the other race." Alabama Const. 1901, Article XIV, Section 256. In Arkansas a statute charges the school directors in each district with the duty to establish separate schools for white and colored persons. Acts 1931, No. 169, Sec. 97, P. 476; Popes Dig. Sec. 11535. Delaware provides, "and separate schools for white and colored children shall be maintained." Delaware Const. 1897, Article X, Section 2. The Florida Constitution of 1885 commands that "white and colored children shall not be taught in the same school." Florida Const. 1885, Art. XII, Sec. 12. As early as 1877 the Constitution of Georgia read, "but separate

[1] For appropriate text of Statutes and Constitutions referred to herein, see Appendix A.

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schools shall be provided for white and colored races." Georgia Const. 1877, Art. VIII, Sec. I. There has to date been no change in this requirement. Kentucky's Constitution of 1890 says, "separate schools for white and colored children shall be maintained." Ky. Const. 1890, Sec. 187. That is the law of Kentucky today. Louisiana's Constitution of 1898 provides for "free public schools for the white and colored races separately established." La. Const. 1898, Art. 245. That "separate public schools shall be maintained for the education of white and colored children" is still the dictate of its present Constitution. La. Const. 1921, Art. 12, Sec. 1. The Mississippi Constitution of 1890 declares that "separate schools shall be maintained for children of the white and colored races." Miss. Const. 1890, Sec. 207. "Separate free public schools shall be established for the education of children of African descent." Mo. Const. 1875, Art. XI, Sec. 3. The Missouri Const. now provides "Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law." Mo. Const. 1945, Laws, 1945 P. 50. North Carolina —"And the children of the white race and the children of the colored race shall be taught in separate public schools." N. C. Const. 1876, Art. IX, Sec. 2. Oklahoma provides: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained." (Const. 1907, as amended Stat. 1931, 13676.) Constitution, Art. XIII, Sec. 3. The statutes of Oklahoma further provide: "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, P. 536, Art. 5, Sec. 1.) Statutes, Supplement 1949, Art. 5, Title 70, Sec. 5-1.

The 1895 Constitution of South Carolina states, "separate schools shall be provided for children of the white and colored races and no child shall ever be permitted to at-

tend a school provided for children of the other race." S. C. Const. 1895, Art. XIM Sec. 7. Tennessee's Constitution of 1870 provides "No school . . . shall allow white and Negro children to be received as scholars together in the same school." Tenn. Const. 1870, Art. XI, Sec. 12. Texas' Constitution of 1876 puts it thusly—"Separate schools shall be provided for white and colored children." Texas Const. 1876, Art. VII, Sec. 7. Virginia's 1902 Constitution says, "white and colored children shall not be taught in the same school." Va. Const. 1902, Art. IX, Sec. 140. Similarly, West Virginia, as long ago as 1872, wrote into its Constitution that—"White and colored persons shall not be taught in the same school." W. Va. Const. 1872, Art. XIII, Sec. 8. The only exception to this use of mandatory language in the laws of the group of states where segregation is institutionalized is Maryland. In Maryland the language of the statutes is similar to the language used in the Acts of Congress, *supra*. Maryland laws provide: (a) "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State . . ." An. Code Md. 1939, Art. 77, Sec. 111. (b) "it shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths between six and twenty-one years of age . . ." An. Code Md. 1939, Art. 77, Sec. 192. In other sections (193, 194, 195), provisions are made for administering "colored schools." Section 203 provides for colored industrial schools; Section 252, for a colored teacher normal school. The compelling language used by the other southern states is absent. We request this Court to take judicial notice of the fact that under these statutes the Board of School Commissions by a vote of 5 to 3 authorized the admission of a Negro student this term to the white Polytechnic Institute of Baltimore, Maryland, without a law suit or legislative action. Admittedly, they did this because no similar provisions were available for Negroes, but likewise

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it is clear that they did not consider these Maryland laws any bar to their administrative action.

Thus, it appears that in the only one of these states where the laws are similar to those in the District of Columbia their language is not interpreted by school officials as compelling segregation.

Speaking of the separate schools of the District of Columbia in a speech in support of a Civil Rights Bill which became the Civil Rights Act of 1875, Senator Pratt of Indiana observed that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[2] There was, therefore, at least some congressional opinion among the contemporary legislators who were active in efforts of Congress to provide equality for the Negro during the period when some of these Acts of Congress were first being considered, that they did not compel segregation.

B. An Interpretation by This Court That These Acts of Congress Compel the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color Alone Would Render Them Unconstitutional for They Would Then Be Met with the Prohibitions of Article I, Section 9, Clause 3, of the Constitution of the United States, and the Limitations Set by the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

1. *Such an interpretation would make these Acts violative of the due process clause of the Fifth Amendment.*

That these Acts, if they are interpreted to compel segregation of pupils in the District of Columbia solely on the basis of race or color, would be unconstitutional under the

[2] From speech of Senator Pratt, 2 Cong. Rec. 3452, 43 Cong., 1st Sess. (1874) at 4081, 4082.

due process clause of the Fifth Amendment has already been shown in Point I of this brief, *supra.*

The question which the instant case raises, whether the Federal Government in providing educational opportunities for pupils in the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color, has never been presented to this Court before. The United States Court of Appeals for the District of Columbia Circuit had this question presented to it in only one other case, *Carr* v. *Corning, supra,* and that court there decided that these Acts of Congress, *supra,* compelled segregation in the District of Columbia and that compulsory separation of races in public education was constitutional. The court below relied upon the holding in the *Carr* case in dismissing petitioners' complaint.

The United States Court of Appeals for the District of Columbia Circuit has had before it only three cases dealing with the question of race distinctions in the provisions for opportunities for public education in the District of Columbia. The first case was *Wall* v. *Oyster,* 36 App. D. C. 50 (1910). In that case, petitioner, a resident of the District of Columbia of school age, questioned her classification as a Negro for purposes of assignment to a particular school. The court, in deciding that question, stated that compulsory segregation of the races was constitutional in the District of Columbia. Petitioner having conceded that point, and having based her case upon a lack of standards for the determination of race, and upon a failure to provide a hearing upon this determination, the issue before the court was whether or not proper standards had been set and a proper hearing provided for. There was no issue before the court as to whether or not the government possessed the power to make the classification. Therefore, that decision is of little value in determining the question posed in the instant case and was not relied upon by the Court of Appeals in the *Carr* case for this purpose.

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The Court of Appeals for the District of Columbia Circuit first faced the question of the power of the Federal Government to segregate Negroes from whites in providing opportunities for public education in the District of Columbia in *Carr* v. *Corning,* and *Browne* v. *Magdeburger, supra.*

The court consolidated for argument and decision these two cases. The *Browne* complaint did not present the question of the constitutionality of the separation of the races in public education; however, the *Carr* complaint did. The Court of Appeals held, at page 175:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did."

The Court concluded on this point that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 did not mean to prohibit the legislature from providing separate schools. The Court examined the chronology of statutes relating to the separate school system in the District of Columbia and concluded that the framers of the Fourteenth Amendment intended to provide separate school facilities for the races in the District of Columbia.

Petitioners have already shown why they do not agree with the opinion of the court below that these Acts of Congress, *supra,* compel segregation. But, even if petitioners are wrong and, these Acts of Congress do compel segregation, these Acts are unconstitutional and the *Carr* case was wrongly decided. The majority failed to meet and deal with the fundamental question raised by Judge Edgerton's dissent. It is submitted that before any reliance can be placed upon the conclusion reached by the majority in

the *Carr* case the following argument of Judge Edgerton at page 192 must first be answered—

> "Appellees say that Congress requires them to maintain segregation. The President's Committee concluded that congressional legislation assumes the fact of segregation but nowhere makes it mandatory. I think the question irrelevant since legislation cannot affect appellant's constitutional rights."

The Court of Appeals was so preoccupied in the *Carr* case with the history and background of the Fourteenth Amendment, and with the legal theories underlying the separate but equal doctrine, and was so convinced by the record in which the lower court had found evidence showing equality of facilities, that its opinion that the action of the School Board was constitutional is of doubtful value in the instant case. Here the sole question is as to the constitutional power of the school officials to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. Here there is no question of equality of facilities. This view is supported by the opinion of the Court of Appeals, especially where it is observed that Judge Clark concurred in the majority opinion although he considered the cases moot and to have been properly dismissed, since the factual basis for the actions was the double shift at Browne Junior High School at the time the actions were brought, and since the double shift had been eliminated prior to the action.

Therefore, whichever interpretation is placed upon these Acts of Congress, respondents are still limited in their power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color by the Constitution and laws of the United States, which limitations should be determined by this Court.

2. *Such an interpretation would render these Acts Bills of Attainder.*

Article I, Section 9, Clause 3 of the Constitution of the

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United States provides that—"No Bill of Attainder or ex post facto law shall be passed.[3]

The Board of Education of the District of Columbia took the position, which was confirmed in the *Carr* case, *supra*, and was relied upon by the Court in the case below, that the statutes enacted by Congress governing public schools in the District of Columbia compelled it to segregate Negroes from whites in the school system.

It is clear that, if respondents and the Court of Appeals in the *Carr* case are right in their interpretation then these statutes are Bills of Attainder, for they compel the exclusion of minor petitioners from Sousa Junior High School solely on account of their race or color, and they are in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States, for:

a. They are legislative or congressional statutes.
b. They are directed at named or easily ascertainable persons—namely, Negroes.
c. They inflict punishment on these persons. This punishment is arbitrary.
d. They inflict punishment without a judicial trial.
e. They convict Negroes of the "crime" of being inferior by reason of birth, color and blood, or of being descendants of slaves.

[1] *These Are Acts of Congress and These Petitioners Are Easily Ascertainable Members of a Group*

It is obvious that these are Acts of Congress, and *United States* v. *Lovett*, 328 U. S. 303, 315-316 (1946), held "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder pro-

[3] For historical background of bills of attainder in America and in England see Notes, 46 Col. L. Rev. 849, Notes, 21 Tulane L. Rev. 278, 2 Story, Commentaries on the Constitution of the United States (5th Ed. 1891) 216, Adams, Constitutional History of England (1935) 228, Holdsworth, History of English Law (4th Ed. 1927) 381.

hibited by the Constitution." Negro children certainly constitute an easily ascertainable group, especially since, under the rule of *Wall* v. *Oyster, supra*, the Board is empowered to determine race for itself, and may force pupils and their parents to accept that determination. Just as in the *Lovett* case, *supra*, the present case involves punishment without judicial trial, and determined by no previous law or fixed rule. A judicial trial would at least provide safeguards against arbitrary action which is inherent—if not implicit—in an administrative condemnation such as the Board of Education's segregation rule. *United States* v. *Lovett, supra*. According to this Court in *Oyama* v. *California*, 332 U. S. 633, 646 (1948), only exceptional circumstances can excuse racial discrimination by law, and such distinctions must be justified by the agency practicing the discrimination. This has never been done with respect to segregation in the public schools of the District of Columbia.

There can be no doubt that segregation in our public schools is aimed at Negroes. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 452-453 (1873).

In *Cummings* v. *Missouri, supra*, at page 327, the Supreme Court declared: "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms define any crimes or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared." This passage surely fits the position in which appellants are placed by appellees. What legislatures may not accomplish directly, they may not effect by indirection. *Ex Parte Garland*, 4 Wall. 333, 380 (1866); *United States* v. *Lovett, supra*. Neither may they act so as to secure by implication that which would be invalid if expressly provided. *Oyama* v. *California, supra*.

It is the function of the courts to protect citizens against

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discriminatory acts such as those presented in this case. Where else can one turn in the face of the disgrace and ignominy heaped upon petitioners by respondents? To paraphrase this Court in *United States* v. *Lovett, supra,* what is involved here is a proscription by the Board of Education of more that 50,000 Negro children, prohibiting their ever attending a school simultaneously occupied by white children. Were this case held not to be justiciable, Board action, aimed at a large, readily recognizable class, which stigmatized their ancestry and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result.

[2] *These Acts of Congress Inflict Punishment on Petitioners*

a. *Segregation is Punishment*

That segregation constitutes punishment is the conclusion reached by recognized authorities in the field of sociology, politics, psychology and law, from a consideration of the studies of segregation and its effects.

Gunnar Myrdal, who made a detailed and authoritative study of the entire problem posed by treatment of the Negro minority in the United States, pointed out that what was merely segregation forty years ago is becoming a caste system today. He continued: "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups." (1 Mydral, *An American Dilemma,* 645 (1944).

The process of development from segregation to caste system is described in Mac Iver, *The More Perfect Union,* 67-68 (1948)—

> "Now let us consider more clearly the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has

greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group but to a considerable extent, in the lower group as well. A total *upper caste complex*, congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."

The effects of segregation upon the group segregated have recently been summarized in a note in 56 Yale L.J. 1059, 1061-2 (1947):

"Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result, in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."

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On the other side of the picture, "Jim Crow" laws, which govern important segments of everyday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside those laws and give it respectability and institutional fixity. (Myrdal, *An American Dilemma*, pp. 579-580). See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. Rev. 201, 204-205. As the Supreme Court in California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension." (*Perez* v. *Lippold*, 32 Calif. (2d) 711, 725, 198 P. (2d) 17, 25 (1948).) In fields which "Jim Crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid." (1 Myrdal, *An American Dilemma*, p. 635).

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segregated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent (Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 259, 261, 262 (1948)). Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided; 2.3% expressed the opposite opinion, and 7.4% did not answer the question or expressed no opinion (Id., 261, 266). Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression (Id., 272, 277).

The resentment and hostility provoked by segregation

find various means of psychological "accommodation," various forms of release (Prudhomme, *The Problem of Suicide in the American Negro,* 25 Psychoanalytic Review, 187, 200). Mediocrity is accepted as a standard because of the absence of adequate social rewards or acceptance (Dollard, (*Caste and Color in a Southern Town,* 424 (1937)). (McLean, *Group Tension,* 2 Journal of American Medical Women's Association, 479, 482). Energy and emotion which might be constructively used are lost in the process of adjustment to the "Jim Crow" concept of the Negro's characteristics and his inferior status in society (Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual and to His Relationship with Other People?,* 29 Mental Hygiene, 189, 190, 191 (1945)). Psychosomatic disease is induced by the tensions engendered by segregation and other forms of racial discrimination. (McLean, *Psychodynamic Factors in Racial Relations,* 244 The Annals of the American Academy of Political and Social Science (March, 1946), 159, 161).

It is further submitted that any suggestion that no punishment is inflicted ignores the basic realities of the situation. The whole theory upon which a segregated school system is maintained is that the dominant class regards the subject group so far inferior as to require quarantining the latter during school hours, to avoid contamination or pollution of the children of the dominant group. Realization of this motive, when it first comes to a child of the segregated class, cannot help but cause mental anquish (i.e., constitutes injury) and repeated reminders of the implications of segregation keep one's awareness of the badge of inferiority fresh during the remainder of one's life.

According to the Brief *Amicus Curiae* of the Committee of Law Teachers against Segregation in Legal Education

[*] For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, An American Dilemma, vol. II, pp. 757, 767.

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before the Supreme Court of the United States in *Sweatt* v. *Painter, supra,* at p. 33, "The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society."

In addition to the conclusions by the experts in the field that segregation is punishment, this Court has characterized similar results of State and Federal statutes as punishment. The rights protected by due process of law included life, liberty and property. Any statute directed at a named individual or an easily recognizable class, which seeks to punish by deprivation or suspension of any of these rights without a judicial trial is a bill of attainder. *Cummings* v. *Missouri, supra.* This Court, in the *Cummings* case, said at pages 321-322: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the proctection of these rights all are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined." The acquisition of knowledge is one of the protected rights. *Meyer* v. *Nebraska, supra. The permanent prohibition against attendance in non-segregated schools is as much punishment as one which perpetually restrains one from serving the Government. United States* v. *Lovett, supra.*

Any contention that no injury is inflicted should be considered not only from the point of view of the contentions advanced in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and in *Henderson* v. *United States,* 339 U. S. 816 (1950), but in the light of *Oyama* v. *California, supra,* at page 646—

> "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land . . ."

Adult petitioners are certainly subject to punishment if they attempt to enforce the right of their children to sit in school with white children, either by withholding [4] their children from attendance at a segregated colored school, or by an attempt to place them at a segregated white school. *Petitioners and all other persons who are under the interdiction of the statutes as interpreted by the Board* [5] *are attained by reason of their birth, blood and pigmentation, and there is no way in which they can overcome the obstacles placed in their way by respondents.*

b. *This Punishment is Arbitrarily Imposed*

We submit that it may properly be held that punishment is arbitrarily imposed where an act forbidden bears no relation to the object allegedly sought to be achieved. And it is certainly true in this case that discriminating against minor petitioners because of their birth, color and blood and the previous servitude of their grandparents or great-grandparents bears no relation whatsoever to their educability in a public school together with white children.

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[4] For full text of compulsory attendance statute see Appendix B, D. C. Code 1951 Ed., Title 31, Sec. 201, 207.

[5] "Without any doubt there is also in the white man's concept of Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. The ordinary man means something particular but beyond secular and rational understanding when he refers to 'blood'. The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up." 1 Mydral, 100.

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This argument is supported by the following quotation in Petition and Brief in Support of Petition for Writ of Certiorari in the Supreme Court of the United States in *Sweatt* v. *Painter, supra*:

> "Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified, as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color."

In regard to the question of a relationship between the act punished and the objective of the punishment, the Supreme Court had this to say at pages 319-320 in *Cummings* v. *Missouri, supra*:

> ". . . There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment of draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church, nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the mere statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath

could not, therefore, have been required as a means of ascertaining whether the parties were qualified or *not* for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

"The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him any thing less that these is no punishment at all.' The *learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraint on the person.* He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office may be punishment as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." (Italics supplied.)

As we have already stated, in the present case there is absolutely no relation between color and educability. Therefore, when the respondents maintain separate schools for colored and white children, they seek to insult and degrade the former, not to educate. And, since it is thus a

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crime to be colored, Negro children are being arbitrarily punished by being singled out and deprived of their rights and privileges—i.e., to be given the same education under the same conditions as any other child, whatever its color. Further, respondents clearly do not include in their definition of liberty freedom from outrage on the feelings, since they inflict such arbitrary punishment on more than half the children under their jurisdiction every day they operate. There is no requirement that there must have been a previous enjoyment of a right. A study of the entire passage shows clearly that the Court means by any right previously enjoyed, any right constitutionally possessed.

We have already adverted to the fact that the lack of any relationship between the methods used and the end sought to be attained is sufficient to constitute arbitrary imposition of punishment. Mr. Justice Murphy, in a concurring opinion in *Oyama* v. *California, supra,* observed that no rational basis for legislation existed where laws discriminating against citizens were motivated by racial hatred and intolerance.

And in *Skinner* v. *Oklahoma,* 316 U.S. 535, 541, 542 (1942), this Court used racial discrimination as a standard for striking down a State law providing for sterilization of certain offenders, in the following terms: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Having shown that minor petitioners have, in fact, suffered injury and punishment by reason of their segregation, and that the segregation on account of race or color may properly be regarded as wholly arbitrarily imposed punishment, we proceed to examine the other elements of a bill of attainder.

[3] *No Trial or Hearing Is Given Petitioners*

In a bill of attainder punishment is inflicted without a judicial trial, *Cummings* v. *Missouri, supra.* In the case at bar, nothing can be clearer than that, if the Board of Education is right in its contention that these Congressional Acts bar any Negro child, at any time, from attending a public school designated for use of white children, solely on the basis of race or color, these minor petitioners have been found guilty of being Negroes and convicted of the offense of possessing some inherent defects which render them unfit to attend Sousa Junior High School without a judicial trial. *There has never been a finding, either by the Board or by Congress, that all Negro children, or any particular individuals among them constituted any such menace to white pupils as would warrant isolating all Negroes in schools limited by law to their sole use.* No reason for segregation has ever been announced. And there has certainly been no attempt to try these individual minor petitioners to determine whether there is any valid ground for depriving them of their right to associate free of a limitation based on their race or color alone in school activities with white children of their own age.

[4] *These Petitioners Are Convicted on Past Acts of a Crime by These Acts of Congress*

In *Cummings* v. *State of Missouri, supra,* page 323, this Court defined a bill of attainder as "a Legislative act which inflicts punishment without a judicial trial." The opinion then continued: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The remainder of the opinion is, we think, particularly appropriate in the present case: "In these cases, the legislative body, in addition to its legitimate functions, exercises the powers and office

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of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Certainly the portion of the opinion just quoted fits the present situation. If the Board, in acting for the legislature is compelled by statute to segregate Negroes and whites, it is acting under legislation which has convicted Negroes of the crime of being inferior by birth, blood, and color and dooms them to separation, without declaring a previous condition of birth, blood or color to be a crime; the guilt attaches to any child the Board sees fit to classify as a Negro (*Wall* v. *Oyster, supra*), without any trial; without any proof that an individual Negro child is in fact so far inferior by birth, blood and color to white children that he may not associate with them in school, it requires that the Negro be taught in a separate schoolhouse; and it fixes the sentence to cover the entire time the child is subject to the jurisdiction of the Board and affects his entire life and deprives him of liberty, property, job opportunity and happiness.

It is manifestly clear that this Court should not interpret these Acts of Congress as compelling racial segregation which would render them unconstitutional when it is possible to interpret them as not requiring segregation and thus render them constitutional. We must assume that Congress enacted these statutes with a constitutional intent. See, *Schneiderman* v. *United States*, 320 U. S. 118, 157, 158 (1943). *This would necessarily mean that they do not compel segregation for if these statutes are interpreted as compelling segregation they would clearly fall within the ban of the constitutional provision against bills of attainder.*

C. If These Acts of Congress Are Interpreted as Permitting the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color, Then to the Extent That This Permissive Legislation Is Implemented by the Action of the Appellees in Denying Admission of Minor Petitioners to Sousa Junior High School, the Action of Respondents Is Unconstitutional.

The arguments submitted under points I and II of this brief are supportive of this proposition. Therefore, this Court should not interpret these Acts of Congress as even authorizing or permitting segregation since any implementation of such authority by respondents would lead to an unconstitutional result, namely, the denial of the admission of minor petitioners to Sousa Junior High School solely on the basis of race or color.

III.

THE DENIAL OF ADMISSION OF MINOR PETITIONERS TO SOUSA JUNIOR HIGH SCHOOL SOLELY ON THE BASIS OF RACE OR COLOR DEPRIVES THEM OF THEIR CIVIL RIGHTS IN VIOLATION OF ARTICLE VI, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES AND OF TITLE 8, UNITED STATES CODE, SECTIONS 41 AND 43, AND IN VIOLATION OF THE CHARTER OF THE UNITED NATIONS, CHAPTER I, ARTICLE I, SECTION 3, AND CHAPTER IX, ARTICLES 55, 56.

A. The Respondents' Refusal to Admit Minor Petitioners to Sousa Junior High School Solely Because of Race or Color Deprives Them of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43, Commonly Referred to as the Civil Rights Act.

It is apparent to petitioners that the racially segregated schools of the District of Columbia administered under control of respondents are operated in violation of the Civil

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Rights Act, Sections 41 and 43 of Title 8, U. S. Code, which provide:

> Section 41: Equal rights under the law:
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. Section 1977.
>
> Section 43. Civil action for deprivation of rights:
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979.

In *Hurd* v. *Hodge, supra*, this court, in prohibiting courts of the District of Columbia from enforcement of racial restrictive covenants said of Section 42 of Title 8 U. S. Code, a companion section of Section 41 which is relied upon here:

> All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt, that for the purposes of this section, the District of Columbia is included within the phrase 'Every state and Territory.' Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia . . ."

While it is true that petitioners do not rely upon Title 8, U. S. Code, Section 42, the section of the Civil Rights

Act considered in *Hurd* v. *Hodge, supra,* but upon Sections 41 and 43, it is hardly possible to conceive that the Supreme Court would make any differentiation in the applicability of these sections to the District of Columbia. The genesis of Sections 41 and 42 are the same. Both sections were originally contained in section 1, chapter 31 of the Civil Rights Act of 1866 (14 Stat. 27). Although now placed in different sections of Title 8, U. S. Code, both sections—41 and 42—secure the rights of persons and citizens in "every State and Territory." Hence, just as under the interpretation of Section 42 in *Hurd* v. *Hodge, supra,* the term "every State and Territory" must be said to include the District of Columbia, as regards Section 41. Any other construction would lack uniformity and would be unreasonable and historically illogical.

Section 43 of Title 8, U. S. Code, is derived from the Act of April 20, 1871, Chapter 22, 17 Stat. 13. As presently entitled under the Code, this section provides for a "civil action for deprivation of rights," obviously, therefore, if Section 41 of the Civil Rights Act is applicable to the District of Columbia, the section of the Civil Rights Act recognizing the means by which civil rights are vindicated by actions at law or suits in equity is equally applicable to violations of civil rights occurring in the District of Columbia. We conclude, therefore, that both Sections 41 and 43 are within the constitutional power of Congress to enact, and that these sections are operative in the District of Columbia.

The remaining question is whether government enforced racial segregation in the public schools of the District of Columbia is violative of the Civil Rights Act. Petitioners contend that racial segregation in the public schools as enforced by respondent under color of law, does violate these sections.

The Congress of the United States, acting pursuant to its powers in the District of Columbia, has provided for

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public education there. It has given to persons residing within the District the privilege of securing, at public expense, an elementary and high school education. This privilege, we contend, once given must be afforded to all without any racial distinction. The Civil Rights Act compels such a result.

The Civil Rights Act does not specifically mention public education. In fact, there is no specification of the particular rights protected, but rather a broad statement concerning "full and equal benefits of all laws" and enjoyment of "rights, privileges or immunities secured by the Constitution and laws." However, when we view the sections presumably directed against discriminatory governmental action in the light of the provisions of the Act of March 1, 1875, Chapter 114, 18 Stat. 335, concerning racial discrimination by individuals within the United States, *it becomes abundantly clear that the sections here under discussion were meant to cover all situations in which, through governmental action, persons are deprived of some right, privilege or immunity recognized under the Constitution and laws of the United States.* And these sections were enacted to insure that all citizens, white and black, should be vested with the same rights and the same responsibilities as citizens. Racial distinctions were thereby prohibited.

The cases support this analysis. In *United States* v. *Cruikshank*, 92 U. S. 542, 555 (1875), this observed:

> "No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, . . ."

And, in *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), the Supreme Court stated that:

> "The plain object of these (civil rights) statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Our national policy, as found in the Constitution, laws and treaties of the United States as well as in the applicable legal precedents, renders unlawful the actions of respondents in excluding minor petitioners from attendance at Sousa Junior High School solely because of race and color. In speaking of the Fourteenth Amendment and the Civil Rights Act of 1866, of which sections 41 and 43 are constituent parts, this court in *Hurd* v. *Hodge, supra,* at page 32, said:

> ". . . It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land . . ."

In a series of State cases this Court has made clear some prohibitions of the Fourteenth Amendment against government enforced distinctions based solely on race or color. In the case of *Strauder* v. *West Virginia,* 100 U. S 303, 306, 307 (1879), this Court condemned the systematic exclusion of colored persons from juries. Similarly the right to qualify as a voter in primary or general elections has been protected against denial because of race or color. *Smith* v. *Allwright,* 321 U. S. 649 (1944). This Court has held that the Constitution of the United States prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948); *Yick Wo* v.

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Hopkins, 118 U. S. 356 (1886). States may not enforce agreements excluding Negroes from owning or occupying property in white neighborhoods. *Shelly* v. *Kraemer*, 334 U. S. 1 (1948). Nor may railroads segregate Negro passengers in dining cars. *Henderson* v. *United States, supra.* Nor may state Universities, when they admit Negroes make any racial distinctions in affording them educational opportunities. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

These holdings are clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the school officials of the District of Columbia. Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that exclusion of minor petitioners from Sousa Junior High School solely because of race or color is prohibited by the Civil Rights Act. *That statute by its terms, requires that all persons shall have the same rights "as is enjoyed by white citizens . . . to the full and equal benefit of all laws."* That minor petitioners have been denied *that right* by virtue of the action of the respondents is clear. They have been denied admission to Sousa Junior High School solely by reason of race or color. It is no answer to petitioners to say that whites may also be denied admission to some Negro school because of race or color.

Speaking on this exact point in *Shelley* v. *Kraemer, supra,* at page 22, this court speaking through Chief Justice Vinson said:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

That these sections of the Civil Rights Act prohibit racial distinctions is too clear for argument. That these sections encompass the right or privilege of public education is free from any reasonable doubt, for at the very foundation of our democratic institutions, in the preservation of rights and the recognition of the duties of citizens, stands the

public school as the logical agency for giving the people the attitudes and skills requisite for effective participation in a democracy. We strongly urge this Court to recognize that the Civil Rights Act prohibits government enforced racial segregation in public education in the District of Columbia.

B. Respondents' Refusal to Admit Minor Petitioners to Sousa Junior High School Solely Because of Race Deprives Them of Fundamental Freedoms in Violation of Chapter I, Articles 1(3), 2(2), Chapter IX, Articles 55(c) and 56 of the Charter of the United Nations.

Articles 1(3), 2(2), 55(c) and 56 of the United Nations Charter, 59 Stat. 1035, *et seq., announce a policy against segregation and discrimination on the basis of race.* The United States is a member of the United Nations and one of the signatory powers to the United Nations Charter.

Chapter I, Article 1(3) declares:

> "One of the purposes of the Organization is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and . . ."

Chapter I, Article 2(2) engages that:

> "All members in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with the present charter."

Furthermore, Chapter IX, Article 55(c) avows:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination

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> of peoples, the United Nations shall promote . . . universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

And Chapter IX, Article 56 breathes meaning into this vow by requiring that:

> "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purpose set forth in Article 55."

The petitioners contend that these articles give to minor petitioners rights which the respondents have violated because: (1) the United Nations Charter is a treaty of the United States, (2) the Articles of the Charter here in issue are capable of judicial enforcement, and (3) properly constructed, they prohibit the segregation of races in free public education.

That the United Nations Charter is a treaty to which the United States is a signatory has not been seriously questioned. It was negotiated by the President, submitted by him to the Senate of the United States for ratification and was ratified by that body as a treaty of the United States. It is likewise the position of the petitioners that Articles 55 and 56—the provisions of the treaty before this Court—are capable of judicial interpretation and application without further legislative or executive action. As a treaty the Charter became "the supreme Law of the Land" and it thus becomes the duty of the courts, both state and federal, to give effect to its provisions. U. S. Constitution, Article 6, Clause 2.

The courts, however, in construing Article VI of the Constitution with reference to judicial enforcement of treaties, have divided treaties into two classes—self-executing and non-self-executing. Self-executing treaties are said to be those which are capable of judicial enforcement without

further legislative or executive action and executory or non-self-executing treaties are those which require further political action before judicial enforcement. In *Foster* v. Neilson, 2 Pet. 253, 314 (1829), this Court, speaking through Chief Justice Marshall, pointed to the two classes of treaties and purported to set forth the basis upon which the distinction between them is to be made.

> "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulations import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Casual examination of this quotation probably suggests that the distinction between the classes of treaties is to be determined by a finding whether the treaty is in form and substance a contract. Viewed in proper perspective, and with particular reference to *U. S.* v *Percheman,* 7 Pet. 51 (1833), it must be concluded that the distinction is not made on such basis but is in fact determined by the subject matter of the treaty. If the subject matter of the treaty before the court is such that it is only capable of interpretation and application by the legislative or executive branches of the federal government, the treaty is executory or non-self-executory. Conversely, if the subject matter of the treaty before the Court is of such a character that it can be interpreted and applied by the judiciary the treaty is self-executing. Under the provision of Article VI *all* treaties become the "Law" of the Land. The fact that a particular treaty contemplates or requires future action does not make it any less the Law of the Land, (*Bacardi Corp.* v. *Domanech,* 311 U. S. 150 (1940)), nor is it any less the Law of the Land if Congress may, within its

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competence, implement any such treaty if it so desires.

Consequently, the doctrine of non-self-executing treaties in American Constitutional Law is but an aspect of the doctrine of "political questions"—"separation of powers." In other words, the sole distinction between self-executing and non-self-executing treaties has been used in American Constitutional Law only with reference to the agency of the Federal Government competent to execute that treaty. All other factors are irrelevant.

The subject matter of Articles 55 and 56 relates to human rights and fundamental freedoms. Their provisions—and particularly Article 56—impose upon the agencies of the United States Government the duty of taking "separate action" to enforce these human rights and fundamental freedoms without racial distinction as the "law of the land." In determining the agencies of the United States Government capable of carrying into effect these articles, it cannot be said that the subject matter is within the exclusive area of the political branches of the government. For these reasons, it is the view of the petitioners that Articles 55 and 56 of the Charter are laws of the United States, do not require further legislative action, and are enforceable by the judiciary.

The petitioners find support for their position in the concurring opinions in *Oyama* v. *U. S., supra.* In the *Oyama* case, *supra,* the major holding of the Court was that a section of the California Alien Land Law was unconstitutional in that it was a denial of the equal protection of the law. The four concurring Justices were of the opinion that the whole statute was unconstitutional. In one of the concurring opinions, Mr. Justice Murphy, with whom Mr. Justice Rutledge joined, outlined the discriminatory aspects of the statute, examined the embarrassing history, and stated at page 673:

> "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

"And so in origin, purpose, administration and effect the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations . . ."

The language leaves no doubt that they considered that the human rights provisions of the Charter prohibited segregation on the grounds of race or color, and, further, that the Charter is binding upon the courts of the United States. Mr. Justice Black and Mr. Justice Douglas concurred, and their opinion at pages 649-650, is also pertinent:

". . . we have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' (Citing Articles 55 and 56.) How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

In *Namba* v. *McCourt*, 185 Ore. 579, 204 P. (2d) 569 (1949), the court concluded that the United States had "become bound by Articles 55 and 56 of the United Nations Charter."

Moreover, it appears that in two instances, where lower courts were faced with the enforcement of other Articles of the Charter these courts have indicated that the Charter is a treaty having force and effect of law without legislative implementation. Thus, in *Balfour, Guthrie and Company* v. *United States*, 90 F. Supp. 831 (N.D. Cal. S.D. 1950),

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the Court held "That the United Nations Organization could sue the United States under the "Suits in Admiralty Act." In *Curran* v. *City of New York,* 191 Misc. 229, 77 N.Y.S. (2d) 206 (1947), aff'd 275 App. Div. 784, 88 N.Y.S. (2d) 924 (1949), the Court held "That Articles 104 and 105 of the Charter were the supreme law of the land, and that by operation of these Articles the organization had the capacity to own land and was immune from taxation." These cases, though not involving Articles 55 and 56, are offered as additional support for petitioners' position.

Articles 55 and 56 properly construed would prohibit government enforced racial segregation in the public schools of the District of Columbia. The Charter of the United Nations must be given a liberal construction in order to effectuate its objectives. The objective of Article 55 of the Charter is to secure to all persons within a particular society the basic freedoms and rights of that society. Basic in any democratic society is public education. The petitioners see no necessity to belabor this point, for whether public education be regarded as a right or a privilege, it has been recognized throughout the United States as a basic element of government and in our interpretation of Articles 55 and 56 it must be of necessity included within the terms "human rights and fundamental freedoms."

Even if, arguendo, the court should determine that the Charter of the United Nations must be implemented by further legislation to be specifically enforceable, *it is clear that the ratification of the Charter by the Senate of the United States and the signing of the Charter by its officially appointed representatives constitute a declaration of the Public Policy of the United States.* As the Honorable Manley O. Hudson stated in 44 *Amer. Journal of Int. Law,* 543 at 548, while contending that the Charter is not specifically enforceable: "The fact that the United States has obligated itself to cooperate may be taken into consideration in determining the national public policy . . ."

It is also a morally binding promise to the other signatories of the United Nations Charter. Certainly the word "pledge" in Article 56 implies an obligation and the reference to "separate" action as distinct from "joint" action indicates that the members are bound to act in accordance with the provisions of that section.

As a morally binding promise of the United States and the declared public policy of the United States the Charter provisions should serve as an aid in the interpretation of the Constitution and Statutes of the United States. Thus the California Supreme Court in *Sei Fujii* v. *State*, 38 Adv. Cal. Rep. 817, 242 P (2d) 617 (1952), while finding that Articles 55 and 56 of the United Nations Charter are not self executing, and therefore those treaty provisions do not ipso facto invalidate the alien land law of the State of California enacted in 1920, did find that the United Nations Charter represents "a moral commitment of the foremost importance." It seems fairly clear that the majority opinion of the Supreme Court of California, which held the California alien land law invalid under what it conceived to be a more modern and democratic concept of the equal protection clause of the Federal Constitution, was influenced by the "moral commitments" of the Charter. As the Court stated in 242 P (2d) at page 622:

> "The humane and enlightened objectives of the United Nations Charter are, of course, entitled to *respectful consideration by the courts and Legislatures* of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The Charter represents a moral committment of foremost importance, and *we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.*" (Italics supplied.)

This decision was in conformity with a previous decision in *Perez* v. *Lippold, supra,* which, in declaring the Cali-

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fornia miscegenation statutes unconstitutional, cited the Charter provisions as buttressing the conclusion reached.

It is of interest to note also that the Supreme Court of Ontario has already determined that the Charter provision of the United Nations serves to give content and meaning to the Statutes of Ontario. In the case of *Re: Drummond Wren*, (1945) Ont. R. 778, 4 D.L.R. 674, that court after referring to the Preamble of the Charter, struck down a restrictive covenant discriminating against "Jews or persons of objectionable nationality" as repugnant to the Charter. The Court ruled that under the Charter, Canada was pledged to promote "universal respect for and observance of fundamental freedoms for all without discrimination as to race, sex, language and religion."

It is significant that prior to the ratification of the Charter by Canada, a similar racial restrictive covenant was objected to on the grounds that it violated section 1 of the Ontario Racial Discrimination Act and the same Ontario Supreme Court held that though the covenant was discriminatory in its effect, it did not violate the Act. *Re: McDougal and Waddell* (1945), O.W.N. 272, 2 D.L.R. 244. In the *Drummond Wren* case, *supra, Re: McDougal and Waddel, supra,* was overruled because the court conceived that the provisions of the United Nations Charter against racial discrimination established the public policy found to be controlling and the Racial Discrimination Act constituted a legislative recognition of the public policy applied in the *Drummond Wren* case. In effect, the court held that the Racial Discrimination Act should be construed in the light of the Charter of the United Nations.

We therefore urge this Court to hold that "in origin, purpose, administration and effect" government enforced racial segregation in the public schools of the District of Columbia "does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations."

IV.

THE COURT BELOW ERRED IN NOT GRANTING PETITIONERS THE RELIEF PRAYED FOR AND IN GRANTING RESPONDENTS' MOTION TO DISMISS MINOR PETITIONERS' COMPLAINT ON THE GROUND THAT IT FAILED TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED.

Reference to the pleadings in the instant case reveals that the respondents relied upon a Motion to Dismiss on the sole ground "that the complaint fails to state a claim upon which relief can be granted."

Such a motion to dismiss, as was true of the old common law demurrer, now abolished in the District of Columbia, said in so many words that the allegations of the complaint with all legal inference conceded did not spell out a cause of action. All things alleged for the purposes of the pleadings must be accepted as being true. What then are the essential allegations of the complaint? Clearly and unequivocally the complaint alleges that the respondents with full power of allocation of minor petitioners in the public schools of the District of Columbia, failed to assign the minor petitioners to the Sousa Junior High School and actually refused them admission to said Sousa Junior High School solely because of their race or color. The Motion to Dismiss concedes the accuracy of this statement. The complaint alleges further that the respondents are construing and applying Acts of Congress so as to require them to deny minor petitioners admission to and to exclude them from the Sousa Junior High School for no other reason than because of their race or color. This allegation the Motion to Dismiss freely admits. The complaint alleges that every administrative requirement was met in seeking admission of minor petitioners to the Sousa Junior High School. The Motion to Dismiss agrees that this was done. The complaint alleges that the respondents are pursuing and have pursued the policy, practice, custom and usage of denying

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minor petitioners admission to and excluding them from attendance as pupils at the Sousa Junior High School and from enjoyment of the educational opportunities afforded therein solely because of their race or color. The Motion to Dismiss concedes such action on the part of the respondents. The complaint seeks not only injunctive relief to correct these violations of the petitioners' constitutional and statutory rights, but, asks the court to render a declaratory judgment to the effect that statutes enacted by Congress regulating public education in the District of Columbia do not require exclusion of the minor petitioners from the Sousa Junior High School, and, that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinctions with respect to them because of their race or color.

Facing the test to which the complaint was put by the motion to dismiss, the Court below, through Judge Walter M. Bastian, embraced the theory urged by respondents and signed an order dismissing the cause.

"ORDER

> "Upon consideration of the complaint, of the motion of the defendants to dismiss the above-entitled cause, of the memoranda of points and authorities in support of and in opposition to said motion and of the arguments of counsel for the plaintiffs and for the defendants, it is, by the Court, this 9th day of April, 1951,
>
> "ORDERED, that the above-entitled cause be, and it is hereby, finally dismissed.
>
> "(s) Walter M. Bastian, Judge."

This order is tantamount to a judicial pronouncement that an admitted statement of denial of civil rights by government officials, solely on the ground of race or color, presents no cause for relief. This order amounts to a direct statement that the defendants below correctly interpreted and put into effect statutes enacted by Congress as com-

pelling racial segregation in the public schools of the District of Columbia, and that said respondents lawfully pursued the policy, practice, custom, and usage of denying minor petitioners admission to Sousa Junior High School solely because of their race or color; and that such interpretation, enforcement, and action on the part of said respondents did no violence to the constitutional and statutory rights of the petitioners. The very making of such statements carries its own refutation.

The Court below clearly erred in not requiring the respondents to answer the complaint. The Court also erred in not issuing a declaratory judgment to the effect that no congressional statute in the District of Columbia could be properly interpreted as requiring racial segregation, and to the effect further that said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them solely because of their race or color. The Court erred in not restraining the action of the respondents in refusing to admit minor petitioners to Sousa Junior High School solely on the basis of race or color, without authority, and in violation of the constitutional and statutory rights of the petitioners.

CONCLUSION

The question whether the Federal Government has the power to compel the segregation of pupils on the basis of race or color alone in affording educational opportunities in the public schools in the District of Columbia is here presented to this Court for the first time. Here no question of equality of facilities is in issue. Here is raised the sole question whether under our democratic system and the protective covering of our Constitution, Congress or public school officials, either or both, have the power to bar Negroes from studying with whites in public schools in the District of Columbia because of their race or color alone.

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No reason or justification is offered by the respondents nor, in the opinion of the petitioners, can any be given, save the dubious one that the Acts of Congress compel it.

Our international relations, our concepts of liberty, our belief in democracy, cannot be reconciled with government imposed racial segregation in education in the District of Columbia. The history of our country, the loyalty of the Negro, the decisions of this Court, all require a condemnation of this un-American practice.

Governmental action has passed beyond the brink of constitutionality when it imposes disabilities upon the Negro people, loyal in war and in peace, native born citizens, limiting their liberty of choice of schools solely because of their race or color. This Court has approved of comparable federal action only when the fate of the Nation was at stake, and even then, it subjected the Government's action to a searching inquiry and laid down definite standards which the Government was required to meet. The actions of respondents in the instant case not only were not taken under such perilous circumstances, but did not meet even the minimum standards set for imposing racial distinctions under those conditions.

Wherefore it is respectfully submitted that the decree of the District Court should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX

A.

Statutory and Constitutional Provisions in the States Where Segregation in Education Is Institutionalized.

ALABAMA

". . . Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Constitution. Article XIV, 1901.

ARKANSAS

"Duties and powers of school directors. . . . The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

"(c) Establish separate schools for white and colored persons." (Acts 1931, No. 169, Sec. 97, page 475; Pope's Digest, Sec. 11535.)

DELAWARE

"In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the States as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law." Constitution. Article X, Sec. 2, 1897.

FLORIDA

"White and colored children shall not be taught in the same school, but impartial provision shall be made for both." Constitution. Article XII, Sec. 12, 1885.

GEORGIA

"There shall be a thorough system of common schools for the education of children *in the elementary branches of an English education only*, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Constitution. Article VIII, Sec. 1, Para. 1, 1877. (Language in italics was deleted in 1912.)

KENTUCKY

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." Constitution. Sec. 187, 1890.

LOUISIANA

". . . Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years." Constitution. Article XII, Sec. 1, 1921.

MARYLAND

An. Code, 1924, Sec. 114; 1912, Sec. 63; 1904, Sec. 59; 1888, Sec. 54; 1872, Ch. 377; 1916, Ch. 506, Sec. 63.

"All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 9, Sec. 124.

An. Code, 1924, Sec. 200; 1912, Sec. 131; 1904, Sec. 124; 1888, Sec. 96; 1872, Ch. 377; 1904, Ch. 584; 1916, Ch. 506, Sec. 131; 1922, Ch. 382, Sec. 131; 1937, Ch. 552.

"It shall be the duty of the county board of education to establish one or more public schools in each election district

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for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 18, Sec. 207.

An. Code, 1924, Sec. 201; 1912, Sec. 132; 1904, Sec. 125; 1888, Sec. 97; 1870, Ch. 311; 1872, Ch. 377, Sub-Ch. 18, Sec. 2; 1874, Ch. 463; 1916, Ch. 506, Sec. 132.

"Each colored school shall be under the direction of a district board of school trustees, to be appointed by the county board of education subject to the provisions of Section 8 of this article, and schools for colored children shall be subject to all the provisions of this Article."

Flack's Anno. Code of Maryland (1952), Article 77, Ch. 18, Sec. 208.

An. Code, 124, Sec. 211; 1912, Sec. 142; 1904, Sec. 139; 1898, Ch. 273, Sec. 5; 1910, Ch. 210, Sec. 139 (p. 232); 1916, Ch. 506, Sec. 142.

"It shall be the duty of the county board of education in each county of the State, when in their judgment there is need thereof, to provide a suitable building or room, or rooms, connected with one of the colored schools of said county, for the establishment of a central colored industrial schools, and to provide for the maintenance of such central colored industrial school where instruction shall be given daily in domestic science and in such industrial arts as may be determined by the county board of education. One-half of the appropriation hereinafter provided shall be used for the maintenance of such industrial school."

Flack's Anno. Code of Maryland, Article 77, Ch. 20, Sec. 203.

An. Code, 1924, Sec. 212; 1912, Sec. 143; 1904, Sec. 140; 1898, Ch. 273, Sec. 6; 1910, Ch. 210, Sec. 140 (p. 232); 1916, Ch. 506, Sec. 143.

"Whenever any such colored industrial school is opened in any county the secretary of the county board of education shall report the fact to the state superintendent of schools, and he, or an assistant designated by him, shall visit said school and shall give, if in his judgment it is warranted, a certificate of approval of the conditions and the plan upon which said industrial school is conducted, to the secretary of the county board of education. The state superintendent of schools shall submit annually to the Comptroller of the treasury of the State on or before the last day of September, a complete list of such schools as are entitled to receive the special appropriation for industrial education."

Flack's Anno. Code of Maryland (1937), Article 77, Ch. 20, Sec. 204.

An. Code, 1924, Sec. 256; 1912, Sec. 193; 1908, Ch. 599.

"There shall be located in the city of Baltimore or elsewhere (if the board of education deem best) a state normal school for the instruction and practice of colored teachers in the science of education, the art of teaching and the mode of governing schools, to be known as State Normal School No. 3; the said school shall be under the control of the state board of education, who shall appoint the principal and necessary assistants; and the faculty shall consist of a principal and as many teachers as the board shall appoint. The sessions of the school shall be determined by the state board of education, who shall prescribe the curriculum of study, which however, shall include courses for the special preparation of instructors for teaching the elements of agriculture and mechanic arts, provide necessary quarters, supplies and apparatus, fix the qualifications for admission as students, the salary of the principal, assistant teachers and employees."

Flack's Anno. Code of Maryland, Article 77, Ch. 21, Sec. 252.

MISSISSIPPI

"Separate school shall be maintained for children of the white and colored races."

Constitution. Article VIII, Sec. 207, 1890.

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MISSOURI

"Separate free public schools shall be established for the education of children of African descent."

Constitution. Article XI, Sec. 3, 1875.

NORTH CAROLINA

"The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race."

Constitution. Article IX, Sec. 2, 1868; Convention, 1875.

OKLAHOMA

"Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children." (Const. 1907, as amended Stat. 1931, 13676.)

Constitution. Article XIII, Sec. 3.

"The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, p. 436, Art. 5, Sec. 1.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-1.

"Any teacher in this state who shall wilfully and knowingly allow any child of the colored race to attend the school maintained for the white race or allow any white child to attend the school maintained for the colored race shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), and his certificate shall be cancelled and he shall not have another issued to him for a term of one (1) year." (Laws 1949, p. 537, Art. 5, Sec. 4.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-4.

"It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution in violation hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense. (*Provided*, that the provisions of this section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis. Segregated basis is defined in this Act as classroom instruction given in separate classrooms, or at separate times. The provisions of this section are subject to Section Four (4) hereof." (Laws 1949, p. 537, Art. 5, Sec. 5, as amended by Laws 1949, Ch. 15, p. 608, Sec. 1, H.B. No. 405, approved June 9, 1949.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-5.

SOUTH CAROLINA

"Separate schools shall be provided for the children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Constitution. Article XI, Sec. 7, 1895.

TENNESSEE

"Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state, being highly conducive to the promotion of this end, it shall be the duty of the Gen-

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eral Assembly, in all future periods of this government, to cherish literature and science. And the fund called the common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools through the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and Negro children to be received as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the colleges, universities, or academies, or from authorizing heirs or distributes to receive and enjoy excheated property under such laws as shall be passed from time to time."

Constitution. Article XI, Sec. 12, 1870.

TEXAS

"Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Constitution. Article VII, Sec. 7, 1876.

VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article IX, Sec. 140, 1902.

WEST VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article XII, Sec. 2, 1872.

APPENDIX

B.

District of Columbia Compulsory Attendance Law

"Section 1. Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session: Provided, that instruction given in such private or parochial school or privately, is deemed equivalent by the Board of Education to the instruction given in the public schools."

"Section 7. The parent, guardian, or other person residing permanently or temporarily in the District of Columbia and having charge or control of any child between the ages of seven and sixteen years who is unlawfully absent from public or private school or private instruction shall be guilty of a misdemeanor, and upon conviction of failure to keep such child regularly in public or private school or to cause it to be regularly instructed in private, shall be punished by a fine of $10 or by commitment to jail for five days, or both, at the discretion of the court: Provided, that each two days such child remains away from school unlawfully shall constitute a separate offense: Provided, further, that upon conviction of the first offense, sentence may, upon payment of costs, be suspended and the defendant placed on probation."

43 Stat. 806, 807, Ch. 140, Art. I, Sec. 1 and 7 (D. C. Code, 1951 Ed., Title 31, Secs. 201, 207).

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DEC 9 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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October Term, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, Et Al.,
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v.

C. MELVIN SHARPE, Et Al.,
Respondents.

REPLY BRIEF FOR PETITIONERS

In order to clarify the issues in this case and to indicate some minor corrections in the briefs and record and to disclose some apparent misconceptions on the part of respondents with respect to the legal theory underlying petitioners' cause of action, petitioners submit this reply brief.

This reply brief deals with certain of the points advanced by the respondents in their brief which will be identified by number and language as used by respondents.

I.

THE COMPLAINT FILED BELOW STATES NO CAUSE OF ACTION BECAUSE, INTER ALIA, IT FAILS TO SET FORTH ANY INJURIES TO THE PETITIONERS.

Here respondents rely upon the fact that minor petitioners do now attend a junior high school in said District of Columbia to support their assertion that the complaint fails to set forth any injury to the petitioners because (1) the compulsory law does not require petitioners to send their

children to public schools and does not require them to go to any school; (2) the complaint fails to show by comparison that Sousa Junior High School has educational opportunities which are superior to educational opportunities in the high school which minor petitioners do now attend, and (3) the allegations of the petitioners are merely legal conclusions.

It is evident that respondents misconceive the gravamen of the complaint. For the purpose of determining whether the injury has been alleged it is only necessary to examine the allegations of the complaint with respect to factual matters in the light of the motion to dismiss. The motion to dismiss, like the old common law demurrer, admits all facts well pleaded. These facts are: that minor petitioners, Negroes, citizens and residents of the District of Columbia, accompanied by their parents, Negroes, citizens, taxpayers and residents of the District of Columbia, at the proper time for admission of students and possessing all qualifications for admission to a junior high school, applied to Sousa Junior High School for admission and enrollment and were denied admission and enrollment solely because of race or color. Admission to Sousa Junior High School was denied by respondent Eleanor P. McAuliffe, principal of Sousa Junior High School, solely upon the basis of race or color; and thereafter petitioners exhausted all of their administrative remedies up to and including the Board of Education, which Board still denied admission and enrollment into Sousa Junior High School solely on the basis of race or color. The petitioners are suffering irreparable injury by reason of this action of respondents and are threatened with irreparable injury in the future at the hands of respondents.

These facts clearly show an admission by the respondents that they denied petitioners admission to Sousa Junior High School for no reason other than because of their race or color, and that this denial was injurious and threatened

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to injure the petitioners in the future. These are all the facts essential to establish a justiciable claim by the petitioners and to provide a basis for the relief requested of the Court by the petitioners. Not only did respondents admit all these facts in their motion to dismiss, but with respect to all these facts except injury, they enumerate them in their brief as a correct statement of the facts. On these admitted facts the only question before this Court is a question of law.

That question of law is—Whether the respondents possess the power to segregate pupils in the District of Columbia for the purpose of public education solely on the basis of race or color. Or to express it in another way, whether the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color violates rights secured to petitioners by the Constitution and laws of the United States. The court below dismissed the complaint, thus deciding this issue in the negative.

In the transmission of the record in this case, from the District Court to the United States Court of Appeals for the District of Columbia Circuit, and in turn to this Court, a clause in paragraph sixteen of petitioners' original complaint was inadvertently omitted. This clause, italicized in the paragraph set out below, we submit for inclusion in the proceedings in this case.

> "16. A present actual case or controversy exists between plaintiffs and defendants. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering irreparable injury, *and are threatened with irreparable injury* in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted would be attended

> by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage, vexation and inconvenience to plaintiffs and other Negroes similarly situated."

This clause as above set out was a part of the original complaint with respect to which the court below granted the motion to dismiss, and its inclusion here can in no wise prejudice the case of the respondents.

On the legal issue as to the power of respondents to take the action complained of, the mere deprivation of a civil right by government, has been held by this Court in numerous cases, to constitute injury. See: *Giles* v. *Harris*, 189 U. S. 475 (1903). In addition, the respondents admitted the well pleaded operative factual allegation of injury contained in paragraph 16 which allegation was not a legal conclusion.

As to the assertion that these petitioners were not compelled by law to send their children to any school or to the public schools, it is sufficient to point out that having chosen to avail themselves of the educational opportunities afforded by the government in the public schools, as they had a right to do, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), petitioners were compelled by threat of criminal sanction to send their children to the school set apart by the respondents for Negroes alone.

As to respondents' contention that the failure of the petitioners to compare educational opportunities offered in the school they now attend with those afforded in Sousa Junior High School, it is apparent that respondents misconceive the legal theory underlying the complaint. Petitioners complain of a deprivation of the right to choose Sousa Junior High School without any limitation based solely on race or color, irrespective of the nature and availability of educational facilities elsewhere. Quite apart from that, petitioners' concession of equality of facilities

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is not a concession of equality of educational opportunities, for it is implicit in petitioners' complaint that the mere denial of admission on the basis of race or color is a denial *per se* of educational opportunities. The offering of education to minor petitioners in a segregated school is *per se* a limitation on the enjoyment of educational opportunities.

Thus, this case as presented to this Court on the complaint and the motion to dismiss, presents a record in which the factual basis is present for the relief sought and the only question remaining is whether the action of respondents herein complained of violates the Constitution and laws of the United States.

II.

A. ACTS OF CONGRESS PROVIDING FOR EDUCATION OF CHILDREN OF THE DISTRICT OF COLUMBIA REQUIRE SUCH EDUCATION IN A DUAL SCHOOL SYSTEM AND HAVE BEEN SO CONSTRUED BY THIS COURT.

B. CONSTRUCTION OF LOCALLY APPLICABLE LAWS BY THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA IS NORMALLY ACCEPTED BY THIS COURT.

Under this heading the respondents attempt to demonstate that the congressional enactment of statutes relating to public education in the District of Columbia and the judicial interpretation thereof by the lower courts have accomplished a construction of these statutes which is binding upon this Court. It is the petitioners' position that the statutes in question do not authorize racial segregation nor do the re-enactments after an intervening judicial construction by a lower Federal court that the statutes do require racial segregation, bind this Court to accept this construction. At most, the re-enactment of congressional legislation and the judicial construction of that legislation by lower

Federal courts are but aids to this Court in making its independent determination as to the proper construction to be given to the statutes. In *Federal Communications System* v. *Columbia Broadcasting System,* 311 U.S. 132, Mr. Justice Frankfurter states at page 138:

> "We are not, however, willing to rest decision on any doctrine concerning the implied enactment of judicial construction upon re-enactment of the statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language."

It is certainly not arguable that the decision of *Carr* v. *Corning,* 86 App. D. C. 173, 182 F. (2d) 14 (1950), creates a well settled interpretation that these statutes compel segregation and are constitutional. As this Court said in *United States* v. *Raynor,* 302 U.S. 540 at 551:

> "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski,* 161 Fed. 88, held that the act only prohibited possession of the distinctive paper, does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation."

Where constitutional rights of individuals are concerned this Court has assumed the duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.,* 335 U.S. 106, 120-121) and certainly it is the position of the petitioners that to adopt the construction given these statutes by the Court of Appeals in *Carr* v. *Corning,* supra, would create a danger of unconstitutionality. The position of the respondents, with respect to the construction of these acts, therefore, is untenable. We agree with the language of this Court in this connection in *Helvering* v. *Reynolds,* 313 U.S. 428, at 431:

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"Respondents' position is not tenable . . . that rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities it does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change."

III.

THE DUAL SCHOOL SYSTEM IN THE DISTRICT OF COLUMBIA IS NOT VIOLATIVE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In this section the respondents, in an apparent misconception of the law applicable to the complaint of the petitioners, first argue that Congress has more power to legislate for the District of Columbia than the State Legislatures have for the States. Then they argue that whatever limitations exist upon the States in the Fourteenth Amendment, no greater limitations exist with respect to the Federal Government in regard to racial disabilities imposed upon Negroes. They argue, for example, that under the Fifth Amendment slavery was constitutional, and that since the Fourteenth Amendment has not prohibited the establishment of the "separate but equal" doctrine in the education cases in the States, that it is certainly not prohibited by the Fifth Amendment. This is a misconception of the fundamental nature of the Federal Government.

Equality, equal justice under law, liberty, freedom of speech and association, and freedom of religion are fundamental and basic principles underlying the foundation of our government. Our government is one of laws and not of men. In this system, race is irrelevant. The system of slavery, constitutionally recognized both in the Constitution and in *Dred Scott* v. *Sanford* (citation), 19 Howard 393, was abolished by the Thirteenth Amendment. Citizenship was conferred upon Negroes under Clause 1 of the Fourteenth Amendment and thus both the system of slav-

ery and the lack of citizenship status of the Negro set forth in the *Dred Scott* decision were removed as sources of constitutional power for the imposition of racial distinctions by the Federal Government upon Negroes. Thus our Government was brought into harmony and accord with its fundamental and basic principles—equality for all citizens—and a constitution that is color-blind.

The Federal Government is one of express powers and implied power necessary to carry out the express powers. It is too clear for argument that, since the Thirteenth and Fourteenth Amendments, the Federal Government has no express power to make racial distinctions in affording educational opportunities to citizens in the District of Columbia. It is the petitioners' position that there is likewise no implied power to do so.

This Court has recognized such power in the Federal Government in only one series of cases—the Japanese War Cases—in which it was dealing with the all-embracing war power. There this Court found an implied power, necessary to deal with sabotage and espionage under threat of invasion in the midst of a world-wide conflict, to deal on the basis of ancestry with loyal citizens who were commingled with disloyal persons. Even there this Court laid down drastic limitations governing the exercise of this implied power. It is apparent that integrated education in the District of Columbia presents no such threat to our National security. And no implied power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color can be implied from the express power given Congress over the District of Columbia.

As an apparent justification for compulsory racial segregation in public education, respondents dwell at length upon quotations from Negroes who were urging the passage of a statute in 1906 designed to increase the power of the Negro superintendent of schools. The constitutional rights of petitioners are neither added to nor diminished by the

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irrelevant opinions of isolated individuals, Negro or white. This Court has said that the rights which petitioners assert here are individual rights. *Gaines* v. *Canada*, 305 U. S. 337. It is of no importance in this case as to whether the "separate but equal" doctrine is constitutionally permissible under the Fourteenth Amendment, although we take the position that it is not; for even if we concede, which we do not, that equal protection of law may be constitutionally satisfied under a racial classification, by testing the quantum of treatment afforded Negroes under the substantially equal theory—it is juristically inconceivable that we can test liberty under the due process clause of the Fifth Amendment by the quantum of liberty which is enjoyed. A deprivation of individual liberty under the due process clause must be tested by the reasonableness of the action of the government. The test is whether the action is arbitrary but never as to how much liberty is taken. Thus the opinions of individual persons as to whether segregation is good or bad is irrelevant and the test of the deprivation of liberty under the Fifth Amendment cannot be measured by the quantum test apparently used under the equal protection clause of the Fourteenth Amendment in civil rights cases.

Moreover, the decision as to the constitutionality of the respondents' action in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color is strictly a legal question to be determined by this Court and legislative policy or action is not determinative.

CONCLUSION

Petitioners believe that the other points advanced by respondents have been fully covered in petitioners' brief on the merits, and for that reason are not touched upon here.

Respectfully submitted,

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HAROLD B. WILLEY,

IN THE

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OCTOBER TERM, 1953

No. [redacted] 8 19 4

SPOTTSWOOD THOMAS BOLLING, *et al.*,
Petitioners,

v.

C. MELVIN SHARPE, *et al.*,
Respondents.

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(F) This Court should declare that the actions of respondents in requiring segregation in the public schools is unlawful. It should direct the District Court to enter a decree ordering that such segregation be discontinued forthwith and that petitioners be admitted to Sousa Junior High School without distinction as to race, as soon as necessary administrative adjustments can be made and in no event later than the beginning of the next school year. (Answer to questions 4 and 5 of the Court.) .. 88

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A.

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B.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 8

SPOTTSWOOD THOMAS BOLLING, *et al.*,
Petitioners,

v.

C. MELVIN SHARPE, *et al.*,
Respondents.

BRIEF FOR PETITIONERS ON REARGUMENT.

OPINION BELOW.

The final decree of The United States District Court for the District of Columbia is unreported, but appears in the Record (R. p. 19).

JURISDICTION.

The final decree of the District Court was entered on April 9, 1951 (R. p. 19). The notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was given on April 10, 1951 (R. p. 20). Briefs were filed by petitioners and respondents in the United

States Court of Appeals for the District of Columbia Circuit. Before argument, before submission of the case for judgment on the briefs, and before judgment petitioners filed a Petition for Writ of Certiorari in this Court, asking that this Court review the judgment of the United States District Court for the District of Columbia before judgment by the United States Court of Appeals for the District of Columbia Circuit. Certiorari was granted by order of this Court dated November 10, 1952. On December 10, 1952 this case was submitted to this Court on brief and argument, and on June 8, 1953 this Court handed down the following order:

> "8. *Brown* vs. *Board of Education of Topeka, etc.*
> 101. *Briggs* vs. *Elliott.*
> 191. *Davis* vs. *County School Board, etc.*
> 413. *Bolling* vs. *Sharpe.*
> 448. *Gebhart* vs. *Belton.*
>
> Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:
>
> 1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> 2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
>
> (a) that future Congresses might, in the exercise of their power under Section 5 of the Amendment, abolish such segregation, or

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(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

Upon application duly had by the Attorney General of the United States and acquiesced in by the parties in inter-

est the date for the oral argument was changed from October 12, 1953 to December 7, 1953.

A motion was made by the petitioners and granted by the Supreme Court of the United States to substitute parties so as to have the personnel of the Board of Education of the District of Columbia to conform with the names of its present members.

This is an appeal from a decree in a civil action denying an injunction and denying an application for a declaratory judgment that the action of respondents, under color of law, in refusing admission of minor petitioners to Sousa Junior High School solely on the basis of race or color was in violation of the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and also in violation of Title 8, United States Code, Section 43, and further was in violation of the Charter of the United Nations, Chapter 1, Article 1, Section 3, Chapter IX, Articles 55(G) and 56, and denying an application for a declaratory judgment that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color in affording them educational opportunities and dismissing petitioners' complaint on the ground that it failed to state a cause of action on which relief could be granted. The jurisdiction of this Court to review by writ of certiorari before judgment in the United States Court of Appeals is conferred by Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED.

1. Whether the Federal Government in providing educational opportunities for pupils of the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely on the basis of race or color.

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2. (a) Whether Acts of Congress which provide educational opportunities for pupils in the District of Columbia compel their segregation solely on the basis of race or color.

(b) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia, compel their segregation solely on the basis of race or color, whether these acts are unconstitutional.

(c) If Acts of Congress which provide educational opportunities for pupils in the District of Columbia permit voluntary segregation solely on the basis of race or color, whether to the extent that this legislation is thus permissive its implementation by actions of respondents to compel segregation of pupils solely on the basis of race or color is unconstitutional.

3. Whether the action of respondents in refusing to admit minor appellants to Sousa Junior High School solely on the basis of race or color violated petitioners' rights guaranteed them by the Constitution and Laws of the United States.

4. Whether the United States District Court for the District of Columbia erred in denying petitioners' application for an injunction and for a declaratory judgment and in granting respondents' motion to dismiss petitioners' complaint on the ground that it failed to state a claim on which relief could be granted.

TREATY AND STATUTES INVOLVED.

Treaty:

Chapter I, Article 1(3), Article 2(2), Chapter IX, Articles 55(c) and 56 of the United Nations Charter, 59 Stat. 1035 et seq.

Statutes:

(A) Title 8, United States Code, Sections 41 and 43.

(B) An Act to provide for the public instruction of Youth in Primary Schools throughout the County of Washington,

in the District of Columbia, without the Limits of the Cities of Washington and Georgetown, May 20, 1862, 12 Stat. 394, Chapter 77, Sec. 35.

(C) An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes. May 21, 1862, 12 Stat. 407, Chapter 83.

(D) An Act relating to Public Schools in the District of Columbia, July 23, 1866, 14 Stat. 216, Chapter 217, Sec. 1.

(E) An Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of Columbia, July 28, 1866, 14 Stat. 343, Chapter 308.

(F) An Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R. S. D. C. Section 281) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI Section 7)].

(G) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R. S. D. C. Section 282) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 16)].

(H) Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R. S. D. C. Section 283), (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 17)].

(I) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1940, Sections 31-1112, was R. S. D. C. Section 306) (In substance—the Act of June 25, 1864, 13 Stat. 187, 191 Chapter CLVI, Section 18)].

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(J) Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of July 21, 1945, 59 Stat. 500, Chapter 321, Title V (Section 21 effective July 1, 1945, now District of Columbia Code, 1951 Ed., Title 31, Section 115).

(K) Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6 as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R. S. D. C. Section 310) (originally enacted May 26, 1862, 12 Stat. 407, Chapter 83, Section 2)].

(L) Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, 1951 Ed., Title 31, Sections 669, 670, 671.

(M) Act of February 4, 1925, 43 Stat. 806, 807, Chapter 140, Art. 1, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31 Secs. 201, 207).

STATEMENT OF THE CASE.

On the 11th day of September, 1950, and during the time when respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Columbia attended solely by white children, all of the minor petitioners, Negroes between the ages of 7 and 16 years, citizens of the United States, residents of and domiciled in the District of Columbia, within the statutory age limits for eligibility to attend the public schools of the District of Columbia and subject to the compulsory school attendance law of the District of Columbia, accompanied by their parents, adult petitioners, presented themselves to respondent Eleanor P. McAuliffe, the principal of Sousa Junior High School, for enrollment and instruction therein. The adult petitioners are taxpayers and citizens of the District of Columbia, and are required by law to send their respective children, minor petitioners, to the specific public schools designated by the respondents,

and are subject to criminal prosecution for failure so to do. Act of February 4, 1925, 43 Stat. 806, 807, Ch. 140, Art. I, Secs. 1 and 7 (D. C. Code 1951 Ed., Title 31, Secs. 201, 207). Each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 27th day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Lawson J. Cantrell, Associate Superintendent of Schools in charge of the vocational and junior high schools in the District of Columbia, Divisions 1-9 (now Division I), restricted to white pupils. Again each minor petitioner was denied and excluded from enrollment and instruction at the Sousa Junior High School solely because of race or color.

On the 31st day of October, 1950, minor petitioners, through their attorneys, appealed to respondent Norman J. Nelson, First Assistant Superintendent of Schools, Divisions 1-9, restricted to white pupils, and to respondent Hobart M. Corning, Superintendent of all the public schools in the District of Columbia, and each denied and excluded each minor petitioner from enrollment and instruction at Sousa Junior High School solely because of race or color.

On the 1st day of November, 1950, the respondent Board of Education of the District of Columbia upheld the actions of the other respondents and itself denied and excluded minor petitioners from enrollment and instruction at Sousa Junior High School solely because of their race or color.

Having exhausted their administrative remedies, thereafter and on November 9, 1950, petitioners, on their own behalf and on behalf of others similarly situated, filed a complaint (R. p. 1) and brought a class suit in the United States District Court for the District of Columbia, against the respondents, members of the School Board and officials of the public school system of the District of Columbia, in their respective official capacities. The action sought a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that the respondents are

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without right in construing the statutes having to do with public education in the District of Columbia so as to require said respondents to exclude the minor petitioners from attendance at the Sousa Junior High School and in denying to the minor petitioners the right of attendance at the Sousa Junior High School in violation of their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, by Title 8, United States Code, Sections 41 and 43, and by Article I, Section 9, Clause 3, of the Constitution of the United States, prohibiting legislation in the nature of a Bill of Attainder, and by the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 55 and 56, and further stating that the said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

The action further sought an interlocutory and a permanent injunction restraining respondents, and each of them, their successors in office, and their agents, and employees from precluding the admission of minor petitioners and other Negro children similarly situated to the Sousa Junior High School for no other reason than because of their race or color, upon the grounds that said refusal of admission as applied to minor petitioners or other Negroes similarly situated, in whose behalf they sue, denies them their privileges and immunities as citizens of the United States, and is in violation of their rights as enunciated under the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, Article I, Section 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

The action also sought an interlocutory and a permanent

injunction requiring respondents, and each of them, their successors in office, and their agents and employees to admit the minor petitioners to attendance in the Sousa Junior High School in conformity with their rights as secured to them by the due process of law clause of the Fifth Amendment of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and Article I, Seciton 9, Clause 3, of the Constitution of the United States, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

Subsequently, the respondents, through their attorneys, filed a motion to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted (R. p. 18). The Honorable Walter M. Bastian, Judge in the United States District Court for the District of Columbia, refused either to grant an injanction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color, or to issue a declaratory judgment that said denial was in violation of petitioners' rights under the Constitution and laws of the United States, or to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School free of any racial distinctions, and on April 9, 1951, granted the motion to dismiss (R. p. 19). The District Judge at the close of oral argument stated that he was bound by the holding of the United States Court of Appeals for the District of Columbia Circuit in *Carr, et al.* v. *Corning*, 86 App. D. C. 173, 182 F. (2d) 14 (1950), and *Browne, et al.* v. *Magdeburger, et al.*, 86 App. D. C. 173, 182 F. (2d) 14 (1950).

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. p. 20), and briefs were filed therein. This case has not been set down for oral argument, nor has it been submitted for judgment on the briefs, and no orders with respect thereto have been entered by that Court.

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ERRORS RELIED UPON.

The District Court erred:

1. In refusing to enter a declaratory judgment holding that the respondents are without right in excluding minor petitioners from Sousa Junior High School under color of law upon the ground that these actions violate rights secured by the due process clause of the Fifth Amendment and Article I, Section 9, Clause 3 of the Constitution of the United States, and by Title 8, United States Code, Sections 41 and 43, and by the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2 and Chapter IX, Articles 55(c) and 56; and in refusing to hold that respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them because of their race or color.

2. In refusing to restrain respondents from denying admission of minor petitioners to Sousa Junior High School for no other reason than because of their race or color, upon the ground that this action is in violation of their rights secured under the due process clause of the Fifth Amendment, and Article VI, Clause 2 of the Constitution of the United States, Title 8, United States Code, Sections 41 and 43, and the Charter of the United Nations, Chapter I, Article 1, Section 3, Article 2, Section 2, Chapter IX, Articles 55(c) and 56.

3. In refusing to issue a decree requiring respondents to admit minor petitioners to Sousa Junior High School in conformity with their rights under the Constitution and laws of the United States, and in refusing to hold that Acts of Congress do not compel racial segregation in the public schools of the District of Columbia, for they would then violate Article I, Section 9, Clause 3 of the Constitution of the United States, and respondents were in error in applying and construing said statutes so as to require the exclusion of minor petitioners from Sousa Junior High School solely on the basis of race or color.

4. In granting respondents' motion to dismiss petitioner's complaint on the ground that it failed to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT.

THE RESPONDENTS HAVE NO POWER OR AUTHORITY TO EXCLUDE MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR OR TO REFUSE PERMISSION TO ADULT PETITIONERS TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR.

A.

The Action of the Respondents Violates the Policy of the Federal Government.

1. It volates National Federal Policy.

2. It violates Federal Policy in the District of Columbia.

B.

The Acts of Congress Which Provide Educational Opportunities for Pupils in the District of Columbia Do Not Compel Their Segregation Solely on the Basis of Race or Color.

C.

If These Acts of Congress Are Interpreted As Compelling Segregation of Minor Petitioners in the Public Schools of the District of Columbia Solely on the Basis of Race or Color Then These Acts Are Unconstitutional.

1. These Acts would then deprive petitioners of their rights protected by the due process clause of the Fifth Amendment of the Constitution of the United States.

2. These Acts would then be bills of attainder in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States.

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D.

The Action of Respondents Deprives Petitioners of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43.

E.

The Court Below Erred in Not Granting Petitioners the Relief Prayed for and in Granting Respondents' Motion to Dismiss Minor Petitioners' Complaint on the Ground That It Failed to State a Claim on Which Relief Could Be Granted.

F.

The Answers to Questions 4 and 5 Asked by the Court.

ARGUMENT.

THE RESPONDENTS ARE WITHOUT POWER TO EXCLUDE MINOR PETITIONERS FROM ADMISSION TO SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR OR TO REFUSE ADULT PETITIONERS PERMISSION TO ENROLL THEIR CHILDREN IN SOUSA JUNIOR HIGH SCHOOL SOLELY BECAUSE OF RACE OR COLOR.

A.

The Action of Respondents in Excluding Minor Petitioners From Admission to Sousa Junior High School Solely Because of Race or Color and in Refusing Permission to Adult Petitioners to Enroll Their Children in Sousa Junior High School Solely Because of Race or Color Violates the Policy of the Federal Government.

Here we are not dealing with the delicate question of State-Federal relations. In this case we are complaining of the action of school officials of the District of Columbia, the Capital of the United States. This is no local setting, this is also the capital of the free world. In this framework the question before the Court is not merely the technical question of the

propriety or reasonableness or even lawfulness of the action of the respondents but it is the basic inquiry as to whether there is constitutionally embedded in the heart of our democracy the seeds of racism or whether, as said by Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson,* 163 U. S. 532, 559. ". . . Our Constitution is color blind . . . " Certain it is that a determination by this Court that the Federal Government may segregate pupils in the public schools in the capital of the United States solely on the basis of race or color and that such action is within the spirit and purpose and meaning of our Constitution would not only be a complete reversal of the position of this Court, but would strip from our democratic system its fundamental and universal appeal to all races and creeds.

Our Federal policy as found in the Constitution, Laws and Treaties of the United States, the executive and administrative acts of the Executive branch of the Federal Government, as well as in the applicable legal precedents interdicts any such determination.

The Federal policy in this regard is revealed in the language of this Court in *Hirabayashi* v. *United States,* 320 U. S. 81 (1943) where it said at p. 100:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Broadly stated, it is the policy of the Government of the United States that the exercise of rights enjoyed by citizens of the United States by virtue of their status as such may not be conditioned on the basis of race or color. This policy has been recognized and effectuated by the executive, the legislative and the judicial branches of the Federal Government. This policy has been given effect not only where the Federal Government is dealing directly with its citizens but also where state action is involved.

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1.

THE DECISIONS OF THIS COURT ARE INDICATIVE OF THIS FEDERAL POLICY.

This Court, in a long line of decisions, has developed the doctrine that Government may not condition the exercise of any right it affords solely on the basis of race or color.

In the evolution of this doctrine, this Court has come to view race as an irrational premise for governmental action. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

In *Hirabayashi* v. *United States*, 320 U. S. 81, 100, Mr. Chief Justice Stone characterized racial distinctions as "odious to a free people." In *Korematsu* v. *United States*, 323 U. S. 214, 216, Mr. Justice Black viewed such racial restrictions as "immediately suspect." Mr. Justice Jackson, concurring in *Edward* v. *California*, 314 U. S. 180, 184, referred to race and color as "constitutionally an irrelevance." Mr. Justice Douglas, dissenting in *South* v. *Peters*, 339 U. S. 276, 278, characterized discriminations based upon race, creed or color as "beyond the pale." Mr. Justice Burton, in *Henderson* v. *United States*, 339 U. S. 816, 824, while not reaching the constitutional question raised, described signs, partitions and curtains segregating Negroes in railroad dining cars as emphasizing "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility."

a.

Where State Action Was Involved.

This thesis has pervaded a wide realm of judicial opinion.

Sweeping decisions have secured the right of Negroes to make effective use of the electoral process consistent with the requirements of the Fifteenth Amendment; *Guinn* v. *United States*, 238 U. S. 347; *Lane* v. *Wilson*, 307 U. S. 268; *Smith* v. *Allwright*, 321 U. S. 649; *Terry* v. *Adams*, 73 S. Ct. 809, 97 L. ed. (Advance p. 745).

This Court has defined the Fourteenth Amendment itself, as a broad prohibition against Government enforcement of differentiations and discriminations based upon race or color. Thus, this Court has held that state action restricting the right of Negroes to vote is a violation of the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U. S. 73.

Similarly, it has refused to sanction the systematic exclusion of Negroes from the petit or grand jury; *Hill* v. *Texas*, 316 U. S. 400; *Pierre* v. *Louisiana*, 306 U. S. 354; their representation on juries on a token or proportional basis; *Cassell* v. *Texas*, 339 U. S. 282; *Shepherd* v. *Florida*, 341 U. S. 50; or any method in the selection of juries found susceptible of racial discrimination in practice; *Avery* v. *Georgia*, ... U. S. ....., 97 L. ed. (Advance p. 798).

No state may sanction or enforce racial distinctions in the use, occupancy or ownership of real property; *Buchanan* v. *Warley*, 245 U. S. 60, even though applied equally to Negroes and white persons; *Shelley* v. *Kraemer*, 334 U. S. 1; *Barrows* v. *Jackson*, ... U. S. ....., 97 L. ed. (Advance p. 961); and see *Oyama* v. *California*, 332 U. S. 633.

At the graduate and professional school level, closest to this case, racial distinctions as applied have been struck down. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; see *Sweatt* v. *Painter*, 339 U. S. 629.

State laws requiring racial segregation in interstate commerce have been declared an invalid invasion of commerce power reserved to the Congress. *Morgan* v. *Virginia*, 328 U. S. 373. But where a state sought to enforce against an interstate carrier its local nondiscriminatory policy, its invasion of the commerce power was upheld. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

The only way in which the decision in the *Morgan case* can be reconciled with the decision in the *Bob-Lo case* is to say that there is a Federal policy against racial distinction and state action in implementation of that policy is permissible under the commerce clause, while state action

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in derogation of that policy is a burden on interstate commerce and invalid.

Again, in passing on the contention of a labor union that the application of a state civil rights law prohibiting it from discriminating in membership in its organization on the basis of race was offensive to the Fourteenth Amendment, this Court held that the judicial determination sought "would be a distortion of policy manifested in that Amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94. This holding seems to indicate a national policy against discrimination on the basis of race and to render valid all state action in support of this policy.

b.

Where Federal Action Was Involved.

This Court has invalidated every restrictive action of the Federal Government which was based upon race or color alone when complained of by citizens of the United States with one exception, namely, in the *Japanese cases.*

It prohibited the racial distinctions complained of in *Henderson* v. *United States*, 339 U. S. 816, with respect to dining cars in use in interstate commerce.

It declared United States District Courts had no power in the District of Columbia to grant injunctions in aid of restrictive covenants based on race. *Hurd* v. *Hodge*, 334 U. S. 24.

In *Steele* v. *Louisville and Nashville R. R. Co.*, 323 U. S. 192, this Court, although not reaching the constitutional question raised, held that enforcement of a collective bargaining agreement discriminating against Negroes as to seniority rights would be enjoined. A more recent case went further. In *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, the Court held that collective bargaining agents cannot use their position and power to de-

stroy colored workers' jobs in order to give them to white workers. The Court thus invalidated attempts to disqualify colored workers for employment on the basis solely of their race or color.

This Court has upheld a departure from this policy in only one situation. The restrictions placed upon persons of Japanese origin on the West Coast during World War II were sustained in *Hirabayashi* v. *United States*, 320 U. S. 81, and in *Korematsu* v. *United States*, 323 U. S. 214, as emergency war measures taken by the national government in a dire national peril of the gravest nature. The military decision was upheld as an implied power under the War Power where the Court decided that it should not interfere with measures considered necessary to the safety of the nation by those primarily responsible for its security. Yet, in upholding these orders, the Court made some of the most sweeping condemnations of governmental action based upon race and color ever announced by our judiciary. And while departure from accepted standards of governmental conduct was sustained in order to remove persons of Japanese origin from areas where sabotage and espionage might have worked havoc with the national war effort, once this removal was accomplished and individual loyalty determined, further restrictions based upon race or color could no longer be countenanced. *Ex parte Endo*, 323 U. S. 283.

As a matter of fact in *Railroad Company* v. *Brown*, 17 Wall. 44, where Congress had granted a charter to Railroad Company in which it prohibited separate street cars for Negroes in the District of Columbia, and enacted a statute to the same effect, this Court upheld the validity of these limitations. This case, the first case involving segregation to reach this Court after the adoption of the Fourteenth Amendment, again is in line with our Federal policy against racial distinctions in the District of Columbia.

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2.

The Acts of Congress Are Indicative of This Federal Policy.

Petitioners submit that in no instance has Congress conditioned the enjoyment of a federally created right on the race or color of citizens upon whom the right is conferred, and that in every instance in which Congress has made reference to race or color of citizens in its legislation the purpose of the reference has been to eliminate or diminish the effect of a real or threatened disability based upon race. It is axiomatic that since the time that Negroes became citizens of the United States Congress has repeatedly sought through the legislative power to achieve equality and eliminate inequality of all citizens without regard to race or color. A clear line of intent is seen from the enactment of the civil rights statutes shortly after the Civil War to the recent amendments to the National Labor Relations Act.

1. Emancipation of Slaves in the District of Columbia 1862. (Act of April 16, 1862, 12 Stat. 376, Chapter LIV, Section 1).

2. Removal of Black Codes in the District of Columbia in 1862. (*Ibid.*, Section 12).

3. The Bill of 1865 providing against separate street cars in the District of Columbia. Act of March 3, 1865, 13 Stat. 536, Section 5.

4. The Freedmen's Bureau Bill, Act of March 3, 1865, 13 Stat. 507, Ch. 90.

5. The Civil Rights Bill of 1866, Act of April 9, 1866, 14 Stat. 27.

6. The Equal Electors Law of 1869. Act of March 18, 1869, 16 Stat. 3, Chapter 3.

7. The Civil Rights Bill of 1871, Act of April 20, 1871, 17 Stat. 13.

8. The Civil Rights Act of 1875, Act of March 1, 1875, 18 Stat. 335.

9. The United Nations Charter. Chapter I, Article 1, Section 3, Chapter IX, Sections 55 and 56.

3.

THE LAWS OF THE LEGISLATIVE ASSEMBLY OF THE DISTRICT OF COLUMBIA ARE INDICATIVE OF THIS FEDERAL POLICY.

1. The Equal Service Law of 1872. Act of June 20, 1872, Comp. St. 1894, C. 16, Sec. 148 *et seq.*

2. The Equal Service Law of 1873. Act of June 26, 1873, Comp. St. 1894, C. 16, Sec. 151 *et seq.* (This statute was upheld in *District of Columbia* v. *John R. Thompson,* 73 Supreme Court 1007).

4.

THE ACTION OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT IS INDICATIVE OF THIS FEDERAL POLICY.

In recent years the President of the United States and his subordinates in the executive branch have come to exercise an increasing quantum of regulatory control over the conduct of citizens of the United States. There has arisen both by virtue of legislative delegation as well as executive initiative a great body of federal administration of important social and economic programs affecting the relationship between the citizen and the Federal Government. In the administration of these programs, care has been taken to see to it that enjoyment of the benefits of the programs would in no instance be conditioned upon the factors of race or color. Again it is submitted that there is no instance of federal action by the executive in which the enjoyment of a federally created right has been conditioned upon

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the race or color of the citizen. Moreover, in areas peculiarly within the purview of the executive the following specific affirmative efforts have been made to eliminate such racial distinctions as are found to exist in the government-citizen relationship:

1. The President's Committee on Civil Rights.

Former President Harry S. Truman created a committee to determine to what extent law-enforcement measures may be strengthened and improved to safeguard the civil rights of the people, President's Committee on Civil Rights, Executive Order 9808, December 5, 1946. The report and recommendations of this committee dealt largely with the injustices and inequalities found in the economic, social and political life of Negroes. The Report of the President's Committee on Civil Rights, "To Secure These Rights." (GPO.: 1947), *passim.*

2. The President's Contract Compliance Order.

Executive Order 10210, Sect. 7, February 6, 1951, prohibited discrimination solely on the basis of race or color by an employer who obtains a government contract. Executive Order No. 10308, December 6, 1951, extended and improved this prohibition, and created a committee, composed of government officials, to ferret out and correct any breaches thereof. These Executive Orders were rescinded and replaced by Executive Order No. 10479, August 13, 1953, which provided that the Vice President of the United States be Chairman, and incorporated the substance of the two Executive Orders above-mentioned.

3. The President's Statement as to segregation in the District of Columbia.

President Eisenhower, in his State of the Union Message to the Congress, February 2, 1952, said that he will use the power of his office to wipe out segregation in the Nation's Capital.

4. The Ending of Segregation in all parks, playgrounds and restaurants operated by the Federal Government.

Numerous Federal Regulations prohibit segregation on the basis of race or color in all parks, playgrounds, and restaurants operated by the federal government, 36 C. F. R. 1.60, 12.7, 3.45 (1949 ed. and pocket Supplement); 14 C. F. R. 570.16 (1949 ed.).

5. The Ending of Segregation in the Armed Services.

Executive Order 9981, July 26, 1948, declared it to be the policy of the President that there be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.

6. Fair Employment Practice Order for Federal Government.

Executive Order 9980, July 26, 1948, commanded that all personnel actions taken by Federal appointing officers be based solely on merit and fitness; and that in all such actions there shall be no discrimination because of race or color. This Order is amplified by Executive Order No. 10479, *supra.*

7. The ending of segregation in Housing projects in the District of Columbia.

By resolution of the National Housing Authority June 4, 1953, the policy of segregation in Housing projects in the District of Columbia was abandoned.

8. District of Columbia Contract Compliance Order.

The District of Columbia Contract Compliance Order, G. F. 47-030, L. S. 6000-B, October 26, 1953, provides that no employer receiving a District of Columbia government contract shall discriminate against any citizen because of race or color in the execution of that contract.

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B.

There Is No Statutory Authority for the Action of Respondents Complained of Here.

The statutes upon which respondents rely are as follows:

(a) *An Act to provide for the public instruction of Youth in Primary Schools throughout the County of Washington, in the District of Columbia, without the Limits of the Cities of Washington and Georgetown, May 20, 1862, 12, Stat. 394, Chapter 77, Sec. 35, which provides:*

> And be it further enacted, That the said levy court may in its discretion, and if it shall be deemed by said court best for the interest and welfare of the colored people residing in said County, levy an annual tax of one-eighth of one percent. on all the taxable property in said county outside the limits of the cities of Washington and Georgetown, owned by persons of color, for the purpose of initiating a system of education of colored children in said county, which tax shall be collected in the same manner as the tax named in section thirteen of this Act. And it shall be the duty of the trustees elected under section nine to provide suitable and convenient rooms for holding schools for colored children, to employ teachers therefor, and to appropriate the proceeds of said tax to the payment of teachers wages, rent of school rooms, fuel and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a full, equal and useful instruction of the colored children in said county. It shall be lawful for such trustees to impose a tax of not more than fifty cents per month on the parent or guardian of each child attending such schools, to be applied to the payment of the expenses of the school of which such child shall be an atetndant; and in the exercise of this power the trustees may, from time to time, discontinue the payment altogether, or may graduate the tax according to the ability of the child and the wants of the school. And said trustees are authorized to receive any donations or contributions that may be

made for the benefit of said schools by persons disposed to aid in the elevation of the colored population in the District of Columbia, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors, said trustees being required to account for all funds received by them, and to report to the commissioners in accordance with the provisions of section twenty-two of this Act.

(b) *An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes. May 21, 1862, 12 Stat. 407, Chapter 83:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act it shall be the duty of the municipal authorities of the cities of Washington and Georgetown, in the District of Columbia, to set apart ten percentum of the amount received from taxes levied on the real and personal property in said cities owned by persons of color; which sum received for taxes, as aforesaid, shall be appropriated for the purpose of initiating a system of primary schools for the education of colored children residing in said cities.

Sec. 2. And be it further enacted, That the boards of trustees of public schools in said cities shall have sole control of the fund arising from the tax aforesaid, as well as from contributions by persons disposed to aid in the education of the colored race, or from any other source, which shall be kept as a fund distinct from the general school fund; and it is made their duty to provide suitable rooms and teachers for such a number of schools as, in their opinion, will best accommodate the colored children in the various portions of said cities.

Sec. 3. And be it further enacted, That the board of trustees aforesaid shall possess all the powers, exercise the same functions, and have the same supervision over the schools provided for in this act as are now exercised by them over the public schools now existing in said cities by virtue of the laws and ordinances of the Corporation thereof.

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Sec. 4. And be it further enacted, That all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted or any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this Act are hereby repealed.

(c) *An Act relating to Public Schools in the District of Columbia, July 23, 1866, 14 Stat. 216, Chapter 217, Sec. 1, which provides:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the eighteenth section of the Act entitled "An act to provide for the public instruction of youth in the county of Washington, District of Columbia, and for other purposes", approved June twenty five, eighteen hundred and sixty-four, shall be so construed as to require the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, bear to the whole number of children, white and colored, between the same ages. That the money shall be considered due and payable to said trustees on the first day of October of each year, and if not then paid over to them, interest at the rate of ten percentum per annum on the amount unpaid may be demanded and collected from the authorities of the delinquent city by said trustees.

(d) *An Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of*

Columbia, July 28, 1866, 14 Stat. 343, Chapter 308 which provides:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of public buildings be, and is hereby authorized and required to grant and convey to the trustees of colored schools for the cities of Washington and Georgetown, in the District of Columbia, for the sole use of schools for colored children in said District of Columbia, all the right, title and interest of the United States in and to lots numbered one, two and eighteen in square nine hundred and eighty-five, in the said city of Washington, said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools, And wherever the same shall be converted to other uses they shall revert to the United States.

(e) *An Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1110, was R. S. D. C. Section 281) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI Section 17)] which provides:*

> *Education of colored children.* "It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children, between the ages of 6 and 17 years, to the payment of teachers' wages, to the building or renting of schoolrooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia."

(f) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316,*

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Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1111, was R. S. D. C. Section 282) (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 16)] which provides:

> *Placement of children in schools.* "Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in the District of Columbia he or she may think proper to select, with the consent of the Board of Education; and any colored resident shall have the same right with respect to colored schools."

(g) *Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1109, was R. S. D. C. Section 283), (originally enacted June 25, 1864, 13 Stat. 187, 191, Chapter CLVI, Section 17)] which provides:*

> *Board of Education may accept and apply donations for colored schools—Accounting.* "The Board of Education is authorized to receive any donations or contributions that may be made for the benefit of the Schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the Board of Education to account for all funds so received."

(h) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6, as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1940, Sections 31-1112, was R. S. D. C. Section 306) (In substance—the Act of June 25, 1864, 13 Stat. 187, 191 Chapter CLVI, Section 18)] which provides:*

> "Proportionate amount of school moneys to be set apart for colored schools. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education

in the District of Columbia, such a proportionate part of all moneys received or expended for school or educational purposes, including the cost of sites, buildings, improvements, furniture and books, and all other expenditures on account of schools, as the colored children between the ages of 6 and 17 years bear to the whole number of children, white and colored, between the same ages, for the purposes of establishing and sustaining public schools for the education of colored children; and such proportion shall be ascertained by the last reported census of the population made prior to such appointment, and shall be regulated at all times thereby."

(i) *Act of June 20, 1906, 34 Stat. 320, Chapter 3446, Section 7, as amended by Act of July 21, 1945, 59 Stat. 500, Chapter 321, Title V, Section 21 (effective July 1, 1945, now District of Columbia Code, 1951 Ed., Title 31, Section 115), which provides:*

Principals of schools—Duties. "Principals of normal, high and manual training schools shall each have entire control of his school, both executive and educational, subject only in authority to the superintendent of schools for the white schools and to the colored first assistant superintendent for the colored schools, to whom in each case he shall be directly responsible."

(j) *Act of June 11, 1878, 20 Stat. 107, Chapter 180, Section 6 as amended by Act of June 20, 1906, 34 Stat. 316, Chapter 3446, Section 2 [(now District of Columbia Code, 1951 Ed., Title 31, Section 1113, was R. S. D. C. Section 310) (originally enacted May 26, 1862, 12 Stat. 407, Chapter 83, Section 2)] which provides:*

Facilities for educating colored children to be provided. "It is the duty of the Board of Education to provide suitable rooms and teachers for such a number of schools in the District of Columbia, as, in its opinion, will be accommodate the colored children in the District of Columbia."

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(k) *Act of July 7, 1947, Public No. 163, 80th Congress, 1st Session, as amended by Act of October 6, 1949, Public No. 353, 81st Congress, 1st Session, District of Columbia Code, 1951 Ed., Title 31, Sections 669, 670, 671, which provides:*

Number of First Assistant Superintendents—Sphere of supervision—Duties. "There shall be two First Assistant Superintendents of Schools, one white First Assistant Superintendent for the white schools, who, under the direction of the Superintendent of Schools, shall have general supervision over the white schools; and one colored First Assistant Superintendent for the colored schools, who, under the direction of the Superintendent of Schools, shall have sole charge of all employees, classes and schools in which colored children are taught. The First Assistant Superintendents shall perform such other duties as may be prescribed by the Superintendent of Schools."

Board of examiners—Composition—Designation of members. "Boards of examiners for carrying out the provisions of the statutes with reference to examinations of teachers, shall consist of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the white schools for the white schools and of the Superintendent of Schools and not less than four nor more than six members of the supervisory or teaching staff of the colored schools for the colored schools. The designations of members of the supervisory or teaching staff for membership on these boards shall be made annually by the Board of Education on the recommendation of the Superintendent of Schools."

Appointment of chief examiners—Compensation. "There shall be appointed by the Board of Education, on the recommendation of the Superintendent of Schools, a chief examiner for the Board of Examiners for white schools. An associate Superintendent in the colored schools shall be designated by the Superintendent of Schools as chief examiner for the board of examiners for the colored schools. All members of the respective boards of examiners shall serve without additional compensation."

It is quite clear from an examination of the above Acts of Congress that they possess no language of a mandatory character. The language is capable of an interpretation that it is a recognition by the Congress of the fact that separate private schools existed in the District long before public schools were supported by Congress. Only precise and concrete language requiring segregation of the races could overcome the historical fact that this language was approved by the Congress that opposed every type of racial distinction by Government.

The history as well as the language of these various Acts demonstrate an intention by the legislature at least to guarantee minimum opportunities to the colored children at a time when serious objections were made to any public education for them. Certainly there were those members of Congress who probably believed that for the newly freed Negro public education might best be secured in separate schools for an adjustment period. All that this means is that the legislature sought to give *recognition to voluntary separation.* It seems doubtful that this Court today would conclude that such a delegation of power by Congress would be constitutional even if such an intent be found to exist.

The problem posed in the Bolling case is whether this Court, as the final arbiter, believes that segregated education in the District of Columbia comports, in 1953, with the due process clause of the Fifth Amendment. We believe that respondents have erroneously concluded that "upon this point a page of history is worth a volume of logic." Mr. Justice Peckham cautioned against the danger of this approach when he said:

> "What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption

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of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

"What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 318; *Dunlap* v. *United States*, 173 U.S. 65, 75.

"In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit." *Maxwell* v. *Dow*, 176 U.S. 581, 601, 602.

Hence, it is petitioners' position that neither the intent which may be inferred from a review of history, nor the action or inaction of Congress is controlling in this matter.

This Court as early as *Marbury* v. *Madison*, 1 Cranch (U.S.) 137, 177, 2 L. ed. 60, announced:

"It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act . . .

> It is, emphatically, the province and duty of the judicial department, to say what the law is"

This Court has stated that the Fifth Amendment is a limitation upon all three branches of the Federal Government, hence Congress could not make any process "due process". *Den ex dem. Murray* v. *Hoboken Land Improvement Co.*, 18 How. 272, 276, 15 L. Ed. 372. In *St. Joseph Stock Yard Co.* v. *U. S. et al.*, 298 U.S. 38, 51-52, Mr. Chief Justice Hughes, speaking for the Court, stated that the rate-making power of Congress was limited by the due process clause of the Fifth Amendment, so that when the legislature acted in that matter

> "its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

This Court in *Baltimore & Ohio R.R. Co.* v. *U.S.*, 298 U.S. 364, 56 S. Ct. 805, cited with approval the *Murray and St. Joseph Stock Yard Co.* cases, supra, when concluding that what constitutes due process of law is for judicial ascertainment. These petitioners' constitutional rights cannot be defeated by the existence or non-existence of legislation.

This Court in exercising its exclusive judicial function of determining whether respondents' actions are violative of the Fifth Amendment must decide whether racial classification in affording public education *today* satisfies due process. As Judge Edgerton, dissenting in *Carr* v. *Corning*, 86 U.S. App. D.C. 173, 182 F. 2d 14, 33 said:

> "When the Fifth Amendment was adopted Negroes in the District of Columbia were slaves, not entitled to unsegregated schooling or to any schooling. Con-

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> gress may have been right in thinking Negroes were not entitled to unsegregated schooling when the Fourteenth Amendment was adopted. But the question what schooling was good enough to meet their constitutional rights 160 or 80 years ago is different from the question what schooling meets their rights now. 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights'." Citing *Wolf* v. *Colorado*, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361.

The petitioners believe that the words of Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 442-443, are apropos to this court's present determination of whether respondents may make racial classifications *today* in affording public school education to these petitioners:

> "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.
>
> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the

provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a *constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' Id., p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago'."

Respondents can point to no law in the District of Columbia which would be violated by the admission of these minor petitioners to the Sousa Junior High School. In Ex Parte Endo, *supra*, this Court said at page 299-300:

"We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and

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> members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Assuming that Congress has the power to compel segregation of American citizens in the Schools of the District of Columbia, though we deny that Congress has it, our present inquiry is, has Congress enacted any statute specifically granting such power to the District of Columbia School Board? In pursuing this inquiry, we are free of entangling juridical concepts which concern themselves with balancing the interests of the states with that of the Federal Government. This case presents a federal matter pure and simple. At the outset, it should be remembered that we are to be guided by the advice of this Court given in *Ex Parte Endo, supra,* namely, that when the Congress of the United States purports to place restraints on its citizens through Congressional enactments the language of those enactments must clearly and unmistakably indicate both the intended extent and scope of such restraints and clearly define the authority granted to the agency which is to administer the Act. See also *Steele* v. *Louisville & Nashville Ry. Co., supra.* Moreover, when as in this case these restraints involve odious distinctions between citizens because of their race, (*Hirabayashi* v. *U. S.,* 320 U. S. 81, 100) we think this Court should demand and require that respondents point out the specific language, *in haec verba,* in which it is asserted that Congress has granted this power of racial segregation. If this Court should do so, it would place no unreasonable burden upon the legislature. As a general rule when legislatures have intended to compel the separation of races in public schools they have done so with simple, easily found, and easily understood words, combining these words into language which none who read could doubt.

An inspection of the constitutions and laws of the states where segregation by law is in vogue demonstrates the proposition that where the law-making body intended a compulsory segregated educational pattern it expressly and clearly said so. As early as 1875 the Constitution of Alabama contained the following phrase: "But separate schools shall be provided for the children of the citizens of African descent." Alabama Const. 1875, Article XII, Section 1. It now provides, in its Constitution of 1901, that "no child of either race shall be permitted to attend a school of the other race." Alabama Const. 1901, Article XIV, Section 256. In Arkansas a statute charges the school directors in each district with the duty to establish separate schools for white and colored persons. Acts 1931, No. 169, Sec. 97, P. 476; Popes Dig. Sec. 11535. Delaware provides, "and separate schools for white and colored children shall be maintained." Delaware Const. 1897, Article X, Section 2. The Florida Constitution of 1885 commands that "White and colored children shall not be taught in the same school." Florida Const. 1885, Art. XII, Sec. 12. As early as 1877, the Constitution of Georgia read, "but separate schools shall be provided for white and colored races." Georgia Const. 1877, Art. VIII, Sec. 1. There has to date been no change in this requirement. Kentucky's Constitution of 1890 says, "Separate schools for white and colored children shall be maintained." Ky. Const. 1890, Sec. 187. That is the law of Kentucky today. Louisiana's Constitution of 1898 provides for "free public schools for the white and colored races separately established." La. Const. 1898, Art. 245. That "separate public schools shall be maintained for the education of white and colored children" is still the dictate of its present Constitution. La. Const. 1921, Art. 12, Sec. 1. The Mississippi Constitution of 1890 declares that "separate schools shall be maintained for children of the white and colored races." Miss. Const. 1890, Sec. 207. "Separate free public schools shall be established for the education of children of African descent."

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Mo. Const. 1875, Laws, 1945 P. 50. North Carolina—"And the children of the white race and the children of the colored race shall be taught in separate public schools." N. C. Const. 1876, Art. IX, Sec. 2. Oklahoma provides: "Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained." (Const. 1907, as amended Stat. 1931, 13676). Constitution Art. XIII, Sec. 3. The statutes of Oklahoma further provide: "The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the colored and white races, with impartial facilities for both races." (Laws 1949, P. 536, Art. 5, Sec. 1) Statutes, Supplement 1949, Art. 5, Title 70, Sec. 5-1).

The 1895 Constitution of South Carolina states, "separate schools shall be provided for children of the white and colored races and no child shall ever be permitted to attend the school provided for children of the other race." S. C. Const. 1895, Art. XIM, Sec. 7. Tennessee's Constitution of 1870 provides: "No school . . . shall allow white and Negro children to be received as scholars together in the same school." Tenn. Const. 1870, Art. XI, Sec. 12. Texas' Constitution of 1876 puts it thusly—"Separate schools shall be provided for white and colored children." Texas Const. 1876, Art. VII, Sec. 7. Virginia's 1902 Constitution says, "white and colored children shall not be taught in the same school." Va. Const. 1902, Art. IX, Sec. 140. Similarly, West Virginia as long ago as 1872, wrote into its Constitution that—"White and colored persons shall not be taught in the same school." W. Va. Const. 1872, Art. XIII, Sec. 8. The only exception to this use of mandatory language in the laws of the group of states where segregation is institutionalized is Maryland. In Maryland the language of the statutes is similar to the language used in the Acts of Congress, *supra*. Maryland laws provide: (a) "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State . . ." An. Code Md. 1939, Art. 77, Sec. 111. (b) "it

shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths between six and twenty-one years of age . . ." An. Code Md. 1939, Art. 77, Sec. 192. In other sections (193, 194, 195), provisions are made for administering "colored schools." Section 203 provides for colored industrial schools; Section 252, for a colored normal school for teachers. The compelling language used by the other southern states is absent. We request this Court to take judicial notice of the fact that under these statutes the Board of School Commissioners by a vote of 5 to 3 authorized the admission of a Negro student the last term to the white Polytechnic Institute of Baltimore, Maryland, without a law suit or legislative action. Admittedly, they did this because no similar provisions were available for Negroes, but likewise it is clear that they did not consider these Maryland laws any bar to their administrative action.

Thus, it appears that in the only one of these states where the laws are similar to those in the District of Columbia the language used there is not interpreted by school officials as compelling segregation.

In the District of Columbia no act of Congress attains the reach of the statutes just enumerated. Among the statutes of the District of Columbia there is none which requires or authorizes the exclusion of any Negro child from any school solely on the basis of race or color.

On April 16, 1862, slavery was abolished in the District of Columbia, 12 Stat. 376, Chapter LIV, Section 1. By virtue of Section 12 of the same act of the "black codes" of Maryland and Virginia were rendered inoperative in the District. Approximately one month later on May 21, 1862, effect was given to the Act of Congress, 12 Stat. 407, Chapter 83, which, *inter alia*, did two things: First, it undertook to give to Negroes at least some measure of participation in such public school educational opportunities as were then extant. And it is of utmost importance to remember that at that time public school education, *qua* public school edu-

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cation, was not universally accepted and was in an undeveloped, rudimentary condition. Secondly, this statute (section 4) struck down any vestiges of the black codes that may have been deemed to have survived the thrust and reach of the Act of April 16, 1862. Again it must be remembered that Congress paused in the midst of its war efforts to give some attention to education for the Negro—not addressing itself to the question of segregation at all, but merely to the problem of some education for the Negro.

Against this backdrop of social and political fabric, and without more, it seems to us to be clear that in this early period Congress not only did not issue respondents a grant of power to compel segregation in the schools of the District of Columbia, but did not even consider the matter. But there is more to be considered.

The Acts of 1862 merely provided that a special tax might be levied upon property "owned by persons of color, for the purpose of initiating a system of schools for colored children." Two years later in 1864 when a comprehensive statute of public schools was enacted which for the first time made attendance at school for District children compulsory it contained no express pronouncement that white and colored children shall not be educated together or that the school managers could compel a Negro child to attend a "Negro school." Congress wrote "it shall be the duty of the school board to provide suitable and convenient houses or rooms for holding schools for colored children." The Act further provided—"Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said portion of the District he or she may think proper to elect, with the consent of the school board; and any colored resident shall have the same rights with respect to colored schools." Patently this language is pitched in terms of privilege and of "may". These are not words of compulsion to attend segregated school facilities. Furthermore, this language of privilege was addressed to choices

of whites for white schools and Negroes for Negro schools and made no reference to choice of Negroes or whites for mixed schools. It is apparent that facing an existing situation of schools being operated by charity and philanthropy Congress desired that Negroes should also benefit from any publicly appropriated funds. A search of the subsequent statutes on public education in the District of Columbia reveals no language, sounding in restraint of the citizenry, which rises above that just quoted, and upon which it appears subsequent statutes are bottomed. Our position bluntly stated is that such language does not in clear and unmistakable terms grant to the school board the power to compel Negro children and white children to be educated separately.

At most they can be said only to permit a voluntary segregation of the Pupils on the Basis of Race.

Asserting as we do that the education statutes do not compel segregation the most that we concede is that they permit a voluntary separation of races. The contemporaneous expressions of members of Congress in the decade beginning with the close of the Civil War add strong support for the assertion here made. This is so, not so much because of what was said by individual Senators and Congressmen for and against "mixed schools", but for the reason that the conflicting opinions on the subject at times apparently slanted in an effort to secure or prevent, as the case might be, passage of legislation designed to guarantee to the newly freed slaves a status commensurate with their new freedom, demonstrated that there was in fact no crystallyzed intent to compel segregated schools. In fact some Congressmen felt Negroes and whites could go to school together in the District. Speaking of the Civil Rights Act of 1875, which he supported, Senator Pratt of Indiana observed that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where they were very few

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colored students, they would have to be intermingled.[1] We think Senator Frelinghuysen's statement should be taken as indicative of the most distant point on the road toward a concept of segregation in schools generally which the Congress as a Congress actually reached. On April 29, 1874, in making a speech to explain the bill denominated S. No. 1 (a Civil Rights Bill) Senator Frelinghuysen said:

> "When in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so . . . I believe that this vountary division into separate schools would often be the solution of the difficulty in communities where there still lingers a prejudice," Cong. Rec., 43rd Congress, 1st Sess. p. 3451.

Again in regard to segregated schools as a generic proposition, it is significant, we think, to note the action of Representative Hereford of West Virginia taken by him on March 11, 1872, and the reaction of the House of Representatives to it. On that day Representative Hereford asked for unanimous consent to submit the following resolution:

> "Whereas it is one of the fundamental principles of our form of government that Governments derive their just powers from the consent of the governed: Therefore,
>
> Be It Resolved, That it would be contrary to the Constitution and a tyrannical usurpation of power for Congress to force mixed schools upon the states, and equally unconstitutional and tyrannical for Congress to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging of right to the states respectively."

Upon objection by Congressman Pierce, Congressman Hereford moved that the rules be suspended and the resolution adopted. His motion was voted down.

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[1] From a speech of Senator Pratt, 2 Cong. Rec. 3432, 43 Cong. 1st Sess.

Turning again to the local scene as historically laid in the formative and fundamental period from 1805 to 1875 we see that the colored children of the District of Columbia were not included among the beneficiaries of public schools in any legislation either by the Congress or the City Council prior to the abolition of slavery in the District of Columbia, April 16, 1862. Wilson, J. Ormond, "Eighty Years of the Public Schools of Washington—1805 to 1885", *Records of the Columbia Historical Society, Vol. 1,* pp. 119-122. The National Government gave nothing for the maintenance of schools in the District until 1878; the support was derived from the people of the District by gifts and taxation and the revenue from lotteries. *Report of the Board of Education to the Commissioner of the District of Columbia,* 1904-1905, p. 56. As to the public education for the benefit of whites it has been said that up to 1844, "The city authorities had not yet come to realize the necessity of a free public school system for all children, and the free schools were in reality charity schools . . . " Dodd, *Government of the District of Columbia* (Byrne & Co. 1909) p. 226. A public school system free to all pupils was not established until 1848, when all tuition requirements were abolished. *Ibid* at p. 226. Annual taxes were first imposed in 1848, *Ibid,* p. 226.

Public education in the District of Columbia was in this embryonic stage of development when slavery was abolished here in 1862.

However since 1807, there had been schools receiving Negro pupils, a number of which schools were mixed. *Special report of the Commissioner of Education on the Conditions and Improvement of Public Schools in the District of Columbia* (GPO: 1871), p. 222; Dabney, pp. 1-22.

Of course, these schools were supported privately. The school legislation of 1862, 1864 and 1868 merely amounted to the giving of some public aid to this then existing system of private education of colored people, *Special Report, supra,* pp. 252-254. Again, we point out, no intent to compel segregation is evident.

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The first public school for colored was not opened until March 1864, and it was opened in a private church. The first publicly owned school house for colored was not acquired until 1865, and was only made possible by private philanthropy, *Special Report, supra,* 254. This no doubt is the genesis of the statutory provision authorizing the school officials to receive donations for colored schools, while nothing is said about donations as to white schools. The various aid societies provided, by and large, the teachers and equipment for the schools, later operated by the Board of Trustees for colored schools.

> "These schools, which began in the Ebenezer church in a single room, with two teachers, in March, 1864, and in the spring of 1865 moved into the first school house built for public schools in the District, were increased by the Aid societies to four schools and as many teachers in 1866, and to five schools with seven teachers of the last named year, the Trustees commenced their school year with 31 teachers, four more being soon added, making for nearly the whole of that year 35 teachers, while through the winter and spring months the number was 41, the Aid societies furnishing at the same time 28, making a total of 69 teachers." Special Report, supra, p. 254.

In addition the management and control of these publicly supported schools, unlike the other public schools placed under the management of the local municipal governing bodies, were placed under the Secretary of the Interior, Act of July 11, 1862, 12 Stat. 537, Chap. 151.

The fact that there was in existence a public school system operated, maintained and controlled by the local municipal government, to which white pupils were admitted while there was this essentially philanthropic arrangement by the federal government for colored pupils, no doubt served as the basis for the general public and private confusion and doubt as to whether Negroes were or were not entitled to be accommodated in the same local public schools to which whites were admitted.

Indeed indecision is the hallmark of this matter and we submit that authority here claimed does not measure up to the test of clear and unmistakable delegation of power of restraint required by *Ex Parte Endo, supra.* Proceeding to a more intimate view of actual conduct, we find that in November of 1869 a Negro pupil, the daughter of the Reverend Mr. Stella Martin, a Negro minister, prominent in the public education movement, was admitted to a "white" school, *Daily Morning Chronicle,* Friday, November 6, 1869. This action admitting the Martin girl to the white school was challenged and a ruling requested from the corporation counsel's office as to the legality of the action. The Office of the corporation counsel sustained the right of this colored child to remain in the "white" school, *Daily Morning Chronicle,* December 1, 1869.[2]

In the latter part of 1869 and in 1870 resolutions were submitted to the Board of Aldermen and to the Board of Common Council of Washington seeking to have the "Board of Trustees of Public Schools" make no distinction on account of "race or color" in the admission of children to the schools under their jurisdiction.[3] And on April 25,

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2 Quoting from Opinion of William E. Cook, Attorney for City of Washington:

"Obviously, the rule makes the judgment of a single trustee, and not the views or avowals of a parent or of any other person, conclusive as to the suitableness of a candidate; and if that judgment correct or erroneous, is favorable to the applicant, a ticket must be granted. It cannot be withheld; and when it is issued the holder, not ex gratia, but dejure, may demand admission to the school designated in it.

Hence, when the child referred to by you was furnished, by "one of your number," with a ticket in the usual form, or in accordance with the cited rule, its qualifications as to a scholar were regularly and definitely determined, and, on presenting the ticket in its possession to the teacher to whom it was addressed, eo instanti, it became entitled to admission into "her school." The teacher could not reject or repel the child, or refuse to receive and consider it as a scholar. And neither the laws of Congress, nor the ordinances of the city, nor the "by-laws" of the Board of Trustees authorize or permit it to be classified as a "visitor", or to be temporarily suspended, or to be deprived in these modes of the rights and privileges conferred on it by the ticket of admission. Unless, therefore, the child is expelled from the school for a violation of existing rules or regulations, or removed from it by paramount legal authority, if any exists, it must be allowed to remain as a pupil and in all respects be regarded and treated as such."

3 Resolution of Mr. Moore, a member of the Board of Alderman, Journal of the 67th Council pp. 828-829. Resolution of Mr. Hatton, Member of the Board of Common Council, March 14, 1870.

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1870, a joint resolution of the Board of Common Council of Washington, unanimously passed, memorialized Congress to reorganize the public schools in the District of Columbia and to give the District "one common school system in which all children can be educated regardless of their color, to be governed by one Board of Trustees."[4] The Board of Common Council was likewise memorialized to strike the word "white" wherever it occurred in the Act of November 12, 1858, or in any other laws relating to the public schools of the City of Washington (Journal of the 67th Council pp. 1474-1475).[5]

We submit that this contemporaneous construction of the powers of the school managers in terms of actual conduct and the efforts made to have a clear cut Congressional pronouncement of a common education system are of extreme significance in deciding whether or not integrated schools were interdicted by Congress. It is submitted that this doubt still exists today for the reason that Congress has taken no specific action since that time to resolve the existing doubt, inherent in the language of these Acts and embedded in this historical background.

Finally when it is considered that it is the Congress of the United States whose intentions we are considering—a Congress which has since 1860 (omitting the educational statutes)[6] enacted no law conditioning the enjoyment of a right in the District of Columbia solely on the basis of race or color, but on the contrary has in every law since that date acted in aid of removal of such racial distinctions in the realm of governmental action in the District of Columbia, it would appear to be an irresistible conclusion

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[4] Piper resolution, Board of Common Council of Washington, April 25, 1870. (Mr. Hatton's amendment to this resolution was rejected; it provided that the children of African descent be removed from the public schools until Congress shall have complied with the resolution.)

[5] Negro member of the Board of Trustees of the Public Schools, Vashon resolution, Journal of the 67th Council, p. 1488.

[6] But see National Training School for Girls Act, Act of February 28, 1923, 42 Stat. 1358, Ch. 148, Sect. 1, March 16, 1926, 44 Stat. 208, Ch. 58, D. C. Code 1951 Ed. Title 32, Sect. 906.

that Congress did not intend in this one area of education alone to compel racial distinctions.

C.

An Interpretation by This Court That These Acts of Congress Compel the Segregation of Pupils in the District of Columbia Solely on the Basis of Race or Color Alone Would Render Them Unconstitutional (Answer to Question 3 of the Court).

1.

SUCH AN INTERPRETATION WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

a.

This Is a Case of First Impression in This Court.

The question which the instant case raises, whether the Federal Government in providing educational opportunities for pupils in the District of Columbia has power under the Constitution and laws of the United States to segregate pupils solely by the basis of race or color, has never been presented to this Court before. The United States Court of Appeals for the District of Columbia Circuit had this question presented to it in only one other case, *Carr v. Corning, supra,* and that court there decided that these Acts of Congress, *supra,* compelled segregation in the District of Columbia and that compulsory separation of races in public education was constitutional. The court below relied upon the holding in the *Carr* case in dismissing petitioners' complaint.

The United States Court of Appeals for the District of Columbia Circuit has had before it only three cases dealing with the question of race distinctions in the provisions for opportunities for public education in the District of Columbia. The first case was *Wall* v. *Oyster,* 36 App. D. C. 50 (1910). In that case, petitioner, a resident of the District of Columbia of school age, questioned her classification as

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a Negro for purposes of assignment to a particular school. The court, in deciding that question, stated that compulsory segregation of the races was constitutional in the District of Columbia. Petitioner having conceded that point, and having based her case upon a lack of standards for the determination of race, and upon a failure to provide a hearing upon this determination, the issue before the court was whether or not proper standards had been set and a proper hearing provided for. There was no issue before the court as to whether or not the government possesed the power to make the classification. Therefore, that decision is of little value in determining the question posed in the instant case and was not relied upon by the Court of Appeals in the *Carr* case for this purpose.

The Court of Appeals for the District of Columbia Circuit first faced the question of the power of the Federal Government to segregate Negroes from whites in providing opportunities for public education in the District of Columbia in *Carr* v. *Corning*, and *Browne* v. *Magdeburger*, *supra*.

The court consolidated for argument and decision these two cases. The *Browne* complaint did not present the question of the constitutionality of the separation of the races in public education; however, the *Carr* complaint did. The Court of Appeals held, at page 175:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did."

The court concluded on this point that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 did not mean to prohibit the legislature from providing separate schools. The court examined the chronology of statutes relating to the separate school sys-

tem in the District of Columbia and concluded that the framers of the Fourteenth Amendment intended to provide separate school facilities for the races in the District of Columbia.

Petitioners have already shown why they do not agree with the opinion of the court below that these Acts of Congress, *supra,* compel segregation. But, even if petitioners are wrong and, these Acts of Congress do compel segregation, these Acts are unconstitutional and the *Carr* case was wrongly decided. The majority failed to meet and deal with the fundamental question raised by Judge Edgerton's dissent. It is submitted that before any reliance can be placed upon the conclusion reached by the majority in the *Carr* case the following argument of Judge Edgerton at page 192 must first be answered—

> "Appellees say that Congress requires them to maintain segregation. The President's Committee concluded that congressional legislation 'assumes the fact of segregation but nowhere makes it mandatory'. I think the question irrelevant, since legislation cannot affect appellant's constitutional rights."

The Court of Appeals was so preoccupied in the *Carr* case with the history and background of the Fourteenth Amendment, and with the legal theories underlying the separate but equal doctrine, and was so convinced by the record in which the lower court had found evidence showing equality of facilities, that its opinion that the action of the School Board was constitutional is of doubtful value in the instant case. Here the sole question is as to the constitutional power of the school officials to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. Here there is no question of equality of facilities. This view is supported by the opinion of the Court of Appeals, especially where it is observed that Judge Clark concurred in the majority opinion although he considered the cases moot and to have been properly dismissed, since the factual basis for the actions

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was the double shift at Browne Junior High School at the time the actions were brought, and since the double shift had been eliminated prior to the action.

Therefore, whichever interpretation is placed upon these Acts of Congress, respondents are still limited in their power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color by the Constitution and laws of the United States, which limitations should be determined by this Court.

b.

Respondents' Actions in Regulating and Administering the Educational System of the District of Columbia Pursuant to and Under Color of Congressional Authority Are Limited by the Provisions of the Due Process Clause of the Fifth Amendment.

Article I, Section 8, Clause 17, of the Constitution of the United States grants to Congress the power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. Pursuant to this power, Congress by legislation has provided a system of education for the District of Columbia and acting pursuant to and under color of this legislation respondents regulate and administer said system of education. Congressional legislation providing the system of education and the acts of respondents in regulating and administering the educational system of the District of Columbia, beyond question, are subject to the limitations of the due process clause of the Fifth Amendment. In *Capital Traction Company* v. *Hof*, 174 U. S. 1, 5 (1899) this Court observed:

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of

a State might exercise within the State; . . . so long as it does not contravene any provision of the Constitution of the United States."

In *Callen* v. *Wilson*, 127 U. S. 540, 550 (1888), this Court observed:

". . . There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property . . ."

One of the constitutional guarantees, the benefit of which petitioners may not lawfully be deprived, is that as citizens no distinctions be made between them and other citizens because of race or color alone.

This Court, in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, (1943) said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection . . ."

In that same case, in a concurring opinion where this Court upheld the deprivation of the liberty of 70,000 Japanese under a war-time curfew law, Mr. Justice Murphy said at page 111:

". . . The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

"Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action

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> to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments . . ."

Another constitutional guarantee, of which minor petitioners may not lawfully be deprived, is the right to go to Sousa Junior High School without any limitations based solely upon race or color.

Mr. Justice Murphy, in a concurring opinion in *Ex Parte Endo*, 323 U. S. 283, 308 (1944), said:

> ". . . For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction."

In the instant case minor petitioners would have a right to go to Sousa Junior High School but for respondents' action in excluding them solely because of their race or color, an action forbidden by the due process clause of the Fifth Amendment.

Final determination of what constitutes due process of law is for the judiciary, not Congress. *Baltimore & Ohio R. R. Co.* v. *U. S.* 298 U. S. 349, 364, 5, 7 (1938).

c.

Fundamental Rights With Respect to Education Are Protected by the Fifth Amendment Against Arbitrary Governmental Restrictions.

The right of a parent to direct the education of his child is a fundamental right firmly embedded in American jurisprudence. This Court has recognized that this right includes liberty of choice of parents and their children in the selection of the type of education which *parents* and *their children* think important. *Farrington* v. *Tokushige*, 273 U. S. 284 (1926); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1924); *Meyer* v. *Nebraska*, 262 U. S. 390 (1922).

This Court, in the cases above cited, has affirmed that educational rights of parents and their children, including their liberty of choice, are protected by the Federal Constitution from arbitrary governmental restrictions.

This Court held in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400 (1923), that:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge,* to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (Emphasis supplied)

Again in *Meyer* v. *Nebraska, supra,* at page 400, this Court stated:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, . . . enforce this obligation by compulsory laws."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-5 (1925), this Court held:

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> "Under the doctrine of Meyer v. Nebraska . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Meyer v. *Nebraska* and *Pierce* v. *Society of Sisters* involved the protection given to educational rights by the Fourteenth Amendment against unreasonable or arbitrary State restrictions. It is clear, however, that these rights are similarly protected by the Fifth Amendment from unreasonable or arbitrary Federal restrictions.

In *Farrington* v. *Tokushige*, 273 U. S. 284, 298, 299 (1927), this Court said:

> "Enforcement of the Act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue. . . . "The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents, and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, . . . Bartels v. Iowa, . . . Pierce v. Society of Sisters . . . While that amendment declares that no State shall 'deprive any person of life, liberty, or property, without due process of law,' the inhibition of the Fifth Amend-

ment—'no person shall . . . be deprived of life, liberty, or property, without due process of law'—applies to the federal government and agencies set up by Congress . . . Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Courts have indicated a respect for opinion of legal scholars and teachers: See: *Georgetown College* v. *Hughes*, 130 F. (2d) 810 (1942). With this in mind, petitioners call attention of the Court to the brief of the Committee of law professors, at pages 36-38, filed as Brief, Amicus Curiae in the Supreme Court of the United States, *Sweatt* v. *Painter, et al.*, No. 44, October Term, 1949, from which we quote in part:

"(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation. While there are many instruments of transmission of culture—the family, the church, business, institutions, political and social groups and the schools—in our society the school seems to have emerged as the most important . . .

"(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer lies not, however, in simply indoctrinating them with the principle of racial equality. . . . 'Education in America must be education for democracy. If education is life and growth, then it must be life within a social group. . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience.'

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"(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed, so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life. In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent."

Educational rights are not immune from all governmental interference, but it is submitted that the educational rights asserted by Petitioners have been judicially determined to be fundamental rights. As such, every governmental interference with, or restriction upon them, when properly challenged as arbitrary, must affirmatively be shown to be reasonable, otherwise they violate the due process clause of the Fifth Amendment. The relevant decisions of this Court demonstrate that when governmental interference with fundamental educational rights and liberties are challenged as arbitrary, the burden is cast upon the government imposing the restrictions to demonstrate the reasonableness of the restrictions.

Farrington v. *Tokushige, supra,* involved an Act of the legislature of Hawaii which was challenged as violative of the due process clause of the Fifth Amendment. The Act imposed severe limitations on the operation of so-called "foreign language schools" in Hawaii, and in this Court's

judgment, denied to parents "reasonable choice and discretion in respect of teachers, curriculum and textbooks", and deprived "parents of fair opportunity to procure for their children instruction which they think important." This Court did not hold that private-supported schools are not subject to government regulation, but it did hold that regulations restricting educational rights and liberties of parents and pupils must be justified as reasonable. The challenged regulation was held to violate the due process clause of the Fifth Amendment, because it restricted liberty of choice with respect to education without adequate reason. The government's contention that the regulations were "necessary for the public welfare" was not an adequate reason.

In *Farrington* v. *Tokushige, supra,* this Court made express reference to "the general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendanc upon schools" as announced in *Meyer* v. *Nebraska, supra,* and *Pierce* v. *Society of Sisters, supra,* and expressly held that this general doctrine is to be applied to educational rights protected by the Fifth Amendment, against arbitrary federal action.

This general doctrine touching educational rights protected by the due process clauses of the Fifth, and also the Fourteenth Amendments, is revealed by an examination of this Court's unanimous opinions in the cases relied upon.

The cornerstone of this doctrine is revealed to be the fundamental and, therefore, constitutionally protected right and duty of parents to direct and control the upbringing and education of their children. This right includes not only the right of pupils to "acquire useful knowledge". (*Meyer* v. *Nebraska, supra,* at page 399) but the parents' liberty of choice as to the type of school, selection of courses, and teachers. (*Meyer* v. *Nebraska, supra,* at pages 400-401; *Pierce* v. *Society of Sisters, supra,* at page 535; *Farrington* v. *Tokushige, supra,* at page 298).

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The doctrine protects the rights thus described and defined, including liberty of choice, against *all* arbitrary governmental restrictions. (*Meyer* v. *Nebraska, supra,* at page 401; *Pierce* v. *Society of Sisters, supra,* at page 535). These educational rights are protected against arbitrary restrictions imposed "under the guise of protecting the public interest." (*Meyer* v. *Nebraska, supra,* at page 400).

The doctrine recognizes that whenever a governmental restriction is properly challenged as arbitrary, "determination by the legislature as to what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts." (*Meyer* v. *Nebraska, supra,* at page 400); and the burden is cast upon the government imposing the restriction, to demonstrate that there is "adequate reason" for the challenged restriction (*Farrington* v. *Tokushige, supra,* at page 298; *Pierce* v. *Society of Sisters, supra,* at page 534; *Meyer* v. *Nebraska, supra,* at page 402). Moreover, the challenged restriction must be shown to be reasonably related to a purpose within the competency of the government. (*Meyer* v. *Nebraska, supra,* at page 403; *Pierce* v. *Society of Sisters, supra,* at page 535).

Governmental action restricting educational rights and liberties by prescribed courses of instruction, to be justified, must be shown to be reasonably related to the promotion of the intelligence of the body politic. In *Meyer* v. *Nebraska, supra,* this Court held that a statute prohibiting the teaching of "any language other than the English Language" to pupils below the eighth grade, unreasonably restricted educational liberties protected by due process. The statute was not justified, because its purpose was to *prevent* the acquisition of knowledge of foreign language rather than to *promote* intelligence—thus an unauthorized purpose. In addition, this Court held that the restriction was "without reasonable relation to *any* end within the competency of the State." (Emphasis supplied).

It is generally agreed that the promotion of the general intelligence of the body politic is so essential to the de-

velopment and progress and even the very existence of democratic government, that education is a proper governmental function. To that end the states and the federal government have established and maintain systems of public education. In addition, the Federal Government and the states may make the education of children compulsory. Such a limitation on the fundamental educational right to liberty of choice must be justified, and is justified by showing that it is within the competency of the Government to require a parent to perform the duty he owes to his child and to his government, to educate his child.

However, compulsory attendance laws may not arbitrarily restrict liberty of choice as to schools. In *Pierce* v. *Society of Sisters, supra,* this Court held violative of due process a statute which compelled every child, for a prescribed period, to attend the public schools exclusively. This Court concluded that the purpose of the challenged statute was the standardization of children "by forcing them to accept instruction from public teachers only". Such a purpose was held to be excluded by the "fundamental theory of liberty upon which all governments in this Union repose". This Court again pointed out that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

In *Board of Education* v. *Barnette,* 319 U. S. 624 (1943) this Court enjoined the enforcement of a state law compelling patriotic observance on the part of public school pupils. In that case a majority of this Court held that the purpose of this restriction on educational rights, was to compel the flag salute and pledge of allegiance, and that such a purpose was beyond the competency of Government. The *Barnette* decision overruled the earlier decision of this Court in *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940) which held, among other things, that "promotion of national cohesion" was a lawful governmental purpose and that compelling public school pupils to salute the flag was reasonably related to this lawful purpose.

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In *Zucht* v. *King*, 260 U. S. 174 (1922), a city ordinance making vaccination a prerequisite to school attendance was challenged as violative of due process. This Court upheld the ordinance; such a restriction on educational rights is justified both because the preservation of public health is recognized as an "adequate reason", and because making vaccination a prerequisite to school attendance is reasonably related to the preservation of public health.[6a]

d.

Governmental Restrictions Based on Race or Color Alone, Are Presumptively Arbitrary.

This Court said, speaking through Mr. Justice Black in *Korematsu* v. *U. S.*, 323 U. S. 214, 216, (1944)—

> "*It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.* That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. *Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.*" (Emphasis supplied.)

That "pressing public necessity" must be more than the possibility of racial conflicts resulting from racial antagonism alone, is made clear in this Court's opinion in *Ex Parte Endo, supra,* at pages 302-303 wherein this Court points out that no authority existed for the detention of an admittedly loyal citizen of Japanese ancestry simply because of "community hostility." This court said:

> "Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is

[6a] School regulations relating to scholarship and fitness of applicants, residence, age, sex, textbooks and courses of study, transportation, membership in fraternities and sororities, may restrict educational rights. Where such regulations are reasonably related to a recognized educational purpose or some purpose within the competency of the government responsible for such regulations, they have been upheld by the courts.

> to be sought on that ground, the Act . . . and Executive Order offer no support. And none other is advanced."

In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), this Court invalidated a city ordinance requiring residential segregation. To the contention that the ordinance was for the promotion of public peace by preventing race conflicts; the Court said:

> "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 245 U. S. 60, 81.

In *Hirabayashi* v. *United States, supra, Korematsu* v. *United States, supra,* and *Ex Parte Endo, supra,* this Court has evolved certain definite standards by which government enforced racial distinctions between citizens must be tested when properly challenged as violative of the due process clause of the Fifth Amendment. These standards are in accord with the earlier decisions of this Court in *Meyer* v. *Nebraska, supra, Pierce* v. *Society of Sisters, supra,* and *Farrington* v. *Tôkushige, supra,* in which restrictions on educational rights were struck down as arbitrary and therefore violative of due process.

1. *The restrictions must be justified by an affirmative showing of peculiar circumstances, present emergency, or pressing public necessity.*

(a) In *Meyer* v. *Nebraska, supra,* this Court invalidated a Nebraska statute restricting the teaching of foreign languages, as infringing educational rights protected by the due process clause of the Fourteenth Amendment. At page 402 the Court said:

> "The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

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(b) In *Farrington* v. *Tokushige, supra,* this Court invalidated an Act of the Legislature of Hawaii restricting the operation of foreign language schools, as infringing educational rights protected by the due process clause of the Fifth Amendment. At page 298, this Court said:

> "Apparently all are parts of a deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason."

In *Hirabayashi* v. *U. S., supra,* this Court upheld a military order confining Japanese-Americans to their homes at night as not infringing on the liberty of persons protected by the due process clause of the Fifth Amendment. At page 101, this Court said:

> "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."

Again at page 108, Mr. Justice Douglas concurring said:

> "Detention for a reasonable cause is one thing. Detention on account of ancestry is another."

(d) In *Korematsu* v. *U. S., supra,* this Court upheld a military order excluding Japanese-Americans from a military area as not infringing on the liberty protected by the due process clause of the Fifth Amendment.

Again at page 218, this Court said:

> "True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 P. M. to 6 A. M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."

In the instant case, no reason is given in justification of the restriction on the educational rights of petitioners.

The only apparent reason is the race or color of petitioners, a reason sternly interdicted by this Court.

2. *The restrictions must be for a purpose which government has authority to effect.*

(a) In *Pierce* v. *Society of Sisters, supra,* this Court invalidated a state statute the purpose of which was "to compel general attendance at public schools by normal children, between eight and sixteen." (page 531) In concluding that the State had no authority to effect this purpose, this Court said at page 535:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

In the instant case the apparent purpose of the action of respondents complained of, is, as to public education in the District of Columbia, to compel Negroes to attend only schools attended by Negroes and to accept instruction by Negro teachers only. It is submitted that the Federal Government has no authority to effect such a purpose.

3. *The restrictions must be clearly authorized and if implied authority is relied upon it must appear that the restriction is clearly and unmistakably indicated by the language used in granting the authority.*

(b) In *Ex Parte Endo, supra,* this Court invalidated the detention in a Relocation Center of a loyal Japanese-American because no authority to detain was expressly granted or necessarily implied. At page 297 this Court said:

> "We are of the view that Mitsye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to de-

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tain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure."

At page 300, it is said:

"We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

Again at page 300 this Court said:

"Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed."

And at page 300, 301, this Court points out

"Neither the Act nor the orders use the language of detention . . . and at page 301, 302 we do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purpose of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."

In the instant case it is clear therefore that the respondents have no express authority to exclude minor petitioners from Sousa Junior High School solely because of

their race or color. No language of exclusion is found in any Congressional Acts relating to public education in the District of Columbia. It is to be assumed that these Acts were passed for educational purposes and objectives. *It is submitted that no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race or color and the exclusion of minor petitioners from Sousa Junior High School by respondents solely because of race or color.* On the contrary, there is abundant authority for the proposition that governmentally enforced racial segregation is in conflict with educational purposes and objectives in our democratic society.

4. *The restrictions must have a reasonable relation to an authorized purpose within the competency of the government to effect.*

In *Hirabayashi* v. *U. S., supra,* Mr. Justice Douglas said in his concurring opinion at page 106:

> "Where the orders under the present Act have some relation to 'protection against espionage and against sabotage' our task is at an end."

In *Korematsu* v. *U. S., supra,* this Court said at page 218:

> "But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."

In the instant case, the exclusion of minor petitioners from Sousa Junior High School solely because of race or color has no reasonable relation to any educational purpose suggested by respondents, for they have suggested no purpose. It is submitted that no purpose, within the competency of the government to effect can be advanced in this case.

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e.

The Action of Respondents, Challenged by Petitioners, Arbitrarily Restricts Educational Rights of Petitioners in Violation of the Fifth Amendment.

Briefly stated, the action of respondents, in refusing to admit minor petitioners to Sousa Junior High School solely because of the race and color of petitioners, is a restriction on the educational rights of minor petitioners to acquire the type of education they desire and which is offered by the government for the District of Columbia. Moreover, the actions of respondents complained of restricts the liberty of choice of petitioners who are parents of minor petitioners in their selection of the type of education and teachers offered by the government of the District of Columbia. The existence of compulsory school laws with criminal sanctions enforceable by respondents serves to emphasize the reality of the restrictions.

The purpose of the challenged restrictions is plain. It is to compel petitioners who desire to avail themselves of the public education offered by the government of the District of Columbia, to receive such education with members of their race only, and only from teachers who are members of their race.

It is respectfully submitted that this attempt by the respondents to classify citizens on the basis of race alone, for the purposes of public education in the District of Columbia, is an arbitrary restriction on constitutionally protected educational rights; and that such restrictions violate the due process clause of the Fifth Amendment under the general doctrine enunciated by this Court touching rights guaranteed by the due process clause to parents and children in respect of attendance upon schools.

At the threshold, there is serious question as to whether the challenged restrictions are authorized.

Should this Court decide that the challenged restrictions are authorized, the limitations to such a holding enunciated by this Court require a showing that there is "adequate reason" for the challenged restrictions.

This Court has never yet recognized *any* reason as adequate to validate *any* purely racial restrictions on fundamental educational rights protected by the due process clause of the Fifth Amendment. Moreover, this Court has decried the use of race alone as the basis for classifying citizens for any purpose, and has held racial classifications valid under the Fifth Amendment only where the War Power of the Federal Government was invoked and there was a reasonable relation between the racial classification and the temporary purpose of protecting the nation against the iminent threat of sabotage and espionage. *Hirabayashi* v. *United States, supra; Korematsu* v. *United States, supra.*

Moreover, where the temporary threat to national security was found not to exist, the racial restriction was held violative of due process. *Ex parte Endo, supra.*

f.

Petitioners Sustain Injury as the Direct Result of the Action of Respondents in Excluding Minor Petitioners from Sousa Junior High School Solely Because of Race or Color.

The exclusion of minor petitioners from admission to Sousa Junior High School, solely because of race or color is a deprivation of *petitioners' constitutional rights to acquire useful knowledge, to choose a particular public school, and to enjoy public educational opportunities without government enforced limitations or restrictions based solely on race or color.* That injury continues and is not removed or even lessened by reason of the fact that minor petitioners "do now attend a junior high school in said District", allocated by respondents for the instruction of Negro children. Beyond question the deprivation of a constitutional right is injurious per se. See *Cummings* v. *Missouri,* 4

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Wall. 277, 320 (1866), where this Court observed that "liberty" includes "freedom from outrage on feelings as well as restraints on the person."

All of the injury shown by petitioners under the succeeding Point 2 of this brief, in reference to a Bill of Attainder supports the contentions here made. Any deprivation of a freedom of choice solely on the basis of race or color is violative of petitioners' civil rights and thus injurious. To be compelled to attend school because of the compulsory school law, D. C. Code 1951 Ed., Title 31, Secs. 201, 207, and then to be compelled to accept segregation on the basis of race or color and to have one's feelings outraged is injurious per se. The deprivation of a civil right is an injury. *Giles* v. *Harris*, 189 U. S. 475, 485 (1903).

2.

Such An Interpretation Would Render These Acts Bills of Attainder.

Article I, Section 9, Clause 3 of the Constitution of the United States provides that—"No Bill of Attainder or ex post facto law shall be passed.[7]

The Board of Education of the District of Columbia took the position, which was confirmed in the *Carr* case, *supra*, and was relied upon by the Court in the case below, that the statutes enacted by Congress governing public schools in the District of Columbia compelled it to segregate Negroes from whites in the school system.

It is clear that, if respondents and the Court of Appeals in the *Carr* case are right in their interpretation then these statutes are Bills of Attainder, for they compel the exclusion of minor petitioners from Sousa Junior High School solely on account of their race or color, and they are in violation of Article 1, Section 9, Clause 3 of the Constitution of the United States, for:

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[7] For historical background of bills of attainder in America and in England see Notes, 46 Col. L. Rev. 849, Notes, 21 Tulane L. Rev. 278, 2 Story, Commentaries on the Constitution of the United States (5th Ed. 1891) 216, Adams, Constitutional History of England (1935) 228, Holdsworth, History of English Law (4th Ed. 1927) 381.

a. They are legislative or congressional statues.

b. They are directed at named or easily ascertainable persons—namely, Negroes.

c. They inflict punishment on these persons. This punishment is arbitrary.

d. They inflict punishment without a judicial trial.

e. They convict Negroes of the "crime" of being inferior by reason of birth, color and blood, or of being descendents of slaves.

a-b.

These Are Acts of Congress and These Petitioners Are Easily Ascertainable Members of a Group.

It is obvious that these are Acts of Congress, and *United States* v. *Lovett,* 328 U. S. 303, 315-316 (1946), held "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." Negro children certainly constitute an easily ascertainable group, especially since, under the rule of *Wall* v. *Oyster, supra,* the Board is empowered to determine race for itself, and may force pupils and their parents to accept that determination. Just as in the *Lovett* case, *supra,* the present case involves punishment without judicial trial, and determined by no previous law or fixed rule. A judicial trial would at least provide safeguards against arbitrary action which is inherent—if not implicit—in an administrative condemnation such as the Board of Education's segregation rule. *United States* v. *Lovett, supra.* According to this Court in *Oyama* v. *California,* 332 U. S. 633, 646 (1948), only exceptional circumstances can excuse racial discrimination by law, and such distinctions must be justified by the agency practicing the discrimination. This has never been done with respect to segregation in the public schools of the District of Columbia.

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There can be no doubt that segregation in our public schools is aimed at Negroes. Cf. *Railroad Co.* v. *Brown*, 17 Wall. 445, 452-453 (1873).

In *Cummings* v. *Missouri*, *supra*, at page 327, the Supreme Court declared: "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms define any crimes or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared." This passage surely fits the position in which appellants are placed by appellees. What legislatures may not accomplish directly, they may not effect by indirection. *Ex Parte Garland*, 4 Wall, 333, 380 (1866); *United States* v. *Lovett*, *supra*. Neither may they act so as to secure by implication that which would be invalid if expressly provided. *Oyama* v. *California*, *supra*.

It is the function of the courts to protect citizens against discriminatory acts such as those presented in this case. Where else can one turn in the face of the disgrace and ignominy heaped upon petitioners by respondents? To paraphrase this Court in *United States* v. *Lovett*, *supra*, what is involved here is a proscription by the Board of Education of more than 50,000 Negro chilren, prohibiting their ever attending a school simultaneously occupied by white children. Were this case held not to be justiciable, Board action, aimed at a large, readily recognizable class, which stigmatized their ancestry and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result.

c.

These Acts of Congress Inflict Punishment on Petitioners.

(1). *Segregation is Punishment.*

That segregation constitutes punishment is the conclusion reached by recognized authorities in the field of so-

ciology, politics, psychology and law, from a consideration of the studies of segregation and its effects.

Gunnar Myrdal, who made a detailed and authoritative study of the entire problem posed by treatment of the Negro minority in the United States, pointed out that what was merely segregation forty years ago is becoming a caste system today. He continued: "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups." (1 Mydral, *An American Dilemma,* 645 (1944).

The process of development from segregation to caste system is described in Mac Iver, *The More Perfect Union,* 67-68 (1948):

> "Now let us consider more closely the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group but to a considerable extent, in the lower group as well. A total *upper caste complex* congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."

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The effects of segregation upon the group segregated have recently been summarized in a note in 56 Yale L.J. 1059, 1061-2 (1947):

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy and discourage racial self-appreciation."

On the other side of the picture, "jim crow" laws, which govern important segments of everday living, not only indoctrinate both white and colored races with the caste conception, but they solidify the segregation existing outside those laws and give it respectability and institutional fixity. (Myrdal, *An American Dilemma*, pp. 579-580). See also Berger, *The Supreme Court and Group Discrimination Since 1937*, 49 Col. L. Rev. 201, 204-205. As the Supreme Court in California has pointedly said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension." (*Perez* v. *Lippold*, 32 Calif. (2d) 711, 725, 198 P. (2d) 17, 25 (1948).) In fields which "jim crow" laws do not cover there has been "a slow trend toward a breakdown of segregation"; within the fields of their operation the laws "keep the pattern rigid." (1 Myrdal, *An American Dilemma*, p. 635).

Professional opinion is almost unanimous that segregation has detrimental psychological effects on those segre-

gated. A questionnaire addressed to 849 representative social scientists was answered by 61% of those to whom it was sent (Deutscher & Chein, *The Psychological Effect of Enforced Segregation: A Survey of Social Science Opinion*, 26 Journal of Psychology, 259, 261, 262 (1948)). Of those replying, 90.4% believed that enforced segregation has "detrimental psychological effects" on those segregated if "equal facilities" are provided; 2.3% expressed the opposite opinion, and 7.4% did not answer the question or expressed no opinion (Id., 261, 266). Those who elaborated their position with comments (55% of those replying) stressed that segregation induced feelings of inferiority, insecurity, frustration, and persecution, and that it developed, on the one hand, submissiveness, martyrdom, withdrawal tendencies, and fantasy, and on the other hand, aggression (Id., 272, 277).

The resentment and hostility provoked by segregation find various means of psychological "accommodation", various forms of release (Prudhomme, *The Problem of Suicide in the American Negro*, 25 Psychoanalytic Review, 187, 200). Mediocrity is accepted as a standard because of the absence of adequate social rewards or acceptance (Dollard, *Caste and Color in a Southern Town*, 424 (1937)). (McLean, *Group Tension*, 2 Journal of American Medical Women's Association, 479, 482). Energy and emotion which might be constructively used are lost in the process of adjustment to the "jim crow" concept of the Negro's characteristics and his inferior status in society (Cooper, *The Frustrations of Being a Member of a Minority Group: What Does It Do To The Individual and to His Relationship with Other People?*, 29 Mental Hygiene, 189, 190, 191 (1945)).[8] Psychosomatic disease is induced by the tensions engendered by segregation and other forms of racial discrimination. (McLean, *Psychodynamic Factors in Racial Relations*, 244 The Annals of the American Academy of Political and Social Science (March, 1946), 159, 161).

[8] For a general discussion of the effects of the caste system, which segregation supports and exemplifies, on Negro personality and behavior, see Myrdal, An American Dilemma, vol. II, pp. 757, 767.

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It is further submitted that any suggestion that no punishment is inflicted ignores the basic realities of the situation. The whole theory upon which a segregated school system is maintained is that the dominant class regards the subject group so far inferior as to require quarantining the latter during school hours, to avoid contamination or pollution of the children of the dominant group. Realization of this motive, when it first comes to a child of the segregated class, cannot help but cause mental anguish (i.e., constitutes injury) and repeated reminders of the implications of segregation keep one's awareness of the badge of inferiority fresh during the remainder of one's life.

According to the Brief *Amicus Curiae* of the Committee of Law Teachers against Segregation in Legal Education before the Supreme Court of the United States in *Sweatt* v. *Painter, supra*, at p. 33, "The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society."

In addition to the conclusions by experts in the field that segregation is punishment, this Court has characterized similar results of State and Federal statutes as punishment. The rights protected by due process of law include life, liberty and property. Any statute directed at a named individual or an easily recognizable class, which seeks to punish by deprivation or suspension of any of these rights without a judicial trial is a bill of attainder. *Cummings* v. *Missouri, supra.* This Court, in the *Cummings* case, said at pages 321-322: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all

are equal before the law. Any deprivation or suspension of these rights for past conduct is punishment, and can be in no otherwise defined." The acquisition of knowledge is one of the protected rights. *Meyer* v. *Nebraska, supra. The permanent prohibition against attendance in non-segregated schools is as much punishment as one which perpetually restrains one from serving the Government. United States* v. *Lovett, supra.*

Any contention that no injury is inflicted should be considered not only from the point of view of the contentions advanced in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), and in *Henderson* v. *United States,* 339 U. S. 816 (1950), but in the light of *Oyama* v. *California, supra,* at page 646;

> "There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land . . ."

Adult petitioners are certainly subject to punishment if they attempt to enforce the right of their children to sit in school with white children, either by withholding[9] their children from attendance at a segregated colored school, or by an attempt to place them at a segregated white school. *Petitioners and all other persons who are under the interdiction of the statutes as interpreted by the Board*[10] *are*

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[9] For full text of compulsory statute see Appendix B, D. C. Code 1951 Ed., Title 31, Sec. 201, 207.

[10] "Without any doubt there is also in the white man's concept of Negro 'race' an irrational element which cannot be grasped in terms of either biological or cultural differences. It is like the concept 'unclean' in primitive religion. It is invoked by the metaphor 'blood' when describing ancestry. The ordinary man means something particular but beyond secular and rational understanding when he refers to 'blood'. The one who has got the smallest drop of 'Negro blood' is as one who is smitten by a hideous disease. It does not help if he is good and honest, educated and intelligent, a good worker, an excellent citizen and an agreeable fellow. Inside him are hidden some unknown and dangerous potentialities, something which will sooner or later crop up." 1 Mydral, 100.

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attainted by reason of their birth, blood and pigmentation, and there is no way in which they can overcome the obstacles placed in their way by respondents.

(2). *This Punishment is Arbitrarily Imposed.*

We submit that it may properly be held that punishment is arbitrarily imposed where an act forbidden bears no relation to the object allegedly sought to be achieved. And it is certainly true in this case that discriminating against minor petitioners because of their birth, color and blood and the previous servitude of their grandparents or great-grandparents bears no relation whatsoever to their educability in a public school together with white children.

This argument is supported by the following quotation in Petition and Brief in Support of Petition for Writ of Certiorari in the Supreme Court of the United States in *Sweatt* v. *Painter, supra:*

> "Dr. Robert Redfield, Chairman of the Department of Anthropology at the University of Chicago, testified, as an expert, that there is no recognizable difference as to capacities between students of different races and that scientific studies had concluded that differences in intellectual capacity or ability to learn have not been shown to exist between Negroes and other students. He testified that as a result of his training and study in his specialized field for some twenty years, it was his opinion that given a similar learning situation with a similar degree of preparation, one student would do as well as the other, on the average, without regard to race or color."

In regard to the question of a relationship between the act punished and the objective of the punishment, the Supreme Court had this to say at pages 319-320 in *Cummings* v. *Missouri, supra:*

> ". . . There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military serv-

ice of the United States and his fitness to teach the doctrines or administer the sacraments of his church, nor can a fact of this kind or the expression of words of smypathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or *not* for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

"The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him any thing less than these is no punishment at all.' The *learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraint on the person.* He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.* Disqualification from office

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> may be punishment as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." (Italics supplied.)

As we have already stated, in the present case there is absolutely no relation between color and educability. Therefore, when the respondents maintain separate schools for colored and white children, they seek to insult and degrade the former, not to educate. And, since it is thus a crime to be colored, Negro children are being arbitrarily punished by being singled out and deprived of their rights and privileges—i. e., to be given the same education under the same conditions as any other child, whatever his color. Further, respondents clearly do not include in their definition of liberty freedom from outrage on the feelings, since they inflict such arbitrary punishment on more than half the children under their jurisdiction every day they operate. There is no requirement that there must have been a previous enjoyment of a right. A study of the entire passage shows clearly that the Court means by any right previously enjoyed, any right constitutionally possessed.

We have already adverted to the fact that the lack of any relationship between the methods used and the end sought to be attained is sufficient to constitute arbitrary imposition of punishment. Mr. Justice Murphy, in a concurring opinion in *Oyama* v. *California*, *supra*, observed that no rational basis for legislation existed where laws discriminating against citizens were motivated by racial hatred and intolerance.

And in *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), this Court used racial discrimination as a standard for striking down a State law providing for sterilization of certain offenders, in the following terms: "When the law lays an unequal hand on those who have committed

intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Having shown that minor petitioners have, in fact, suffered injury and punishment by reason of their segregation, and that the segregation on account of race or color may properly be regarded as wholly arbitrarily imposed punishment, we proceed to examine the other elements of a bill of attainder.

d.

No Trial or Hearing Is Given Petitioners.

In a bill of attainder punishment is inflicted without a judicial trial, *Cummings* v. *Missouri, supra.* In the case at bar, nothing can be clearer than that, if the Board of Education is right in its contention that these Congressional Acts bar any Negro child, at any time, from attending a public school designated for use of white children, solely on the basis of race or color, these minor petitioners have been found guilty of being Negroes and convicted of the offense of possessing some inherent defects which render them unfit to attend Sousa Junior High School without a judicial trial. *There has never been a finding, either by the Board or by Congress, that all Negro children, or any particular individuals among them constituted any such menace to white pupils as would warrant isolating all Negroes in schools limited by law to their sole use.* No reason for segregation has ever been announced. And there has certainly been no attempt to try these individual minor petitioners to determine whether there is any valid ground for depriving them of their right to associate free of a limitation based on their race or color alone in school activities with white children of their own age.

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e.

These Petitioners Are Convicted on Past Acts of a Crime by These Acts of Congress.

In *Cummings* v. *State of Missouri, supra,* page 323, this Court defined a bill of attainder as " . . . a legislative act which inflicts punishment without a judicial trial." The opinion then continued: "If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The remainder of the opinion is, we think, particularly appropriate in the present case: "In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Certainly the portion of the opinion just quoted fits the present situation. If the Board, in acting for the legislature is compelled by statute to segregate Negroes and whites, it is acting under legislation which has convicted Negroes of the crime of being inferior by birth, blood, and color and dooms them to separation, without declaring a previous condition of birth, blood or color to be a crime; the guilt attaches to any child the Board sees fit to classify as a Negro (*Wall* v. *Oyster, supra*), without any trial; without any proof that an individual Negro child is in fact so far inferior by birth, blood and color to white children that he may not associate with them in school, it requires that the Negro be taught in a separate schoolhouse; and it fixes the sentence to cover the entire time the child is subject to the jurisdiction of the Board and affects his entire life and deprives him of liberty, property, job opportunity and happiness.

It is manifestly clear that this Court should not interpret these Acts of Congress as compelling racial segregation which would render them unconstitutional when it is possible to interpret them as not requiring segregation and thus render them constitutional. We must assume that Congress enacted these statutes with a constitutional intent. See, *Schneiderman* v. *United States*, 320 U. S. 118, 157, 158 (1943). *This would necessarily mean that they do not compel segregation for if these statutes are interpreted as compelling segregation they would clearly fall within the ban of the constitutional provision against bills of attainder.*

D.

The Denial of Admission of Minor Petitioners to Sousa Junior High School Solely on the Basis of Race or Color Deprives Them of Their Civil Rights in Violation of Title 8, United States Code, Sections 41 and 43.

It is apparent to petitioners that the racially segregated schools of the District of Columbia administered under control of respondents are operated in violation of the Civil Rights Act, Sections 41 and 43 of Title 8, U. S. Code, which provide:

Section 41. Equal rights under the law:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. Section 1977.

Section 43. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

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> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. Section 1979.

In *Hurd* v. *Hodge,* 334 U.S. 24, 31, this Court, in prohibiting courts of the District of Columbia from enforcement of racial restrictive covenants said of Section 42 of Title 8 U. S. Code, a companion section of Section 41 which is relied upon here:

> All the petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt that for the purposes of this section, the District of Columbia is included within the phrase 'every State and Territory.' Nor can there be doubt of the constitutional power of Congress to enact such legislation with reference to the District of Columbia."

While it is true that petitioners do not rely upon Title 8, U. S. Code, Section 42, the section of the Civil Rights Act considered in *Hurd* v. *Hodge, supra,* but upon Sections 41 and 43, it is hardly possible to conceive that the Supreme Court would make any differentiation in the applicability of these sections to the District of Columbia. The genesis of Sections 41 and 42 are the same. Both sections were originally contained in Section 1, Chapter 31 of the Civil Rights Act of 1866 (14 Stat. 27). Although now placed in different sections of Title 8, U. S. Code, both Sections—41 and 42—secure the rights of persons and citizens in "every State and Territory". Hence, just as under the interpretation of Section 42 in *Hurd* v. *Hodge, supra,* the term "every State and Territory" must be said to include the District of Columbia, as regard Section 41. Any other construction would lack uniformity and would be unreasonable and historically illogical.

Section 43 of Title 8, U. S. Code, is derived from the Act of April 20, 1871, Chapter 22, 17 Stat. 13. As presently entitled under the Code, this section provides for a "civil action for deprivation of rights". Obviously, therefore, if Section 41 of the Civil Rights Act is applicable to the District of Columbia, the section of the Civil Rights Act recognizing the means by which civil rights are vindicated by actions at law or suits in equity is equally applicable to violations of civil rights occurring in the District of Columbia. We conclude, therefore, that both Sections 41 and 43 are within the constitutional power of Congress to enact, and that these sections are operative in the District of Columbia.

The remaining question is whether government enforced racial segregation in the public schools of the District of Columbia is violative of the Civil Rights Act. Petitioners contend that racial segregation in the public schools as enforced by respondent under color of law does violate these sections.

The Congress of the United States, acting pursuant to its powers in the District of Columbia, has provided for public education there. It has given to persons residing within the District the privilege of securing, at public expense, an elementary and high school education. This privilege, we contend, once given must be afforded to all without any racial distinction. The Civil Rights Act compels such a result.

The Civil Rights Act does not specifically mention public education. In fact, there is no specification of the particular rights protected, but rather a broad statement concerning "full and equal benefits of all laws" and enjoyment of "rights, privileges or immunities secured by the Constitution and laws". However, when we view the sections presumably directed against discriminatory governmental action in the light of the provisions of the Act of March 1, 1875, Chapter 114, 18 Stat. 335, concerning racial discrimination by individuals within the United States, *it becomes*

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abundantly clear that the sections here under discussion were meant to cover all situations in which, through governmental action, persons are deprived of some right, privilege or immunity recognized under the Constitution and laws of the United States. And these sections were enacted to insure that all citizens, white and black, should be vested with the same rights and the same responsibilities as citizens. Racial distinctions were thereby prohibited.

The cases support this analysis. In *United States* v. *Cruikshank*, 92 U. S. 542, 555 (1875), this Court observed:

> "No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, . . ."

And, in *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), the Supreme Court stated that:

> "The plain object of these [civil rights] statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same."

Our national policy, as found in the Constitution, laws and treaties of the United States as well as in the applicable legal precedents, renders unlawful the actions of respondents in excluding minor petitioners from attendance at Sousa Junior High School solely because of race and color. In speaking of the Fourteenth Amendment and the Civil Rights Act of 1866, of which Sections 41 and 43 are constituent parts, this Court in *Hurd* v. *Hodge, supra*, at page 32, said:

> ". . . It is clear that in many significant respects the statute and the Amendment were expressions of

> the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land . . ."

In a series of State cases this Court has made clear some prohibitions of the Fourteenth Amendment against government enforced distinctions based solely on race or color. In the case of *Strauder* v. *West Virginia,* 100 U. S. 303, 306, 307 (1879), this Court condemned the systematic exclusion of colored persons from juries. Similarly the right to qualify as a voter in primary or general elections has been protected against denial because of race or color. *Smith* v. *Allwright,* 321 U. S. 649 (1944). This Court has held that the Constitution of the United States prohibits denial to a person, because of his race or ancestry, of the right to pursue his accustomed calling. *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). States may not enforce agreements excluding Negroes from owning or occupying property in white neighborhoods. *Shelly* v. *Kraemer,* 334 U. S. 1 (1948). Nor may railroads segregate Negro passengers in dining cars. *Henderson* v. *United States,* 339 U. S. 816 (1950). Nor may state universities, when they admit Negroes, make any racial distinctions in affording them educational opportunities. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950).

These holdings are clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act in their application to the school officials of the District of Columbia. Moreover, the explicit language employed by Congress to effectuate its purposes leaves no doubt that exclusion of minor petitioners from Sousa Junior High School solely because of race or color is prohibited by the Civil Rights Act. *That statute by its terms, requires*

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that all persons shall have the same rights "as is enjoyed by white citizens . . . to the full and equal benefit of all laws." That minor petitioners have been denied *that right* by virtue of the action of the respondents is clear. They have been denied admission to Sousa Junior High School solely by reason of race or color. It is no answer to petitioners to say that whites may also be denied admission to some Negro school because of race or color.

Speaking on this exact point in *Shelley* v. *Kraemer, supra*, at page 22, this Court, speaking through Chief Justice Vinson, said:

> " . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

That these sections of the Civil Rights Act prohibit racial distinctions is too clear for argument. That these sections encompass the right or privilege of public education is free from any reasonable doubt, for at the very foundation of our democratic institutions, in the preservation of rights and the recognition of the duties of citizens, stands the public school as the logical agency for giving the people the attitudes and skills requisite for effective participation in a democracy. We strongly urge this Court to recognize that the Civil Rights Act prohibits government enforced racial segregation in public education in the District of Columbia.

E.

The Court Below Erred in Not Granting Petitioners the Relief Prayed for and in Granting Respondents' Motion to Dismiss Minor Petitioners' Complaint on the Ground That It Failed to State a Claim on Which Relief Could Be Granted.

Reference to the pleadings in the instant case reveals that the respondents relied upon a motion to dismiss on the sole ground "that the complaint fails to state a claim upon which relief can be granted".

Such a motion to dismiss, as was true of the old common law demurrer, now abolished in the District of Columbia, said in so many words that the allegations of the complaint with all legal inference conceded did not spell out a cause of action. All things alleged for the purposes of the pleadings must be accepted as being true. What then are the essential allegations of the complaint? Clearly and unequivocally the complaint alleges that the respondents with full power of allocation of minor petitioners in the public schools of the District of Columbia, failed to assign the minor petitioners to the Sousa Junior High School and actually refused them admission to said Sousa Junior High School solely because of their race or color. The motion to dismiss concedes the accuracy of this statement. The complaint alleges further that the respondents are construing and applying Acts of Congress so as to require them to deny minor petitioners admission to and to exclude them from the Sousa Junior High School for no other reason than because of their race or color. This allegation the motion to dismiss freely admits. The complaint alleges that every administrative requirement was met in seeking admission of minor petitioners to the Sousa Junior High School. The motion to dismiss agrees that this was done. The complaint alleges that the respondents are pursuing and have pursued the policy, practice, custom and usage of denying minor petitioners admission to and excluding them from attendance as pupils at the Sousa Junior High School and from enjoyment of the educational opportunities afforded therein solely because of their race or color. The motion to dismiss concedes such action on the part of the respondents. The complaint seeks not only injunctive relief to correct these violations of the petitioners' constitutional and statutory rights, but, asks the court to render a declaratory judgment to the effect that statutes enacted by Congress regulating public education in the District of Columbia do not require exclusion of the minor petitioners from the Sousa Junior High School, and that respondents are re-

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quired by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinctions with respect to them because of their race or color.

Facing the test to which the complaint was put by the motion to dismiss, the Court below, through Judge Walter M. Bastian, embraced the theory urged by respondents and signed an order dismissing the cause.

"ORDER

"Upon consideration of the complaint, of the motion of the defendants to dismiss the above-entitled cause, of the memoranda of points and authorities in support of and in opposition to said motion and of the arguments of counsel for the plaintiffs and for the defendants, it is, by the Court, this 9th day of April, 1951,

"ORDERED, that the above-entitled cause be, and it is hereby, finally dismissed.

"(s) Walter M. Bastian, Judge."

This order is tantamount to a judicial pronouncement that an admitted statement of denial of civil rights by government officials, solely on the ground of race or color, presents no cause for relief. This order amounts to a direct statement that the defendants below correctly interpreted and put into effect statutes enacted by Congress as compelling racial segregation in the public schools of the District of Columbia, and that said respondents lawfully pursued the policy, practice, custom and usage of denying minor petitioners admission to Sousa Junior High School solely because of their race or color; and that such interpretation, enforcement, and action on the part of said respondents did no violence to the constitutional and statutory rights of the petitioners. The very making of such statements carries its own refutation.

The Court below clearly erred in not requiring the respondents to answer the complaint. The Court also erred in not issuing a declaratory judgment to the effect that no

congressional statute in the District of Columbia could be properly interpreted as requiring racial segregation, and to the effect further that said respondents are required by the Constitution and laws of the United States to admit said minor petitioners to Sousa Junior High School and to refrain from any distinction with respect to them solely because of their race or color. The Court erred in not restraining the action of the respondents in refusing to admit minor petitioners to Sousa Junior High School solely on the basis of race or color, without authority, and in violation of the constitutional and statutory rights of the petitioners.

F.

This Court Should Declare That the Actions of Respondents in Requiring Segregation in the Public Schools Is Unlawful. It Should Direct the District Court to Enter a Decree Ordering That Such Segregation Be Discontinued Forthwith and That Petitioners Be Admitted to Sousa Junior High School Without Distinction As to Race or Color, As Soon As Necessary Administrative Adjustments Can Be Made and in No Event Later Than the Beginning of the Next School Year.

This portion of the brief is directed to questions four and five of the Order of this Court dated June 8, 1953:

> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,
>
> (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> "5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

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(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

1.

Petitioners should forthwith be admitted to schools of their choice.

The way in which this question is framed would suggest that this question is not applicable to the *District of Columbia* case, however, in order that this Court may have the benefit of our views, we are assuming that the question is based upon a finding that segregation violates the Fifth Amendment to the Constitution.

"It is fundamental that these cases concern rights which are personal and present". *Sweatt* v. *Painter,* 1950, 339 U. S. 629, 635; see also *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 352. The rights of the parents and their children, with respect to education are fundamental rights guaranteed by the Fifth Amendment against arbitrary action by the Federal Government. *Farrington* v. *Tokushige,* 273 U. S. 284 and see *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Myer* v. *Nebraska,* 262 U. S. 390. They are personal because each petitioner is asserting his individual constitutional right to grow up in our democratic society without the impress of government imposed racial segregation in the public schools. They are present because they

will be irretrievably lost if their enjoyment is put off. The rights of the adult students in *Sweatt, Sipuel, Gaines* and *McLaurin* cases required, this Court held, vindication forthwith. *A fortiori* this is true of the rights of children who are growing through their vital formative years. As to them, "postponement" is a mere euphemism for denial of justice. It follows that petitioners are entitled to be admitted forthwith to Sousa Junior High School without distinction as to race and color. Since the number of named petitioners in this case is small no administrative difficulties can arise as to them.

2.

There is no warrant in equity for postponement of petitioner's enjoyment of their rights.

a.

Petitioners' rights are by nature unsuited to postponement by equity.

Petitioners have no desire to set precise bounds to the reserve discretion of equity. They concede that, as a court of chancery, this Court has power to mold its relief to individual circumstances in ways and to an extent which it would be undesirable to define with entire precision. But the rights established by these petitioners are far outside the class as to which, whether for denial or delay, a nice "balance of convenience" has been or ought to be struck.

The minor petitioners are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born.

We have discovered no case in which such rights, once established, have been postponed to a cautious calculation of conveniences. The nuisance cases, the sewage cases, the

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cases of the overhanging cornices, need not be distinguished. They distinguish themselves.

If equity remembers itself, it will indeed mold its remedy to fit petitioners claims—but the molding will be to an artful swiftness.

Affirming the decree of one of the few judges still carrying the traditional title and power of Chancellor, the highest court of Delaware epitomized equity in one of the cases now before this bar when it declared (*Gebhart* v. *Belton*, 91 A. 2d 137, 149):

> " . . . To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled."

b.

Even should this Court proceed to consider the propriety of a decree postponing desegregation, assay of the factors involved makes it clear that in the District of Columbia there is no necessity for a "gradual decree".

Before examining alleged bases for delaying relief to petitioners, three preliminary remarks are necessary.

First, we have, in the main, to guess at the factors respondents might bring forward to support a plea for postponement rather than total denial for they have taken ground from which they can only plead that this shabby business of government compelled racism must be allowed to go on so long as the federal government wills it.

Secondly, in deciding whether sufficient reasons exist for postponing the enjoyment of petitioners' rights, this Court is not resolving an issue upon a mere preponderance of the evidence. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slow in upholding the most vital rights of children accruing to them under the Constitution must make out an affirmative case of crushing conviction to sustain his plea for delay. Respondents have not done this on this record, and it is

hard to see how they can do it in supplementary proceedings or in matters outside the record, for their matter must sound in disputed prophecy, if not in menace, and human prophecy is as shaky a ground for the denial of known present justice as menace is unsuitable to the attention of chancery.

Thirdly, the problem of gradualism cannot fairly arise at all in this case. Here the appeal is from a dismissal of the complaint on motion, and there is in the record no matter whatever suggesting difficulty in accomplishing desegregation. Surely it would be a curious as well as a gratuitous assumption that such a change cannot be expeditiously handled in this nation's capital.

In fact desegregation has proceeded so rapidly in the District of Columbia in the last decade that there is practically no area save in the public schools where segregation is still practiced. Negroes and whites work together, play together and live in the same neighborhoods with no friction. Segregation in street cars and busses has been outlawed in the District of Columbia since 1865, Act of March 3, 1865 (13 Stat. 536, 537). We respectfully request this Court to take judicial notice that;— Negroes are now admitted into many professional groups and voluntary associations formerly for white only, *e.g.*, The District of Columbia Medical Society, American Institute of Architects, American Association of University Women. The largest employer in the District of Columbia, the United States Government, expressly prohibits segregation in its employment policies. The National Capitol Housing Authority has announced that its new housing projects will be and some of its old housing projects have been desegregated. Negroes are presently freely admitted to all Catholic schools and most of the other parochial and private schools in the District of Columbia. White and Negro children attend together a large number of private kindergartens and nursery schools and increasingly play together on the playgrounds under the desegregated policy

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of the Recreation Board of the District of Columbia. Negro and white teachers meet together in an integrated teachers' union. Both races attend without segregation all the legitimate theatres, concert and lecture halls as well as most motion picture theatres. Many white and Negroes attend the same churches. Moreover, segregation in restaurants and cafes has been outlawed since 1873 and since that pronouncement of this Court in *District of Columbia* v. *John R. Thompson*, 73 S. C. 1007, Negroes eat, without racial incidents, in all restaurants in the District of Columbia. In the southwest section, white and Negro parents and teachers meet together to plan for neighborhood improvement.

Therefore the factual situation in the District of Columbia makes a gradual decree unnecessary.

We concede that there may well be difficulties and delays of a purely administrative nature involved in bringing about desegregation. Any injunction requires time for compliance and we do not ask the impossible. We strongly urge, however, that no reason has been suggested and none has been discovered by us that would warrant denying petitioners their full rights beyond the beginning of the next school year.

But we do not understand that the "gradual adjustment" mentioned in this Court's fourth and fifth questions referred to such possible necessities.

Finally, it would be strange indeed to find any possible considerations serving to slow the hand of equity. A good part of the early work of the Chancellor's court had to do precisely with the protection of the weak and helpless from powerful local antagonisms (See, *e.g.*, *Inhabitants of Whitby* v. *New York* (1553) in 12 Sheldon Society, Select Cases in the Court of Requests (1889) op. 192-200 and see Introduction, p. XX; see also Maitland, Equity, 4-6 (1936))

Finally, we cannot forget that petitioners, too, place public interests in the balance. Petitioners assert that there is a public interest also in the reaffirmation of a constitutional right fought for and won almost a century ago, namely, the

enjoyment by all of a common citizenship unrestricted by governmentally imposed distinctions based solely on race or color one of the severest embarrassments to our country in its international relations.

3.

This Court should not formulate detailed decrees.

Petitioners urge that this Court make no attempt to formulated detailed decree in this case but rather that it send down its mandate directing that minor petitioners be admitted to Sousa Junior High School and that the Respondents be enjoined from imposing distinctions based on race or color alone in the administration of the public schools of the District of Columbia.

The formulation of a detailed decree would involve this Court and the Court below in elaborate administrative questions having to do with public schools.

Above all, the school boards, the courts, and the people, in the District of Columbia are law-abiding officials and citizens. They have acted in good faith under their view of the law. We believe that this Court may confidently anticipate that an authoritative holding, and an injunction in general terms, will be all that is needful to bring about compliance with the Constitution and that respondents will address themselves sincerely to the task of complying with the law.

4.

Petitioners are unable, in good faith, to suggest terms for a decree for an effective gradual adjustment, for they sincerely believe that no such decree will be efficacious in protecting petitioners' rights while at the same time minimizing purported difficulties attendant on desegration.

While desiring to answer responsively the Fifth question posed by the Court in setting this case down for reargument, petitioners have been unable to visualize any *bona*

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fide criteria for determining a method of delay that would protect the constitutional rights of the named petitioners and the class they represent to admission to public schools on a non-segregated basis.

As already noted, petitioners concede the possibility of delay until the next school year by reason of administrative requirements. Beyond this, petitioners respectfully submit that their duty to this Court may better be discharged by commenting upon any plans for postponement that may be put forward by respondents, than by the *pro forma* proposal of decree terms which they believe unwise and unwarranted.

5.

This Court should not appoint a master.

It follows that there is no need for this Court to appoint a master. Since repeal in 1948 of the 1805 Statute forbidding the introduction of new evidence at an appellate level, there would appear to be no reason why such master could not be appointed (280 U. S. C. § 863 (1946)). Certainly respected authorities have recommended the practice of appellate courts' taking evidence (see 1 Wigmore, Evidence § 41 (3d ed., 1940); Pound, "Appellate Procedure in Civil Cases" (1941) pp. 303, 387; Note, 56 Harv. L. Rev. 1313 (1943)) and in other times and jurisdictions it has been respected practice. (See Smith, Appeals of the Privy Council from American Plantations 310 (1950); Rules of the Supreme Court of Judicature, order 58, Rules 1, 2; cf. New Mexico, St. 1949, Mar. 17, c. 168, § 19.) However, taking of evidence by master is undoubtedly a departure from normal practice on appeal and it may result in loss of time to the prejudice of petitioner's rights.

6.

The terms of the decree we believe should be stated by the District Court.

This Court should remand this case to the District Court with instructions to that Court to enter an order granting an injunction restraining respondents from denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color and ordering respondents to cease discriminating on the basis of race or color in administering the public schools in the District of Columbia.

CONCLUSION.

The question whether the Federal Government has the power to compel the segregation of pupils on the basis of race or color alone in affording educational opportunities in the public schools in the District of Columbia is here presented to this Court for the first time. Here no question of equality of facilities is in issue. Here is raised the sole question whether under our democratic system and the protective covering of our Constitution, Congress or public school officials, either or both, have the power to bar Negroes from studying with whites in public schools in the District of Columbia because of their race or color alone. No reason or justification is offered by the respondent nor, in the opinion of the petitioners, can any be given, save the dubious one that the Acts of Congress compel it.

Our international relations, our concepts of liberty, our belief in democracy, cannot be reconciled with government imposed racial segregation in education in the District of Columbia. The history of our country, the loyalty of the Negro, the decisions of this Court, all require a condemnation of this un-American practice.

Government action has passed beyond the brink of constitutionality when it imposes disabilities upon the Negro people, loyal in war and in peace, native born citizens, limiting their liberty of choice of schools solely because of their

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race or color. This Court has approved of comparable federal action only when the fate of the Nation was at stake, and even then, it subjected the Government's action to a searching inquiry and laid down definite standards which the Government was required to meet. The actions of respondents in the instant case not only were not taken under such perilous circumstances, but did not meet even the minimum standards set for imposing racial distinctions under those conditions.

Wherefore it is respectfully submitted that the decree of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A.

Statutory and Constitutional Provisions in the States Where Segregation in Education Is Institutionalized.

ALABAMA

". . . Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Constitution. Article XIV, Section 256, 1901.

ARKANSAS

"Duties. The board of school directors of each district in the State shall be charged with the following powers and perform the following duties:

"(c) Establish separate schools for white and colored persons." (Acts 1935, No. 184, Sec. 97, page 2880; Pope's Digest, Sec. 11535.)

DELAWARE

"In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund, shall be equitably apportioned among the school districts of the States as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free text books; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained. All other expenses connected with the maintenance of free public schools, and all expenses connected with the erection or repair of free public school buildings shall be defrayed in such manner as shall be provided by law." Constitution. Article X, Sec. 2, 1897.

FLORIDA

"White and colored children shall not be taught in the same school, but impartial provision shall be made for both." Constitution. Article XII, Sec. 12, 1885.

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GEORGIA

"There shall be a thorough system of common schools for the education of children *in the elementary branches of an English education only,* as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." Constitution. Article VIII, Sec. 1, Para. 1, 1877. (Language in italics was deleted in 1912.)

KENTUCKY

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." Constitution. Sec. 187, 1890.

LOUISIANA

". . . Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years; provided, that kindergartens may be authorized for children between the ages of four and six years." Constitution. Article XII, Sec. 1, 1921.

MARYLAND

"All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

An. Code, 1924, Sec. 114; 1912, Sec. 63. 1904, Sec. 59. 1888, Sec. 54. 1872, Ch. 377. 1916, Ch. 506, Sec. 63.

"It shall be the duty of the county board of education to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free, and which shall be kept open not less than one hundred and eighty (180) actual school days or nine months in each year; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools."

An. Code. 1924, Sec. 200; 1912, Sec. 131; 1904, Sec. 124; 1888, Sec. 96; 1872, Ch. 377; 1904, Ch. 584; 1916, Ch. 506, Sec. 131; 1922, Ch. 382, Sec. 131; 1937, Ch. 552.

"Each colored school shall be under the direction of a district board of school trustees, to be appointed by the county board of education subject to the provisions of Section 8 of this article, and schools for colored children shall be subject to all the provisions of this Article."

An. Code, 1924, Sec. 201; 1912, Sec. 132; 1904, Sec. 125; 1888, Sec. 97; 1870, Ch. 311; 1872, 377, Sub-Ch. 18, Sec. 2; 1874, Ch. 463; 1916, Ch. 506, Sec. 132.

"It shall be the duty of the county board of education in each county of the State, when in their judgment there is need thereof, to provide a suitable building or room, or rooms, connected with one of the colored schools of said county, for the establishment of a central colored industrial school, and to provide for the maintenance of such central colored industrial school where instruction shall be given daily in domestic science and in such industrial arts as may be determined by the county board of education. One-half of the appropriation hereinafter provided shall be used for the maintenance of such industrial school."

An. Code, 1924, Sec. 211; 1912, Sec. 142; 1904, Sec. 139; 1898, Ch. 273, Sec. 5; 1910, Ch. 210, Sec. 139 (p. 232); 1916, Ch. 506, Sec. 142.

"Whenever any such colored industrial school is opened in any county the secretary of the county board of education shall report the fact to the state superintendent of schools, and he, or an assistant designated by him, shall visit the said school and shall give, if in his judgment it is warranted, a certificate of approval of the conditions and the plan upon which said industrial school is conducted, to the secretary of the county board of education. The state superintendent of schools shall submit annually to the Comptroller of the treasury of the State on or before the last day of September, a complete list of such schools as are entitled to receive the special appropriation for industrial education."

An. Code, 1924, Sec. 212; 1912, Sec. 143; 1904, Sec. 140; 1898, Ch. 273, Sec. 6. 1910, Ch. 210, Sec. 140 (p. 232). 1916, Ch. 506, Sec. 143.

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"There shall be located in the city of Baltimore or elsewhere (if the board of education deem best) a state normal school for the instruction and practice of colored teachers in the science of education, the art of teaching and the mode of governing schools, to be known as State Normal School No. 3; the said school shall be under the control of the state board of education, who shall appoint the principal and necessary assistants; and the faculty shall consist of a principal and as many teachers as the board shall appoint. The sessions of the school shall be determined by the state board of education, who shall prescribe the curriculum of study, which however, shall include courses for the special preparation of instructors for teaching the elements of agriculture and mechanic arts, provide necessary quarters, supplies and apparatus, fix the qualifications for admission as students, the salary of the principal, assistant teachers and employees."

An. Code, 1924, Sec. 256; 1912, Sec. 193; 1908, Ch. 599.

MISSISSIPPI

"Separate school shall be maintained for children of the white and colored races."

Constitution. Article VIII, Sec. 207, 1890.

MISSOURI

"Separate free public schools shall be established for the education of children of African descent."

Constitution. Article XI, Sec. 3, 1875.

NORTH CAROLINA

"The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of, either race."

Constitution. Article IX, Sec. 2, 1868; Convention, 1875.

OKLAHOMA

"Separate schools for white and colored children with like accommodations shall be provided by the Legislature and impartially maintained. The term "colored children," as used in this section, shall be construed to mean children of African descent. The term "white children" shall include all other children."

Constitution. Article XIII, Sec. 3.

"The public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races, with impartial facilities for both races." (Laws 1949, p. 436, Art. 5, Sec. 1.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-1.

"Any teacher in this state who shall wilfully and knowingly allow any child of the colored race to attend the school maintained for the white race or allow any white child to attend the school maintained for the colored race shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), and his certificate shall be cancelled and he shall not have another issued to him for a term of one (1) year." (Laws 1949, p. 537, Art. 5, Sec. 4.)

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-4.

"It shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution of this State where persons of both white and colored races are received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school, or institution in violation hereof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and each day such school, college or institution shall be open and maintained shall be deemed a separate offense.

Okla. Statutes Annot., Title 70, Article 5, Sec. 5-5.

SOUTH CAROLINA

"Separate schools shall be provided for the children of the white and colored races, and no child of either race shall

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ever be permitted to attend a school provided for children of the other race."

Constitution. Article XI, Sec. 7, 1895.

TENNESSEE

"Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government, to cherish literature and science. And the fund called the *common school fund*, and all the lands and proceeds thereof, dividends, stocks and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools and all such as shall hereafter be appropriated, shall remain a *perpetual fund*, the principal of which shall never be diminished by *legislative* appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The State taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the General Assembly shall, from time to time, direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the Colleges, Universities, or Academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time."

Constitution. Article XI, Sec. 12, 1870.

TEXAS

"Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."

Constitution. Article VII, Sec. 7, 1876.

VIRGINIA

"White and colored children shall not be taught in the same school."

Constitution. Article IX, Sec. 140, 1902.

WEST VIRGINIA

"White and colored persons shall not be taught in the same school."

Constitution. Article XII, Sec. 8, 1872.

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APPENDIX B.

District of Columbia Compulsory Attendance Law.

Every parent, guardian, or other person residing permanently or temporarily in the District of Columbia who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately during the period of each year in which the public schools of the District of Columbia are in session: Provided, that instruction given in such private or parochial school or privately, is deemed equivalent by the Board of Education to the instruction given in the public schools. 43 Stat. 806, Ch. 140, Art I, Sec. 1 (D.C. Code, 1951 Ed., Title 31, Sec. 201).

The parent, guardian, or other person residing permanently or temporarily in the District of Columbia and having charge or control of any child between the ages of seven and sixteen years who is unlawfully absent from public or private school or private instruction shall be guilty of a misdemeanor, and upon conviction of failure to keep such child regularly in public or private school or to cause it to be regularly instructed in private, shall be punished by a fine of $10 or by commitment to jail for five days, or both, at the discretion of the court: *Provided*, that each two days such child remains away from school unlawfully shall constitute a separate offense: *Provided* further, that upon conviction of the first offense, sentence may, upon payment of costs, be suspended and the defendant placed on probation."

43 Stat. 807, Ch. 140, Art. II, Sec. 1 (D. C. Code, 1951 Ed., Title 31, Sec. 207).

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DEC 5 195

HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ~~8~~ 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS ON REARGUMENT

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IN THE

Supreme Court of the United States

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No. 8

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS ON REARGUMENT

In Part I of this brief we repeat the reply brief filed in this case on argument for the convenience of the Court; and, in Part II of this brief we reply to the brief of Respondents on Reargument.

PART I.

In order to clarify the issues in this case and to indicate some minor corrections in the briefs and record and to disclose some apparent misconceptions on the part of respondents with respect to the legal theory underlying petitioners' cause of action, petitioners submit this reply brief.

This reply brief deals with certain of the points advanced

by the respondents in their brief which will be identified by number and language as used by respondents.

I.

The Complaint Filed Below States No Cause of Action Because, Inter Alia, It Fails To Set Forth Any Injuries To The Petitioners.

Here respondents rely upon the fact that minor petitioners do now attend a junior high school in said District of Columbia to support their assertion that the complaint fails to set forth any injury to the petitioners because (1) the compulsory law does not require petitioners to send their children to public schools and does not require them to go to any school; (2) the complaint fails to show by comparison that Sousa Junior High School has educational opportunities which are superior to educational opportunities in the high school which minor petitioners do now attend, and (3) the allegations of the petitioners are merely legal conclusions.

It is evident that respondents misconceive the gravamen of the complaint. For the purpose of determining whether the injury has been alleged it is only necessary to examine the allegations of the complaint with respect to factual matters in the light of the motion to dismiss. The motion to dismiss, like the old common law demurrer, admits all facts well pleaded. These facts are: that minor petitioners, Negroes, citizens and residents of the District of Columbia, accompanied by their parents, Negroes, citizens, taxpayers and residents of the District of Columbia, at the proper time for admission of students and possessing all qualifications for admission to a junior high school, applied to Sousa Junior High School for admission and enrollment and were denied admission and enrollment solely because of race or color. Admission to Sousa Junior High School was denied by respondent Eleanor P. McAuliffe, principal of Sousa Junior High School, solely upon the basis of race or color; and thereafter petitioners exhausted all of their

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administrative remedies up to and including the Board of Education, which Board still denied admission and enrollment into Sousa Junior High School solely on the basis of race or color. The petitioners are suffering irreparable injury by reason of this action of respondents and are threatened with irreparable injury in the future at the hands of respondents.

These facts clearly show an admission by the respondents that they denied petitioners admission to Sousa Junior High School for no reason other than because of their race or color, and that this denial was injurious and threatened to injure the petitioners in the future. These are all the facts essential to establish a justiciable claim by the petitioners and to provide a basis for the relief requested of the Court by the petitioners. Not only did respondents admit all these facts in their motion to dismiss, but with respect to all these facts except injury, they enumerate them in their brief as a correct statement of the facts. On these admitted facts the only question before this Court is a question of law.

That question of law is—Whether the respondents possess the power to segregate pupils in the District of Columbia for the purpose of public education solely on the basis of race or color. Or to express it in another way, whether the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color violates rights secured to petitioners by the Constitution and laws of the United States. The court below dismissed the complaint, thus deciding this issue in the negative.

In the transmission of the record in this case, from the District Court to the United States Court of Appeals for the District of Columbia Circuit, and in turn to this Court, a clause in paragraph sixteen of petitioners' original complaint was inadvertently omitted. This clause, italicized in the paragraph set out below, we submit for inclusion in the proceedings in this case.

"16. A present actual case or controversy exists between plaintiffs and defendants. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering ireparable injury, *and are threatened with irreparable injury* in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage, vexation and inconvenience to plaintiffs and other Negroes similarly situated."

This clause as above set out was a part of the original complaint with respect to which the court below granted the motion to dismiss, and its inclusion here can in no wise prejudice the case of the respondents.

On the legal issue as to the power of respondents to take the action complained of, the mere deprivation of a civil right by government, has been held by this Court in numerous cases, to constitute injury. See: *Giles* v. *Harris,* 189 U. S. 475 (1903). In addition, the respondents admitted the well pleaded operative factual allegation of injury contained in paragraph 16 which allegation was not a legal conclusion.

As to the assertion that these petitioners were not compelled by law to send their children to any school or to the public schools, it is sufficient to point out that having chosen to avail themselves of the educational opportunities afforded by the government in the public schools, as they had a right to do, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), petitioners were compelled by threat of criminal sanction to send their children to the school set apart by the respondents for Negroes alone.

As to respondents' contention that the failure of the petitioners to compare educational opportunities offered in

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the school they now attend with those afforded in Sousa Junior High School, it is apparent that respondents misconceive the legal theory underlying the complaint. Petitioners complain of a deprivation of the right to choose Sousa Junior High School without any limitation based solely on race or color, irrespective of the nature and availability of educational facilities elsewhere. Quite apart from that, petitioners' concession of equality of facilities is not a concession of equality of educational opportunities, for it is implicit in petitioners' complaint that the mere denial of admission on the basis of race or color is a denial *per se* of educational opportunities. The offering of education to minor petitioners in a segregated school is *per se* a limitation on the enjoyment of educational opportunities.

Thus, this case as presented to this Court on the complaint and the motion to dismiss, presents a record in which the factual basis is present for the relief sought and the only question remaining is whether the action of respondents herein complained of violates the Constitution and laws of the United States.

II.

A. Acts of Congress Providing For Education of Children of The District of Columbia Require Such Education In a Dual School System And Have Been So Construed by This Court.

B. Construction of Locally Applicable Laws By The Highest Court of The District of Columbia Is Normally Accepted By This Court.

Under this heading the respondents attempt to demonstrate that the congressional enactment of statutes relating to public education in the District of Columbia and the judicial interpretation thereof by the lower courts have accomplished a construction of these statutes which is binding upon this Court. It is the petitioners' position that the statutes in question do not authorize racial segregation nor do the re-enactments after an intervening judicial construc-

tion by a lower Federal court that the statutes do require racial segregation, bind this Court to accept this construction. At most, the re-enactment of congressional legislation and the judicial construction of that legislation by lower Federal courts are but aids to this Court in making its independent determination as to the proper construction to be given to the statutes. In *Federal Communications System* v. *Columbia Broadcasting System,* 311 U.S. 132, Mr. Justice Frankfurter states at page 138:

> "We are not, however, willing to rest decision on any doctrine concerning the implied enactment of judicial construction upon re-enactment of the statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language."

It is certainly not arguable that the decision of *Carr* v. *Corning,* 86 App. D. C. 173, 182 F. (2d) 14 (1950), creates a well settled interpretation that these statutes compel segregation and are constitutional. As this Court said in *United States* v. *Raynor,* 302 U.S. 540 at 551:

> "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski,* 161 Fed. 88, held that the act only prohibited possession of the distinctive paper, does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation."

Where constitutional rights of individuals are concerned this Court has assumed the duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.,* 335 U.S. 106, 120-121) and certainly it is the position of the petitioners that to adopt the construction given these statutes by the Court of Appeals in *Carr* v. *Corning,* supra, would create a danger of unconstitutionality. The position of the respondents, with respect to the construction of these

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acts, therefore, is untenable. We agree with the language of this Court in this connection in *Helvering* v. *Reynolds*, 313 U.S. 428, at 431:

> "Respondents' position is not tenable . . . that rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities it does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change."

III.

The Dual School System In The District of Columbia Is Not Violative of The Fifth Amendment To The Constitution of The United States.

In this section the respondents, in an apparent misconception of the law applicable to the complaint of the petitioners, first argue that Congress has more power to legislate for the District of Columbia than the State Legislatures have for the States. Then they argue that whatever limitations exist upon the States in the Fourteenth Amendment, no greater limitations exist with respect to the Federal Government in regard to racial disabilities imposed upon Negroes. They argue, for example, that under the Fifth Amendment slavery was constitutional, and that since the Fourteenth Amendment has not prohibited the establishment of the "separate but equal" doctrine in the education cases in the States, that it is certainly not prohibited by the Fifth Amendment. This is a misconception of the fundamental nature of the Federal Government.

Equality, equal justice under law, liberty, freedom of speech and association, and freedom of religion are fundamental and basic principles underlying the foundation of our government. Our government is one of laws and not of men. In this system, race is irrelevant. The system of slavery, constitutionally recognized both in the Constitution and in *Dred Scott* v. *Sanford* (citation), 19 Howard 393, was abolished by the Thirteenth Amendment. Citizen-

ship was conferred upon Negroes under Clause 1 of the Fourteenth Amendment and thus both the system of slavery and the lack of citizenship status of the Negro set forth in the *Dred Scott* decision were removed as sources of constitutional power for the imposition of racial distinctions by the Federal Government upon Negroes. Thus our Government was brought into harmony and accord with its fundamental and basic principles—equality for all citizens—and a constitution that is color-blind.

The Federal Government is one of express powers and implied power necessary to carry out the express powers. It is too clear for argument that, since the Thirteenth and Fourteenth Amendments, the Federal Government has no express power to make racial distinctions in affording educational opportunities to citizens in the District of Columbia. It is the petitioners' position that there is likewise no implied power to do so.

This Court has recognized such power in the Federal Government in only one series of cases—the Japanese War Cases—in which it was dealing with the all-embracing war power. There this Court found an implied power, necessary to deal with sabotage and espionage under threat of invasion in the midst of a world-wide conflict, to deal on the basis of ancestry with loyal citizens who were comingled with disloyal persons. Even there this Court laid down drastic limitations governing the exercise of this implied power. It is apparent that integrated education in the District of Columbia presents no such threat to our National security. And no implied power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color can be implied from the express power given Congress over the District of Columbia.

As an apparent justification for compulsory racial segregation in public education, respondents dwell at length upon quotations from Negroes who were urging the passage of a statute in 1906 designed to increase the power of the Negro superintendent of schools. The constitutional rights

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of petitioners are neither added to nor diminished by the irrelevant opinions of isolated individuals, Negro or white. This Court has said that the rights which petitioners assert here are individual rights. *Gaines* v. *Canada,* 305 U.S. 337. It is of no importance in this case as to whether the "separate but equal" doctrine is constitutionally permissible under the Fourteenth Amendment, although we take the position that it is not; for even if we concede, which we do not, that equal protection of law may be constitutionally satisfied under a racial classification, by testing the quantum of treatment afforded Negroes under the substantially equal theory—it is juristically inconceivable that we can test liberty under the due process clause of the Fifth Amendment by the quantum of liberty which is enjoyed. A deprivation of individual liberty under the due process clause must be tested by the reasonableness of the action of the government. The test is whether the action is arbitrary but never as to how much liberty is taken. Thus the opinions of individual persons as to whether segregation is good or bad is irrelevant and the test of the deprivation of liberty under the Fifth Amendment cannot be measured by the quantum test apparently used under the equal protection clause of the Fourteenth Amendment in civil rights cases.

Moreover, the decision as to the constitutionality of the respondents' action in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color is strictly a legal question to be determined by this Court and legislative policy or action is not determinative.

PART II.

PETITIONERS TREAT RESPONDENTS ANSWERS TO QUESTIONS 4(a) AND 5 AS ONE ARGUMENT IN THIS REPLY.

I.

In their Brief on Reargument counsel for respondents undertake to justify what they refer to as a "strictly legal position" in support of respondents actions in excluding minor petitioners from Sousa Junior High School solely because of race or color. Counsel for petitioners recognize that this undertaking is both difficult and delicate by reason of the absolutely contrary position of other high government officials, but it is respectfully submitted that the Brief for Respondents on Reargument not only fails to meet the issues as raised by petitioners, but confuses the issues involved in the instant case with those involved in the "state cases", and makes assumptions that are not supported by available facts. It is a fact, as set forth by respondents on page 18 of their brief, that the policy of the President of the United States is to use all applicable authority of his high office to terminate all forms of segregation in the Nation's Capital. It is likewise a fact that the highest legal officer of the United States, the Attorney General, has filed a brief in this case in which he agrees with petitioners' views that respondents do not have the power or authority to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color. It is also a fact that the District Commissioners have ordered an end to all discrimination and segregation in the District Government. Thus, not only do the superior officers of the Government differ with counsel for respondents as to this "strictly legal position" but counsel on page 18 of their brief say that even some of the respondents themselves differ with them. Yet counsel for respondents say they are taking a "strictly legal position" which they believe is sound. This anomalous position of counsel for respondents is reflected in the various inconsistent positions taken in their brief.

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On page 13 of their brief counsel for respondents say they do not suggest that a gradual adjustment would be desirable or, indeed, necessary—but on page 15 of their brief they argue that time should be given "to properly indoctrinate teachers and the public to a radical change in the local educational policy." This is in fact a gradualist argument. Thus, it is difficult if not impossible, for petitioners to know what the "strictly legal position" of counsel for respondents really is.

Again throughout the brief counsel for respondents argue that the history of the Fourteenth Amendment is irrelevant to the District of Columbia case; yet on pages 17 and 18 of their original brief they argue that this history is relevant. We must presume then that counsel are abandoning that line of argument in their latest brief. In this latest brief on page 16 they proceed to analyze the effect of decrees in the four state cases and even to include segregation in all other areas in the United States as being involved in the decision and decree in this case. On page 17 of the brief counsel deal with "eighteen separate political subdivisions of the United States which would be obliged to make revolutionary changes in what has been described as 'a way of life' ". Again counsel for petitioners find it extremely difficult to answer as to any subdivisions or changes except those involved in the District of Columbia case. "The way of life" in the District of Columbia is completely nonsegregated except in education. We are unable to determine then to what "way of life" counsel for respondents refer in the District case.

Again on page 15 counsel for respondents say that petitioners will not suffer since there is no question of equality of facilities; here counsel do not address themselves to the issue of deprivation of liberty but are still arguing as if they are counsel in the four state cases and are enmeshed in the separate but equal philosophy growing out of the interpretation of the Fourteenth Amendment and the so-called *Plessy Doctrine.* None of this is involved in the District case under the Fifth Amendment.

Respondents' counsel disclaim the possibility of bloodshed in effectuating integration in education, with which disclaimer we heartily agree. Subsequent references to possibilities of racial conflict and quotations from a decision by this Court in a case involving issues not even remotely related to any issues present in the instant case are irrelevant.

Counsel for respondents concede that should this Court invalidate enforced racial segregation in public education in the District of Columbia, the only delays in changing to an integrated system would be administrative in nature. Then they pose several administrative problems which they assume are present and assert that the time needed to solve them cannot be predicted. Had counsel for respondents conferred with their clients—the Board of Education—they would have been advised that substantial "indoctrination of teachers" is already an accomplished fact. They also would have been advised that their clients—the Board of Education—"will not be unprepared in the event that major changes in organization are required." Under administrative delays they list a substantial amount of time for indoctrination of teachers, the problem of locating instructors, and the necessity for securing appropriations from Congress to finance the program.

The fallacy of the argument that substantial time would be needed for indoctrination of teachers is demonstrated by (1) the existence of an integrated teachers union with several hundred members of both races, and by (2) reference to the present contacts of colored and white teachers in the two divisions of the public schools of the District of Columbia engaged in without untoward incident, on a wholly integrated basis. Approximately 80% of all the educational personnel in the District of Columbia public school system have served on one or more of these integrated committees:

(1) System-wide committees and groups
(2) In-service training programs
(3) Officers meetings

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(4) Departmental meetings of teachers with respective department heads
(5) General meetings of teachers and officers

The documented details under each of the foregoing captions is here set forth, representing only partial listings in a number of instances:

System-Wide Committees

School House Building Standards
100 teachers and officers; about 50% from each division; 12 sub-committees; 6 Negro chairmen (S. C. [superintendents circular] #94, 1949)

Text Book Committees; 2 Co-Chairmen for each of the 5 sub-committees, one from each Division; 93 teachers and officers involved (S. C. #25, 9/17/53)

Committees on Books for Libraries, 44 teachers and officers, about 50% from each division (S.C. #45, 11/14/52)

Committee on Recruitment, Examination and Appointment of Teachers, 16 officers and teachers, about 50% from each division (S.C. #49, 11/28/52)

Committee on Blank Forms—10 officers—a continuing committee, about 50% from each division (S.C. #58, 1/6/53)

Permanent Committee on Provision of Supply Schedules. Co-Chairmen from Divisions 1 and 2; approximately 35 officers on (S.C. #77; 3/9/53) steering Committee; approximately 130 teachers on sub-committees; Co-Chairmen from Divisions 1 and 2 for each of the 23 sub-committees (S.C. #89; 4/8/53)

Additional Schoolhouse Standards Committee on Shop Layouts for Tech. H.S.; 7 members, 3 Negro and 4 white; 2 Division 1, 2 Division 2; 3 Central Staff (S.C. #52; 11/25/53)

The Court is respectfully requested to take judicial notice of the following official committees of the District of Columbia School System, all of which are completely integrated:

Committees on City-wide Pupil Testing—Approximately 50 teachers and officers; Assoc. Supt's Foster (Div. 1) and Hypps (Div. 2), Co-Chairmen.

Joint Legislative Council—over 10 years old; includes representation from approximately 75 organizations of school personnel.

Teachers Advisory Council—Representatives from all schools and officer groups—approximate membership 80.

Curriculum Committees—go back more than ten years; hundreds of teachers involved. Actually began under Dr. Ballou about 1924.

Committees on Salary Revision—currently active on proposed legislation.

Coaches Organization—have met together periodically for past 4 years on common problems.

In-Service Training Programs; widely attended by teachers and officers of both races:

Prescott lecture—Roosevelt High School, 10/6/53 (S.C. #20; 9/23/52)[1]

Courses at Washington School of Psychiatry—600 teachers, 50% colored, 50% white, both sem. (Also held previous year) (S.C. #26; 9/25/52).

Panel on Cancer—Roosevelt High School, 1/15/53. All School personnel invited (S.C. #56; 1/2/53).

Panel on Tuberculosis—Roosevelt High School, 3/12/53 —All school personnel invited—Negro physician was one discussant (S.C. #56; 1/2/53).

Series of 5 meetings at Roosevelt High School for all officers and teachers on subject of school health, 3/2, 3/23, 4/6, 4/27, 5/11/53, hundreds in attendance (S.C. #72; 2/9/53).

Visit of all teachers (3500) to exhibit arranged at Raymond School by General Textbook Committee, March 9, 10, 11, 12/53; visits of school personnel scheduled at random (S.C. #75; 2/26/53).

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Washington School of Psychiatry Courses—8:00 to 9:30 P.M., Oct. 15, Nov. 19, Dec. 17/53, Jan. 21, 1954; 450 enrolled (S.C. #20; 9/11/53).

Officers Meetings—integrated:

Supt's. Staff; 28 meetings scheduled for school year 1952-53. (S.C. #24; 9/25/52).

Presidents of Teachers Col.; 7 meetings scheduled (S.C. #24; 9/25/52).

Senior High School Principal Division 1 and 2; 7 meetings scheduled (S.C. #24; 9/25/52).

Junior High School Principal Division 1 and 2; 7 meetings scheduled (S.C. #24; 9/25/52).

Vocational High School Principal Division 1 and 2; 4 meetings scheduled (S.C. #24; 9/25/52).

Directors of Elementary Education, Division 1 and 2; 8 meetings scheduled (S.C. #24; 9/25/52).

Heads of Department, Division 1 and 2; 4 meetings scheduled (S.C. #24; 9/25/52).

Superintendent's meetings with all school officers held 3rd Monday each month (S.C. #24; 9/25/52).

Judge Cockrill addressed all officers at Roosevelt High School, 11/10/52 (S.C. #41; 10/22/52).

Associate Superintendents of Research, Division 1 and 2, Dr. Foster and Dr. Hypps respectively discuss "uneducables"—all officers (S.C. #57, 1/2/53).

Officers Meeting 8/19/53 (S.C. #40, 8/12/53).

Departmental Meetings—integrated

Series of 3 joint meetings of Departments of Home Economics, Science, Physical Education (several hundred persons) 11/6/53; 1/15/53 and 3/12/53 (S.C. #44; 11/3/53).

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SUMMARIES OF PARTICIPANTS IN THE AMERICAN FRIENDS SERVICE COMMITTEE SEMINARS FOR TEACHERS[1]

Total No. of Hours—10

Theme	Date 1953		Directors Division I	Directors Division II	Librarians Division I	Librarians Division II	Teachers Division I	Teachers Division II	Counselors Division I	Counselors Division II	Principals & Ass't. Prin. Division I	Principals & Ass't. Prin. Division II	Others Division I	Others Division II	Totals
The Classroom Problems of an Integrated School System	3/6, 7		1												
		E					5	6			4	3			
		J						2	1		1	1			
		V													
		S					3	1		1					(29)
The Teacher in an Integrated School System	3/20, 21			1											
		E					2	4			4	2			
		J					5	5		1					
		V						1							
		S			1		2	1				2			(31)
Approaches to School Integration	5/15, 16	E					5	8				3			
		J					1	3							
		V					1								
		S			1		3	2							(27)
Human Relations in an Integrated School System	11/6, 7	K					3								
		E					2	9			1	4			
		J					2	1							
		V					1								
		S					4	1	1				2	2	(33)
		Totals	1	1	2		39	44	2	2	10	15	2	2	(120)

Others include: A training specialist and a sight conservation teacher in Division I.
An elementary supervisor and a teacher of the physically handicapped in Division II.

Letters: E—Elementary J—Junior High V—Vocational High S—Senior High K—Kindergarten

THE EXPECTED NUMBER OF PARTICIPANTS FOR THE DECEMBER 4 AND 5 SEMINAR IS 30; THE DISTRIBUTION IS NOT AVAILABLE YET.

30 participants are expected to enroll in the seminars in February and March.

Grand Total for the Seminars held from March, 1953 to November, 1953 120
Grand Total for Seminars previously held and those expected enrollments 210

General Meetings of Teachers and Officers—integrated.

Two General meetings of school personnel on salary bill.

11/9/53 Elementary Personnel Div. 1 and 2.

11/10/53 Secondary Personnel Div. 1 and 2 (S.C. #40; 11/4/53).

In addition to those in service meeting a number of the teachers in the public school system have attended inter-group relations seminars given by the American Friends Service Committee.[1]

FOOTNOTE TO CHART ON OPPOSITE PAGE

[1] Summary of Reports of Participants in *A Program of Seminars For Washington Public School Teachers (Looking Toward Our Role in An Integrated School System)*, American Friends Service Committee, Community Relations Program, Washington, D. C., March 6-7, 1953; March 20-21, 1953; May 15-16, 1953; November 6-7, 1953.

American Friends office volunteers the opinion that over ninety per cent of the teachers of both divisions who have been trained in their seminars are equipped to carry on similar work in their own school buildings. Thus, the nucleus of 200 or so trained persons who will have had the benefit of seminars experience with the American Friends represent instructional resources in their respective buildings. Inasmuch as the selection of persons for the American Friends Seminars has been distributed as widely as possible among school buildings, the chances are that most faculties would have someone in their ranks with the proper conditioning for leadership. The American Friends office gives assurance that if called upon they could greatly augment their services and facilities for inter-group education in Washington. Likewise, it is probable that other similar resources could be expected to carry their share of the load including, for example, National Conference of Christians and Jews, the Anti-Defamation League, the American Association of University Women, the League of Women Voters.

Addressing ourselves to what the Corporation counsel refers to as being a second major consideration—the matter of teacher replacements and promotions—we find again an exaggerated statement of what as a matter of fact is a relatively minor problem. The Rules of the Board of Education, admittedly the controlling law, presently provide for and the annual practice carries out a merger of eligibility lists compiled from the results of competitive examinations given at different dates. It cannot reasonably be argued that the plan assumes any additional proportions because the individuals involved are of different races. All that the Board of Education need do is to amend its Rules and provide for the merger of these two lists and no time element is involved. Since promotions are presumably based upon merit no problem of time or of any other character can reasonably be posed for this so-called problem. To suggest that any considerable time would be consumed in locating instructors or working out the program for financing the integrated plan is negatived first by the personal relationships set forth above; secondly, by the fact that a large number of the teachers have already had courses in intergroup relations given by the American Friends Committee, American University, Catholic University, George Washington University and Howard University, in cooperation with the Board of Education. It is partially negatived, thirdly, by the fact that there is available from an original annual appropriation of $3000 for in-service training the sum of approximately $2000. A like sum of $3000 will become available for this purpose on July 1, 1954 in the pending appropriation bill.

The basic weakness of respondents position lies in the false assumption that because the Board rules have the effect of law the Board lacks power to amend or modify those rules. *U. S. ex rel Denny* v. *Callahan*, 54 App. D. C. 61,294 F. 992, cited by Respondent clearly recognizes the authority of the Board to exercise its discretion in the selection and appointment of teachers. In that case an

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applicant for a position, who was number one on the eligible list when a vacancy occurred, was denied the job. She then sued to obtain the position. While this suit was pending the Board changed the eligible list. The Court held that under those circumstances the Board could not do this.

Under the present rules of the Board as set forth in respondents' brief Appendix, p. 4, rule eleven at p. 5, and 6 provides for the merger of eligibility lists after each examination "irrespective of the date of examination." Certain it is that if the eligibility lists can be and have been merged without regard to date, merger without regard to race cannot present a serious obstacle to integration of personnel. The Court is asked to take judicial notice of the fact, well-known in the community, that the Board of Education intends to conduct its examination this school year of white and colored teachers of physical education by giving one and the same examination to both groups. (Minutes of Meeting of the Board of Education, June 24, 1953.)

Eligibility rosters in public employment are not unlike seniority rosters in private industry where it has long been the rule that although seniority is generally considered as a property right of an employee, it is nevertheless within the power of a union to modify or destroy an individual's seniority in a subsequent collective agreement. The analogous action in public employment is the modification of the statute or administrative order upon which the preferential right is based. So long as the modification is not arbitrary, no valid objection arises, *Elder* v. *N. Y. Central R.R. Co.*, 152 F. 2d 361 (C.C.A. 6th 1945).

The most devastating rebuttal to the Corporation Counsel's contention that the District of Columbia is unprepared for the possibility of an immediate end of segregation in the public schools comes from the pen of his own client, the Superintendent of Schools, one of the respondents. In the "Report of the Superintendent of Schools to the Board of Education, 1952-1953," The Superintendent of Schools of the District of Columbia says at pages III and IV:

"During the past year the Board of Education, the Superintendent of Schools, and the school officers have concerned themselves with planning for the general reorganization of the schools which may be brought about as a result of the decision of the Supreme Court on the cases concerning segregation of the schools pending before it. Although there is no way to anticipate what decision the Court may render or the exact changes in organization which may be necessary as a result of its action, efforts are being made to be prepared for any eventuality. Consistent with this general plan the Board of Education invited the organized citizenry of Washington and any interested individuals to send to the Board of Education written statements expressing their ideas on the mechanics of integration of the schools should the present system of segregation be abolished by the Supreme Court's decision, and also on the methods to be employed to educate the public for any change which may be required. In response to this invitation 160 replies were received. In most instances groups and individuals sent in statements which were very helpful and which indicated thoughtful consideration of the question. These statements were analyzed and tabulated, and the various suggestions made have been and are being considered in connection with any planning for a change in school organization which may be necessitated by the Supreme Court's decision.

"Subsequently the Board of Education held a hearing to which it invited 30 leading citizens to appear before the Board to give their advice. This hearing, too, proved to be very helpful in planning for any changes which may be required.

"During the past several months the Superintendent and his staff have held a series of meetings to formulate plans, procedures, and techniques of transition from one type of organization to the other. This has been done so that the Superintendent will be ready to recommend to the Board certain changes should they be required. Obviously it is not known whether changes will be required by the decision and certainly the exact terms of transition cannot be known until the full text of the decision is made public.

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> Should the Supreme Court rule against segregation it will be necessary that any plans that may have been evolved be revised in the light of the specific terms imposed by the decision. *The Superintendent and the officers will not be unprepared in the event that major changes in the organization are required.*" (Emphasis supplied).

A revealing experiment in integration is available in the experience of the State of New Jersey. This eminently successful operation, involving forty-three school districts, including some large cities, a few fair-sized rural county seat towns, some small industrial areas, some agricultural townships and a few very high-level economic suburban communities, was accomplished in less than one year, except in the case of three districts where school buildings had to be constructed. The late Joseph S. Bustard, Assistant Commissioner of Education of the State of New Jersey, in commenting on this significant achievement in integration, on a state-wide basis in a complex situation, said:

> "While New Jersey cannot furnish any one formula, it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it." Bustard, "The New Jersey Story: The Development of Racially Integrated Public Schools." *Journal of Negro Education,* P. 285, Vol. 21, No. 3.

In the Brief on Reargument petitioners advanced the argument that the public policy of our national government as enunciated by the President and the public policy of the District of Columbia Government in process of effectuation are opposed to all governmental distinctions based on race or color. In their Brief on Reargument, page 18, counsel for respondents concede the factual support for this argument, and suggest no conclusion different

from that drawn by petitioners. It is respectfully submitted therefore that counsel for respondents concede that the actions of respondents herein complained of are violative of national policy and as well of the public policy of the District of Columbia.

CONCLUSION

Petitioners believe that the other points advanced by respondents have been fully covered in petitioners' brief on the merits, and for that reason are not touched upon here.

Respectfully submitted,

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NOV 15 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

BRIEF FOR PETITIONERS ON FURTHER REARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

BRIEF FOR PETITIONERS ON FURTHER REARGUMENT

On May 17th last, this Court disposed of the basic constitutional question presented by this case and companion cases by construing the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment as stripping federal and state governments of the power to require, authorize or permit the enforcement of racial segregation in the public schools. The Court said, moreover, that the formulation of decrees was made difficult "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions ... We have now an-

nounced that [Segregation in public education] is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission on briefs by October 1, 1954."

Subsequently the time for filing of briefs for all parties was set for November 15, and these cases set down for re-argument December 6th.

QUESTIONS

Questions 4 and 5 left undecided, and now the subject of the discussion in this brief, follow:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

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(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of the courts of first instance follow in arriving at the specific terms of more detailed decrees?

PRELIMINARY STATEMENT

Since May 17th the School Board of the District of Columbia without awaiting a decree from this Court, has proceeded with implementation of a plan to desegregate the public school system of the District of Columbia. This so-called "Corning plan" has received wide publicity and has been referred to by many as a model plan for the desegregation of public school education. Since this Court is undoubtedly interested in what has taken place in the District of Columbia since its May 17th decision, we feel constrained to point out in some detail the development, modification, and operation of this plan. We likewise believe it will be of aid to the Court in its consideration of the answers to questions 4 and 5 to acquaint the Court with the framework within which this plan has been developed. In addition it also appears important to us that we give the Court our appraisal of this plan and its implementation. Under any thoughtful consideration of what has happened here, due deliberation must be given to the fact that this is the Nation's capital. It should also be borne in mind that the decision of May 17th is in line with the policy of the Federal Government.

These factors shed additional light on the events which have occurred since that decision. Any critical examination of what has taken place in the District of Columbia must be made in full awareness of the strong position taken by the President of the United States in not only urging immediate integration in the public schools of the District of Columbia but in also expressing the hope that the manner in which this transition from a segregated public school system to an integrated one might serve as a model for the rest of the country. The Commissioners of the District of Columbia took vigorous action in support of this position. The Corporation Counsel of the District of Columbia issued a clear cut opinion authorizing immediate action in the implementation of this position. The Board of Education then adopted a forthright and unequivocal policy calling for immediate integration. All of these actions occurred within the astonishingly short period of eight (8) days. It would also appear to us to be of some assistance to the Court to be advised that wherever unseasonable delay manifested itself in the plan proposed or in the steps taken in carrying out the plan that some one or more of these public officials or agencies insisted upon elimination of such delay and thus facilitated prompt action. It is in the light of this background that we wish to discuss with the Court the "Corning plan" and the steps taken thereunder in the District of Columbia.

DEVELOPMENT AND OPERATION OF THE CORNING PLAN

On December 17, 1952 the Board of Education directed Dr. Hobart Corning, the Superintendent, to formulate plans and to hold hearings on the integration of the then existing dual school system in the District of Columbia in the event that the Supreme Court should declare the dual school system to be unconstitutional. (Minutes of the Seventh (stated) meeting of the Board of Education, 1952-1953, held on December 17, 1952, p. 34.) The Superintendent

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pursuant to this directive invited suggestions with regard to desegregation from interested persons and community organizations. Numerous responses resulted from these invitations. These responses were analyzed and tabulated, and reported upon by Dr. Corning to the Board. The Board invited organizations and citizens to appear and submit further suggestions. The materials submitted were referred to the Superintendent for the attention of his staff, looking forward to the submission of a plan of desegregation by the Superintendent.

The Superintendent advised the Board at its meeting on December 16, 1953, that he planned "to set up a series of meetings in the general field of inter-cultural relationships . . . " (Superintendent's Circular No. 79, Appendix B, p. 33.)

From December, 1953 until May 1954, a program of inter-cultural education was carried on among Dr. Corning's staff and to a limited extent among the teaching personnel. The superintendent stated that the purpose of his activity was not to deal "with segregation or integration as such or with the advantages and disadvantages of either system, but that we are dealing rather with the problem of developing desirable human understandings and relationships as we live together and work together for the education of all the children—no matter under what general plan the schools are organized." (*Ibid.*, p. 34.)

On the day this Court announced its opinion in this case, Superintendent Corning made a statement to the press that neither he nor the Board could do anything about desegregation until the Court had handed down its final decree. However, the next day, May 18, 1954, the District authorities decided not to wait for the re-arguments on the method and timing of integration nor for this Court's final decree. On that day the members of the Board of Education and Superintendent Corning, along with the Corporation Counsel for the District of Columbia, The Honorable Vernon West, met with the Commissioners of the

District of Columbia. The Corporation Counsel advised them that the decision of this Court made Acts requiring separation of the races in public education unconstitutional; that the Board could determine the mechanics and time of integration; and that there was nothing to prevent the school authorities from desegregating as soon as they deemed advisable. At this meeting Commissioner Samuel Spencer disclosed that President Eisenhower had expressed the hope that the District would become a "model" for the nation in school integration. (Washington Post-Times Herald, May 19, 1954, p. 1 col. 7, p. 6 col. 3.)

The Board at its next regular meeting, May 19, 1954, decided to have a call meeting on May 25, 1954 for the purpose of hearing the Superintendent's report on the matter of desegregation of the public schools. A resolution was presented to the Board that "the Board enunciate in advance of the consideration of any plan proposed by the Superintendent, a clear and unequivocal statement of principles which shall govern in the adoption and execution of the Superintendent's proposed plan", and that the President appoint a special committee for the purpose of drafting such a set of principles for presentation to the Board at the May 25 meeting.

During the discussion of the resolution, the Superintendent strenuously objected to this proposal saying, ". . . he is wholly in accord with the establishment by the Board of an unequivocal set of principles. He stated further, however, that he has been working for weeks in the preparation of a set of principles to recommend to the Board and that he believed his report would be almost useless if the Board, prior to receiving his report, established a set of principles. He stated that his report is not a detailed administrative report except insofar as it illustrates how the principles would operate. He stated further that he was prepared to present to the Board at its special meeting on May 25, 1954, a specific set of principles with the firm recommendation that they be adopted as an

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unequivocal set of principles to govern the administrative procedures to follow. He stated that he had no objection to another set of principles being suggested, but that it was his thought that inasmuch as work had been put upon this matter of principles, he felt the Board should first give consideration to his report which the Board could amend, revise or eliminate."

"... The Superintendent stated that whatever principles are adopted and whatever administrative devices are applied will require a great deal of time beyond the establishment of principles."

The resolution was adopted by the Board and the committee was appointed. (Minutes of the Twelfth (stated) Meeting of the Board of Education, 1953-54, May 19, 1954.)

At its May 25th meeting the Board adopted the following policy:

> "In the light of the decision of the Supreme Court of the United States in Bolling v. Sharpe, the Board of Education of the District of Columbia, believing it to be in the best interest of all citizens of the community of Washington, and necessary to the effective administration of an integrated system within the public schools, hereby adopts the following declaration of policy:
>
> 1. Appointments, transfers, preferments, promotions, ratings, or any other matters respecting the officers and employees of the Board shall be predicated solely upon merit and not upon race or color.
>
> 2. No pupil of the public schools shall be favored or discriminated against in any matter or in any manner respecting his or her relationship to the schools of the District of Columbia by reason of race or color.
>
> 3. Attendance of pupils residing within school boundaries, hereafter to be established, shall not be permitted at schools located beyond such boundaries, except for the most necessitous reasons or for the public convenience, and in no event

for reasons related to the racial character of the school within the boundaries in which the pupil resides.

4. The Board believes that no record should be kept or maintained in respect to any pupil not enrolled in a public school on or prior to June 17, 1954, or in respect to any officer or employee not employed within the system on or prior to that date in which information is solicited or recorded relating to the color or race of any such person.

5. That the maximum efficient use shall be made of all physical facilities without regard to race or color.

In support of the foregoing principles, which are believed to be cardinal, the Board will not hesitate to use its full powers. It is pledged to a complete and wholehearted pursuit of these objectives.

We affirm our intention to secure the right of every child, within his own capacity to the full, equal and impartial use of all school facilities, and the right of all qualified teachers to teach where needed within the school system. And, finally, we ask the aid, cooperation and good-will of all citizens and the help of the Almighty in holding to our stated purposes." (Minutes of the 13th (Special) Meeting of the Board of Education, 1953-1954, held May 25, 1954, and Recessed Session held June 2, 1954, pp. A-8-9, App. pp. 1-15.)

After adopting this declaration of principles, the Superintendent was called upon to present his plan for integration. The "Corning Plan" was then presented by the Superintendent.

This plan was prefaced by the following statement:

1. *Complete desegregation of all schools is to be accomplished with least possible delay.*

Desegregation by grades or by levels would delay the process and would create administrative problems arising from confusion and inconsistencies.

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2. *New boundaries are to be established for each school.*

Definite boundaries will be established for each school to make the optimum use of the school by the pupils living in its immediate area.

In sections of the city where schools are located very close to each other it will be impossible to set up separate boundaries for each school. In such instances, therefore, the boundaries will be for groups of schools rather than for individual schools.

When the new boundaries have been established and the plan is in operation, adherence to the boundary limitations must be definite and without exception.

This does not mean, however, that there will be any change in the present practice of adjustments of any school boundaries by the Superintendent wherever changes in school population make such action necessary. These boundary readjustments during the period of transition to a desegregated system will probably be more frequent than they are at present.

3. *Appointments and promotions of all school personnel are to be made on a merit system only and assignment will be in accord with the needs of the service.*

The tenure rights of individuals as to salary level and rank will be maintained.

The duties of some officers will necessarily be changed.

4. *The transition to a desegregated system is to be accomplished by natural and orderly means.*

Artificial and immediate reassignments of large numbers of pupils, teachers, and officers would be disruptive and will be avoided." (*Ibid.*, p. A. 16)

The report next proceeds with a consideration of the distribution of pupils and of school boundaries. The following

criteria are provided for governing the distribution of pupils:

"1. the optimum use of all school buildings, and

2. the optimum accessibility of school buildings to the residences of pupils.

These criteria according to the plan necessarily require the establishment of definite zones to be served by each school or group of schools with the exception of the teachers colleges and the vocational and technical high schools which are specialized in nature and will continue to be city-wide in their services." (*Ibid.*, p. A. 17)

This plan provides for an option for students presently enrolled in the District of Columbia system at any level to remain at the school until graduation from that level in order to avoid immediate displacement of large numbers of pupils. It provides the following procedures for carrying this out:

"1. Fixed zones are to be established for each elementary, junior high and senior high school to insure balanced use of school facilities.

2. All pupils new to the school system or to a particular school level will be assigned to the schools designated to serve the zones in which they live.

3. All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within the new boundaries of the school are not denied. If they prefer they may transfer to the school serving the zone in which they live. Elementary school pupils who change residence will be transferred to the school assigned to the area of the new residence.

4. Transfers from one school to another will be required when necessary to relieve overcrowded conditions." (*Ibid.*, p. A. 17-18.)

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In keeping with the directions of the Board of Education the plan next set forth a proposed schedule (*Ibid.*, pp. A. 21-25.) This schedule provided for the completion of the drawing of new boundaries for the public schools by September, 1954. (*Ibid.*, p. A. 21.) It provided for limited transfers of elementary and junior high school pupils solely to relieve overcrowding by September, 1954. (*Ibid.*, p. A. 21-22.) It further provided for a beginning of a merger of the McKinley and Armstrong technical high schools at the same time. (*Ibid.*, p. A. 22.) In addition, provision was made for students of all races to attend the Miner and Wilson Teacher Colleges by September, 1954. (*Ibid.*, p. A. 22-23.)

The plan next enumerated a series of administrative actions which needed to be taken which caused the Superintendent to feel that he could make no more progress toward desegregation in the public schools by September, 1954 than indicated in the paragraph above. He also indicated that the need for legislative changes supported this delay. (*Ibid.*, p. A. 22.)

The plan continues with these observations:

> "If the Board approves the Superintendent's plan and if there are no such setbacks as the failure to secure such legislative changes as the Corporation Counsel deems necessary or to secure funds that may be necessary to accomplish the physical changes in schools and in the redistribution of classroom equipment and supplies, the Superintendent feels that he can complete the changeover to a desegregated system by September, 1955.
>
> "It is the belief of the Superintendent that he can not in September go beyond the steps outlined in this report because of the lack of sufficient time before the close of school in June as the presence of pupils, teachers, and officers is essential to the carrying out of these plans. The official school calendar specifies June 17, as the last day for pupils; June 18, as the last day for teachers; and July 1 through August 31, as the summer vacation period for field officers. The field

officers are, of course, subject to call during this vacation period if their services are needed." (*Ibid.*, p. A. 23-24.)

As regards personnel, the Superintendent set no dates, but stated that persons presently employed would not be moved immediately, and that new personnel would be assigned in accordance with the needs of the service. Staff personnel would continue to exercise their current functions. (*Ibid.*, pp. A. 19-21.)

The Board heard the Superintendent read this report and immediately recessed until June 2. On June 2 the Board met and discussed the Superintendent's report—that is the "Corning Plan" as described above. (*Ibid.*, pp. A. 35-61). The Superintendent then submitted a statement to the Board in which he sought to justify the validity of the "option" plan and to further support his position that it was administratively impossible to put his plan into effect in September, 1954, except for the emergency transfers indicated above. In this statement the Superintendent conceded that he could establish new school boundaries by July 1, 1954; but, he stressed vigorously his viewpoint that it was administratively impossible to make any significant assignment of pupils by September, 1954. In this statement it was pointed out that emergency transfers referred to would provide for the transfer of about 2,700 Negro pupils into the previously all-white elementary and junior high schools. (*Ibid.*, pp. A. 62-66.)

The Superintendent's report of May 25 was accepted and filed and Dr. Corning was instructed to complete the designation of school boundaries and present maps to the Board on July 1 and to submit to the Board on June 23 a specific schedule covering the steps in desegregation. (*Ibid.*, p. A. 74.)

In the Board Meeting of June 23, 1954, Superintendent Corning outlined the steps in the desegregation program which had been taken and were to be accomplished,

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with their respective dates. (*Ibid.*, A. 41-46.) The schedule has been carried out to date except in instances and manners as hereinafter noted:

June 8	Temporary reorganization of the two Boards of Examiners into one Board under the direct chairmanship of the Superintendent.
June 10, 11, 12	Teacher examinations for elementary, junior high, and vocational high schools on a completely integrated basis.
June 11	Notices sent to all high school principals announcing that both Miner and Wilson Teachers Colleges are receiving applications for admission in September from any qualified person, regardless of race.
June 11	Instructions issued to Heads of Departments of Military Science and Tactics to prepare and submit suggested plan for integration of cadet program for 1954-55 school year.
June 14	Meeting of First Assistant and Associate Superintendents concerned, Directors of Health, Physical Education, Athletics, and Safety, and Directors of Athletics to discuss all sports programs for 1954-55 school year. Directors of Athletics to report back on June 24 with suggested schedules.
June 14	First field officer examination announced on a city-wide basis (five such announcements issued to date).
June 15	Completion of tabulation and listing of data from registration cards for approximately 100,000 pupils.
June 17	Preliminary steps completed to effect transfers of pupils in elementary, junior high, and senior high schools listed in Superintendent's report of May 25 (Proposed Schedule, pp. 7-8)
June 23	Revised legislative language submitted to the Board covering necessary amendments to existing law because of Supreme Court decision—

Concerning First Assistant Superintendent
Concerning Chief Examiners
Concerning Board of Examiners
Concerning School Censuses

July 1	Superintendent to submit to Board maps and descriptive data to show new boundary lines for all elementary, junior high and senior high schools.
July 1	All necessary data concerning new boundaries to be furnished school principals and press to insure publicity reaching all school personnel and patrons.
	Superintendent to submit recommendations for merging of all lists of persons eligible for appointment to all teacherships on all levels.
September 1	Use of new boundaries on all levels for all pupils new to the public schools including kindergarten and first grade pupils entering the public schools for the first time.
	(12,000 children affected. Change moved up by three months and put into operation.)
September 13	Evening schools to open for operation on an integrated basis.
September 13	Transfers of selected Division 2 elementary school pupils who, because of present boundaries, are required to travel excessive distances where there are present Division 1 schools near their homes. This is possible as it involves a limited number of pupils and in no instance will require reorganization in a school receiving pupils or the transfer of furniture or equipment.
	(Approximately three hundred transferred.)
	(Pupil changes and transfers were made in the elementary schools, junior high schools, senior high schools, teachers colleges and evening schools. Estimated number of pupils transferred was 2903.)
September 13	Completion of building organizations including the transfer of teachers in some schools.
September 13	Completion of transfer of furniture and equipment and textbooks and classroom supplies between schools affected by pupil transfers.
October 1-15	Explain to all pupils the options provided either for remaining in present schools or transferring to new schools. (Prior to this date, this phase was accelerated.)
	Hold meetings for parents of all children who are qualified to request options to explain the choices

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although no assurance can at that time be given whether the options can be approved for February 1 or for a later date.
(Meetings of parents not held as provided for.)

Written statements to be filed not later than November 11 confirming all options requested. Sixth, ninth and twelfth grade pupils not to be transferred.

(Transfers not made in the sixth, ninth and twelfth grade pupils, except in instances showing hardships. Senior High, 400 Negroes transferred to white school. Junior High, 525 Negroes transferred to white school. Elementary, 900 Negroes transferred to white school.)

The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February.

(Transfers being made with changes of address and in accord with zoning for new pupils)

On September 22, 1954, Superintendent Corning summarized the progress made in desegregating the public schools. He reported that the following things had been accomplished: (1) Schools reorganized; (2) Teachers' eligible register merged and appointments made therefrom; (3) Pupils transferred in accordance with the administration's plans; (4) Furniture, etc. moved; (5) Faculties in more than one-fifth of the schools rendered bi-racial; (6) Committee set up to consider "hardship cases," received about 700 requests for relief, processed about 500, granted about 60%, rejected about 10 percent and placed the remaining 30% under the "option" category

to be disposed of later; (7) new kindergartners, new first graders and all pupils attending Washington schools for the first time assigned on the basis of the new boundaries; (8) more than 3000 elementary and junior high school pupils transferred to new schools to relieve over-crowding; (9) about 100 children transferred to avoid necessity of travelling long distances; (10) Youth Council Centers established at Thomson and Walker-Jones Schools [student bodies bi-racial not faculties]; (11) 20 mentally retarded children and 3 special teachers assigned to the Military Road School [actually only 8 pupils—3 Negro and 5 white—and 3 teachers—2 Negro and 1 white—were assigned here]; (12) merging of McKinley and Armstrong started with a transfer of several hundred (346) children to McKinley; (13) Miner and Wilson Teachers Colleges opened to all qualified applicants [no whites at Miner, 32 Negroes at Wilson]; (14) all evening schools opened on an integrated basis; (15) on September 20 about 460 applications for transfers on the basis of options filed by senior high school pupils [467 eventually granted]; (16) on September 27, 560 applications filed by junior high school pupils [488 eventually granted]; (17) on September 27, about 2400 applications filed by elementary school pupils [none granted, at first because a strike against desegregation existed in the secondary schools, later about 900 transfers in the secondary schools effected, the remainder not acted upon.] (Minutes of the Fourth (Stated) Meeting of the Board of Education, 1954-55, September 22, 1954, pp. A. 18-22. Matters in brackets obtained by us from the District of Columbia School Officials.)

We turn now to an appraisal of the "Corning Plan", and our answers to Questions Four and Five propounded by this Court.

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ARGUMENT

I

In Answer to Question 4a This Court Must, and in Answer to Question 4b This Court Should Issue a Decree Ordering Forthwith Desegregation of the Public School System of the District of Columbia.

Again stated, Question 4 is:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

With respect to these questions petitioners reaffirm the views set forth in their brief on reargument heretofore submitted[1] wherein it is urged that this Court should by its decree direct respondents forthwith to admit petitioners to schools of their choice within the limits of normal geographic school districting. This Court, having decided that segregation in public schools is violative of the Fifth Amendment should decree that respondents, lacking the constitutional power to assign pupils to public schools on the basis of race, immediately cease and desist using race as a factor in making such assignments.

Supporting of that position are the cases decided by this Court enunciating the proposition that the rights here involved are personal and present. *Sweatt* v. *Painter,* 339 U.S. 629, 635; *Sipuel* v. *Board of Regents,* 332 U.S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 350 U.S. 337, 352; *Brown* v. *Board of Education,* 347 U.S. 483; *Bolling* v. *Sharpe,* 347

[1] Brief for Petitioners on Reargument No. 8, October Term, 1953, pp. 89-94.

U.S. 497. The present, personal rights of children who are growing through their formative years necessitate forthwith vindication if they are not to be irretrievably lost.

Petitioners also adopt the arguments urged in the joint brief filed by the pupils and parents in the State cases. Further, petitioners reaffirm the position taken in their brief on reargument hereinbefore mentioned which is in essence that no power exists in this Court to postpone the enjoyment by petitioners of rights constitutionally protected, especially where, as here, the unconstitutional conduct of respondents is causing injury to the most important secular claims that can be put forward by children, the claim to their full measure of the opportunity to learn and grow, and to be treated as entire citizens of the society into which they have been born. In the words of the Delaware Court:

> ". . . To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled." *Gebhart* v. *Belton*, 91 A. (2d) 137, 149.

Moreover, even should this Court conclude that its equity powers do permit an ending of a segregated school system to be accomplished by means of an *effective gradual adjustment*, assay of the factors involved makes it clear that in the District of Columbia it would be both unnecessary and unwise to exercise such powers. The factual situation in the District of Columbia makes a gradual decree unnecessary. Racial segregation has disappeared from virtually every phase of life in the District where Negroes and whites live side by side, work together, dine together and recreate in the same places and in general live their lives without racial distinction, save in the public schools. As has been heretofore indicated, since May 17, 1954 the great majority of individuals and organizations in the District have worked and are working with great zeal to achieve the implementation of this Court's decision without awaiting the decree of this Court. In this atmosphere it is sub-

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mitted that it would be an unwise exercise of equity powers were this Court to do other than grant a forthwith decree.

In specific implementation of their answer to question four (b) and as an aid to the Court in its consideration thereof, petitioners would like to call to the attention of the Court the experience in the District of Columbia with the *Corning Plan* for desegregation of the District school system.

This Court has questioned whether it might permit a gradual adjustment from a segregated school system to one not based upon race. We have already indicated that in our opinion no power exists in the Court to postpone relief and we address ourselves to that question on the assumption that the Court finds that such power does exist. Even if this Court finds that such powers exist, we submit, that the power should not be exercised in this case. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slowly in upholding the adjudicated vital rights of children accruing to them under the Constitution must make out an affirmative case of crushing conviction to sustain his plea for delay.

The experience in the District of Columbia with the Corning Plan substantiates the empirical studies of actual cases of desegregation of public schools and other social institutions, and rebuts the possibility that an affirmative case can be made out to prove that there is any compelling and valid justification which would sustain the delay implicit in the plan.[2]

At the very outset we desire to make our position clear that we do not agree with counsel for the respondents in

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[2] Ashmore, Harry S., *The Negro and the Schools*, Chapel Hill: University of North Carolina Press, 1954;

Clark, Kenneth B., "Desegration: An Appraisal of the Evidence", *The Journal of Social Issues*, 1953, 9, No. 4, 1-77;

"Next Steps in Racial Desegration in Education", *Journal of Negro Education*, Summer 1954, 23, No. 3, The Yearbook Number 23, 1-399.

their publicized position that desegregation of the public schools in the District of Columbia has been accomplished in compliance with the pronouncement of this Court in its decision of May 17th. It is our appraisal of the plan put in operation in the District of Columbia that respondents have advanced on the assumption that this Court has accepted the theory of an effective gradual adjustment of the transition from a segregated system to a system not based on color distinctions and they have discounted the propriety of a forthwith disposal of this matter upon its merits, and have launched upon this gradual plan which is replete with errors and pitfalls. There is a basic inconsistency between the protestations of immediacy by the respondents and the gradualism contained in the program and demonstrated in its operation.

The inequities and partial or complete denial of constitutional rights which are necessarily inherent in any plan providing for postponement of constitutional rights are highlighted by a discussion and critique of the "Corning Plan" as administered by the District of Columbia which plan contains elements of both forthwith desegregation and gradualism. Here the gradualist element has caused not only a denial of present constitutional rights to some pupils, but has also been the genesis of many administrative difficulties in the past. It presages many more difficulties for the future, most all of which would be avoided by the adoption of a forthwith plan.

The principal areas of objections to the Corning Plan are (1) the delay in completely desegregating the public school system and (2) the insertion of a plan of student options designed to defeat effective desegregation as contemplated by the May 17th decision and by the policy declaration of the Board.

(1) An examination of proposals and statements of Superintendent Corning indicates that administratively he was of the opinion that the only desegregation which could take place in the District by September 1954, was the lim-

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ited desegregation involved in relieving overcrowding; the merging of Armstrong and McKinley; and the opening of Wilson and Miner Teachers Colleges without regards to race. As a matter of fact, the Superintendent stated that he could not even draw boundary lines before September 1954. But when the Board took its position and told Dr. Corning to act forthwith, the Superintendent found that he could draw the boundary lines by July 1, 1954, and could partially desegregate in all levels by September, 1954, which he accordingly did. That is, the Superintendent took an administrative position of gradualism from which he receded step by step. The experience here in the District of Columbia demonstrated that extended time to desegregate was not necessary, which is in line with the results of studies made in the field of desegregation.[3]

It should be noted in this connection that part of the administrative indecision and delay was repeatedly justified by Dr. Corning on the basis that he was acting in advance of a final decree in this case.

It is the petitioners position that the Corning Plan taken out of its setting and transplanted into another would occasion greater delay, confusion, and extended, if not complete, denial of constitutional rights.

We should like to call the attention of the Court to the repeated statements by the Superintendent of Schools that certain steps in desegregation were necessary because they were educationally sound, not for the purpose of discrediting the Superintendent, but for the purpose of emphasizing to the Court that claims of educational unsoundness as justification for delay and other administrative actions are, to say the least, unreliable.

(2) The provision for an option, which the Superintendent engrafted upon a boundary system, created anticipated

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[3] Clark, Kenneth B., "Desegregation: An Appraisal of the Evidence", *The Journal of Social Issues*, 1953, 9, No. 4, 1-79, 36.
Ashmore, Harry S., *The Negro and the Schools*, Chapel Hill: University of North Carolina Press, 1954, 70-71.

confusion and so-called hardship cases. It was difficult for some and impossible for others to understand the operation of this phase of the plan, so that many did not exercise these options because they did not know whether they could, or when they could, exercise them. Some people did not exercise the option to remove their children from the school they had been attending outside the new boundary to the school within the new boundary for fear of the hostility which would be accorded the children in the new school because they would be "bumping" former students. This piecemeal desegregation thus produced the very ills forecast by the experts.[4]

The option provision in effect takes the authority to operate an orderly integrated system from the Superintendent and delegates it to the parents of each child. The option plan has not in fact operated as Dr. Corning has promised that it would. At one place in the plan we find this language:

> "Any child living in the area of School "A" may attend that school if he so desires even though he may now be enrolled in School "B" or in some other school.
>
> "It should be noted that all children living within the boundaries of any given school *will have first priority for attending that school.*"

This on its face seems a fair proviso but the application of the rule, with the required sanction of the Superintend-

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[4] Kutner, Bernard; Wilkins, Carol; Yarrow, Penny Rechman, "Verbal Attitudes and Overt Behavior Involving Racial Prejudice", *The Journal of Abnormal and Social Psychology*, 1952, 47, 649-652;

LaPiere, R. T., "Attitudes vs. Action", *Social Forces*, 1934, 13, 230-237; Saenger, Gerhart and Gilbert, E., "Customer Reactions to the Integration of Negro Sales Personnel", *International Journal of Opinion and Attitude Research*, 1950, 4, 57-76;

Deutsch, Morton and Collins, M. E., Interracial Housing, *A Psychological Study of a Social Experiment*, Minneapolis; University of Minnesota Press, 1951;

Chein, I.; Deutsch, M.; Hyman, H.; Johoda, M.—Editors, "Consistency and Inconsistency in Intergroup Relations", *The Journal of Social Issues*, 1949, No. 3, 1-63.

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ent, is having the following demonstrated result: Child John Doe (Negro) lives now in an area within the boundaries serviced by School A (white) and expresses the desire to go to School A. The Superintendent denies this right on the ground that School A will be overcrowded by that transfer, although the place which John Doe seeks to occupy is being held by one or more children (white) who live outside of the area of School A. In others words, exactly contrary to the wording of the plan, the preference is given to the child outside of the boundaries of the school. Thus attendance with race fundamentally as the controlling factor is being perpetuated. That this is designedly done and that there is no immediate relief in sight is voiced by the Superintendent himself in his announced projected plan:

> "The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February."

Our investigation discloses no instance where a single Negro child has been transferred from a school which he has previously attended because of race to a school from which he was previously excluded because of race where to do so would have meant the displacement of a white student. To the contrary, we have come upon instances where white children required by Board rules to attend schools formerly all Negro have been permitted to transfer to schools predominantly white on the alleged ground of "hardship". We respectfully submit that this so-called "hardship" is nothing less than having to attend a public

school within his boundary where his racial group is in the minority. The granting of such transfers by the School Administrator is an admission and acceptance of this as hardship. In addition, the granting of such transfers is assigning students on the basis of race in contravention of this Court's decision of May 17th, and in violation of the expressed policy of the Board of Education stated in the following language:

> "Attendance of pupils residing within school boundaries, hereafter to be established, shall not be permitted at schools located beyond such boundaries, except for the most necessitous reasons or for the public convenience, *and in no event for reasons related to the racial character of the school within the boundaries in which the pupil resides.*" (Minutes of the 13th (Special) meeting of the Board of Education, 1953-1954, held May 25, 1954, p. A 8.)

This is further evidence that this plan not only embraces the principles of gradualism but fosters the denial of effective desegregation.

It appears to us that the Corning Plan as evolved and operated in the District of Columbia tends to nullify the decision of May 17th in two ways: (1) The option features of the plan operate to fasten aspects of the segregated system upon the purportedly desegregated system, and (2) the lack of known standards by which the administrators of the plan are to determine when desegregation is to take effect and why desegregation is to be delayed subject petitioners declared constitutional rights to the uncertain whims and caprice of school authorities, and argues for a forthwith decree, rather than a decree permitting gradualism.

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II

If This Court Should Decide to Permit an "Effective Gradual Adjustment" From a Segregated School System to a System Not Based on Color Distinctions, It Should Not Formulate a Detailed Decree But Should Remand This Case to the Court of First Instance With Specific Directions.

In addressing themselves to the problems posed by the several parts of Question 5, petitioners submit that a crucial factor in determining the kind and character of decree which this Court should enter, is the factor of respondents' actions taken and proposed as hereinabove described looking toward the de-segregation of the public schools in the District of Columbia. Based on respondents' own prognosis the outer limit in point of time required for the necessary adjusment of the school system from a segregated system to one not based on race or color is September, 1955. Inasmuch as the bulk of the deficiencies in the proposed plan to which petitioners have called attention are deletions, their adoption will not extend but tend to shorten the time needed for transition. An additional factor which is submitted as a consideration underlying the choice of form of decree is the atmosphere of integration, to which attention has been called, extant in the District of Columbia.

For the reasons enumerated above it would appear crystal clear that it would be injudicious for this Court to undertake the formulation of a detailed decree in this case. Neither is it needful that the decree reach the specifics which have been considered by the Board of Education and implemented by its action. Nor should this Court appoint a special master since all pertinent evidence is already before this Court and is of record for the use both of this Court and the District Court as well.

It is petitioners' position that this Court should issue its mandate directing that the District Court enter a decree enjoining respondents forthwith from imposing distinctions based on race or color in the administration of the public schools of the District of Columbia and directing that each child eligible for public school attendance in the

District of Columbia be admitted to the school of his choice not later than September, 1955, within the limits set by normal geographic school districting.

CONCLUSION

It is respectfully submitted that in light of the decisions of this Court to the effect that respondents lack the constitutional power to use race or color as a basis for the administering of the public schools in the District of Columbia and that it is in violation of Petitioners' rights under the Fifth Amendment to the Constitution of the United States to be excluded from any of such schools on the basis of race or color, this Court should therefore by its mandate require the entry of a forthwith decree restraining Respondents from using distinctions based on race or color in the administration and operation of the public school system in the District of Columbia.

Respectfully submitted,

(s) .....

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APPENDIX A

Extracts from the Minutes of The Board of Education of the District of Columbia

SUPERINTENDENT OF SCHOOLS
FRANKLIN ADMINISTRATION BUILDING
THIRTEENTH AND K STREETS N. W.
WASHINGTON 5, D. C.

May 25, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

On Monday, May 17, 1954, the Supreme Court of the United States issued two opinions, one having to do with segregation in public schools in Kansas, South Carolina, Virginia, and Delaware, and the other with segregated schools in the District of Columbia. The first opinion declared that "such segregation is a denial of the equal protection of the laws" and the second opinion stated:

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution."

The latter opinion also restored to the docket of the Court the case of Brown v. the Board of Education for further argument next fall on certain aspects of the suit. This opinion placed upon the Board of Education and the Superintendent of Schools the responsibility for accomplishing the complete de-segregation of all public schools in the District of Columbia.

The transition from a segregated to a de-segregated type of school organization requires definite administrative decisions and practices. To accomplish the transition in Washington as rapidly and effectively as possible, basic principles need to be established which will govern all administrative procedures necessary in complying with the opinion of the Court. The Superintendent and his staff state as a basic premise that the schools will hereafter operate as a single system and that no reference will be made in any way to racial differences among its pupils or its employees.

The following general principles are calculated to make the best use of the total resources of the school system in plant and personnel, to serve the best interest of all the pupils, and to promote the general welfare of the community. To implement these principles, administrative attention must be directed toward steps which will assure the distribution of pupils and the assignment of employed personnel smoothly and expeditiously. These general principles are presented to the Board of Education for its consideration.

1. *Complete de-segregation of all schools is to be accomplished with least possible delay.*

   De-segregation by grades or by levels would delay the process and would create administrative problems arising from confusion and inconsistencies.

2. *New boundaries are to be established for each school.*

   Definite boundaries will be established for each school to make the optimum use of the school by the pupils living in its immediate area.

   In sections of the city where schools are located very close to each other it will be impossible to set up separate boundaries for each school. In such instances, therefore, the boundaries will be for groups of schools rather than for individual schools.

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When the new boundaries have been established and the plan is in operation, adherence to the boundary limitations must be definite and without exception. This does not mean, however, that there will be any change in the present practice of adjustments of any school boundaries by the Superintendent wherever changes in school population make such action necessary. These boundary readjustments during the period of transition to a de-segregated system will probably be more frequent than they are at present.

3. *Appointments and promotions of all school personnel are to be made on a merit system only and assignment will be in accord with the needs of the service.*

The tenure rights of individuals as to salary level and rank will be maintained.

The duties of some officers will necessarily be changed.

4. *The transition to a de-segregated system is to be accomplished by natural and orderly means.*

Artificial and immediate reassignments of large numbers of pupils, teachers, and officers would be disruptive and will be avoided.

SCHOOL BOUNDARIES AND DISTRIBUTION OF PUPILS

One very significant aspect of the process of de-segregation is that concerned with the distribution of pupils among the various schools. It is evident that the reasonable and proper criteria for this distribution are:

1. the optimum use of all school buildings, and
2. the optimum accessibility of school buildings to the residences of pupils.

These criteria necessarily require the establishment of definite zones to be served by each school or group of

schools. The teachers colleges and the vocational and technical high schools because they are specialized in nature will continue to be city-wide in their services. In establishing zones for the optimum use of all school buildings, the objective will be to assign to each given school or group of schools an area calculated to give each building its fair share of the total pupil load in relation to its capacity.

Although it will not be possible to avoid all traffic hazards or to assure convenient public transportation in every case in considering the accessibility of a school account will be taken of these factors as well as the factor of distance to be travelled by the pupils.

To facilitate the establishment of proper boundaries for all school buildings on a de-segregated basis, the residence cards for all pupils now in the Washington public schools have been set up on the IBM accounting machines according to city blocks, by grade levels, and by schools now attended. In addition thereto each building principal is preparing a spot map to indicate the places of residence of all his pupils. The officers charged with the responsibility of establishing the boundaries will then be able to determine the number of pupils now enrolled in the schools who live in any given city block. They will also know the grade level and the school last attended by each pupil. The compilation of these data will assist in the establishment of the boundary limitations.

In order to provide stability, continuity, and security in the educational experiences of pupils during the transition period, it is agreed that it will be educationally sound to permit pupils at present enrolled in any school to continue in that school even though they are not living within the new boundaries. By this means immediate displacement of unnecessarily large numbers of pupils will be avoided. Progressively with the establishment of new boundaries all children will attend the schools serving the areas in which they live.

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The following procedures will be needed to carry out this plan:

1. Fixed zones are to be established for each elementary, junior high and senior high school to insure balanced use of school facilities.

2. All pupils new to the school system or to a particular school level will be assigned to the schools designated to serve the zones in which they live.

3. All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within the new boundaries of the school are not denied. If they prefer they may transfer to the school serving the zone in which they live. Elementary school pupils who change residence will be transferred to the school assigned to the area of the new residence.

4. Transfers from one school to another will be required when necessary to relieve overcrowded conditions.

In order to demonstrate how these procedures will operate, the Superintendent suggests that the cases of the boundaries of two hypothetical schools (elementary, junior high or senior high) be considered: School "A", formerly a Division 1 school, and School "B", formerly a Division 2 school, serving areas within their new boundaries on a desegregated basis, the two areas being contiguous.

By the application of the foregoing procedures, what children must attend and what children may attend School "A"?

These *must* attend School "A"

1. All children living within the new boundaries who formerly attended School "A".

2. All children living within the new boundaries who are entering a school of that level for the first time.

3. All children who are newly residing in the area served by School "A".

4. Children now attending School "B" but living within the boundaries of School "A" if School "B" becomes overcrowded.

Those who *may* attend School "A"

1. Children now enrolled in School "A" whether or not their residence is within the boundaries of School "A" may continue to attend until their graduation subject to the following conditions:

   a. if School "A" becomes overcrowded, pupils previously attending School "A" who live in the area now served by School "B" or any other school will be transferred to that school.

   b. if further relief from overcrowding is necessary after all children not living in the area served by School "A" have been transferred, it will then be necessary to provide additional relief by further changing the boundaries of School "A".

2. Any child living in the area of School "A" may attend that school if he so desires even though he may now be enrolled in School "B" or in some other school.

It should be noted that all children living within the boundaries of any given school will have first priority for attending that school.

These same regulations will apply to School "B", and to all other elementary, junior high or senior high schools in the city except those which are city-wide in their services.

The ultimate distribution of pupils strictly in accordance with established zones will be accomplished through the provisions of the principle that all pupils entering the elementary, junior high, or senior high schools for the first time shall be assigned to the schools designated to serve the zones of their residences. This applies equally to pupils entering the first grade, pupils promoted to

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junior high or senior high schools, pupils entering the Washington Public Schools for the first time, and pupils transferring from one area of the city to another.

Finally, authority for the placement of all pupils must be vested in the Superintendent of Schools and his staff, who will administer the plan within the framework of the policies enunciated by the Board of Education.

ASSIGNMENT OF EDUCATIONAL EMPLOYEES

A second major aspect of the process of de-segregation is that dealing with the distribution of the teachers, including librarians and counselors. The following procedures are recommended to govern the assignment of these employees. Here again it is felt that once policies are established through formal action of the Board of Education the school administration shall then be vested with final authority for determining the placement of school employees.

1. *Teachers now in service.*

In general these employees will remain in their present assignments subject to the following conditions.

a. They will be transferred only to meet the needs of the service and then only within the level and/or the subject matter fields of their preparation and experience.

b. When vacancies occur or when there is need for additional teachers in a given school, assignments to that school will be determined in accordance with the best use of available personnel. As is true at present, a controlling consideration in the placement of personnel will be the general fitness and adaptability of a individual for a particular situation.

c. Requests of teachers for transfers will be honored as at present if the transfers are in accordance with the needs of the overall school organization.

2. *Appointment and placement of teachers new to the service.*

a. All appointments of teachers will be made from rated lists resulting from examinations to be held by a single Board of Examiners.

b. All assignments of new personnel will be in accordance with the needs of the service.

Another important aspect in the de-segregation process is the assignment of field officers. Since most of them are specialists in their field it is essential that consideration be given their training and experience.

1. *Principals and Assistant Principals now in service.*

The procedure for the assignment of assistant principals and principals now in the service will be the same as that prescribed for teachers.

2. *Directors, Assistant Directors, Heads of Departments, and other field officers.*

Directors, assistant directors, and heads of departments, who at present serve the system on a divisional basis will be assigned to duties in the same fields of work on a city-wide basis. The duties of most of these positions fall logically into large areas, such as administration, supervision and improvement of instruction, and curriculum revision. Each of these officers will be assigned to some such area in his field on a city-wide basis and will serve all levels of the system.

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3. Personnel in special departments and offices now operating on a divisional basis will be reassigned on a city-wide basis.

4. Newly appointed officers in these groups will be selected according to merit under the existing procedures for the selection and promotion of persons for officer positions, but on a system-wide basis.

The Superintendent is not yet prepared to make recommendations as to any formal changes in the functions of the officers on his staff. The work involved in accomplishing de-segregation in so large a school system will require the closely-knit and joint efforts of all these officers for a considerable period of time. They have been engaged in working out the detailed preparation of this plan and it will require their continued cooperative efforts in its inauguration. The responsibilities and duties of such officers as the Assistant to the Superintendent in charge of Business Administration, the Associate Superintendent in charge of Buildings and Grounds, and the Associate Superintendent in charge of Personnel are already city-wide in scope. The work which is at present the responsibility of the officers in charge of instruction and school administration and of educational research will in no wise be lessened by the change in the school system. It is the plan of the Superintendent to assign these officers eventually to duties that will be broadened and on a system-wide basis and which will provide opportunity for the initiation of new services and the development of others not at present sufficiently emphasized. These reassignments will result in considerably improved supervisory and administrative practices in the classrooms of all levels.

PROPOSED SCHEDULE

To begin the implementation of the plan to de-segregate the public schools of the District of Columbia, the Superintendent proposes the following tentative schedule:

By September, 1954—

Completion by the building principals and their supervisory officers of the establishment of new boundaries for all schools except those that will continue to function on a city-wide basis.

Relief of present urgent situations in:

1. Elementary Schools

a. To relieve overcrowding transfer a sufficient number of pupils:

from the Slowe and Noyes Schools to the Woodridge, Langdon, and Burroughs Schools

from the Bruce, Monroe, and Park View Schools to the Raymond, Petworth, Barnard, and Rudolph Schools

from the Madison, Maury, and Lovejoy Schools to the Kingsman, Edmonds, and Blair Schools

from the Taylor, Hayes and Ludlow Schools to the Wheatley School

from the Bryan and the Payne Schools to the Buchanan School

from the River Terrace School to the Benning School.

b. To vacate the Military Road School, no longer needed for classroom purposes, transfer the pupils from that school to the Brightwood School.

2. Junior High Schools

a. To alleviate overcrowding transfer pupils:

from the Randall Junior High School to the Jefferson Junior High School

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from the Browne, Eliot, and Langley Junior High Schools to the Eastern Junior-Senior High School

from the Kelly Miller Junior High School to the Sousa Junior High School.

NOTE: These transfers of elementary and junior high school pupils are proposed by the Superintendent because of almost emergency situations and in his opinion are deserving of approval at this time as first steps in the complete de-segregation process. He feels that no cases beyond these should be considered at this time.

3. Senior High Schools

Begin the merging of the McKinley and Armstrong Technical High Schools by transferring to McKinley students in such courses as can be accommodated in the present classroom and shop facilities.

NOTE: The complete merger of these two schools will depend upon appropriation of necessary funds for construction and moving and purchase of equipment.

4. Teachers Colleges

While there is no urgent situation in the college enrollments, it is proposed that both Wilson and Miner Teachers College be opened to qualified students regardless of race and that the two institutions plan special course offerings so that students in either one will be able to take advantage of such offerings in the other. A complete merging of the colleges cannot be accomplished at this time since there is not at present any building available which can accommodate so large an institution.

Attention is called to the fact that the suggestions proposed above providing for de-segregation in certain areas of the school system are in advance of any present requirement of the Supreme Court Opinion.

After the opening of the schools in September, the Superintendent will continue as rapidly as possible with the whole program, taking into consideration the necessary steps, the most important of which are listed below:

1. Assigning pupils to schools on basis of new boundaries.
2. Preparing Board Orders for changed assignments of teachers and officers where necessary.
3. Carrying on programs of in-service training in intercultural relationships for all employees.
4. Conducting examinations based on amended legislation.
5. Establishing new eligible lists for teacher appointments.
6. Replanning city-wide student activities, such as sports, cadets, student government, and musical activities.
7. Relocating all field officers now occupying space which will be required for classroom use.
8. Making adjustments in allotments for postage, stores-clerks, and evening schools.
9. Moving furniture and classroom equipment.
10. Arranging for adjustments in the delivery of classroom supplies and textbooks to meet changed school enrollments.
11. Recommending to the Board necessary changes in its rules.

If the Board approves the Superintendent's plan and if there are no such setbacks as the failure to secure such

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legislative changes as the Corporation Counsel deems necessary or to secure funds that may be necessary to accomplish the physical changes in schools and in the redistribution of classroom equipment and supplies, the Superintendent feels that he can complete and change over to a de-segregated system by September, 1955.

It is the belief of the Superintendent that he cannot in September go beyond the steps outlined in this report because of the lack of sufficient time before the close of school in June as the presence of pupils, teachers and officers is essential to the carrying out of these plans. The official school calendar specifies June 17, as the last day for pupils; June 18, as the last day for teachers; and July 1 through August 31, as the summer vacation period for field officers. The field officers are, of course, subject to call during this vacation period if their services are needed.

The Superintendent submits this report for the consideration of the Board and recommends its approval. For the convenience of the Board he recapitulates below the specific recommendations that will require Board approval before he can begin the administrative steps looking to the actual de-segregation of the public schools of the District of Columbia:

1. As a basic premise, that the public schools operate hereafter as a single system without reference of any kind to or consideration of racial differences among its pupils or its employees.

2. That complete de-segregation be accomplished with the least possible delay according to the suggested scheduled steps.

3. That the transition to a de-segregated system be made by natural and orderly means.

4. That new boundaries be established for each school to provide the optimum use of all buildings and the

optimum accessibility of schools to the places of residence of pupils.

5. That the assignments of pupils to schools be made on the basis of the steps outlined in the section, "School Boundaries and Distribution of Pupils," and according to the calendar established in the schedule.

6. That all appointments, promotions, and assignments of school personnel be made on the basis of merit only and in accordance with the needs of the service.

7. That the assignments of teachers, librarians, counselors, and field officers be made according to the policies outlined in the section, "Assignment of Educational Employees."

8. That members of the Superintendent's immediate staff continue in their present assignments until the whole process of de-segregation has proceeded sufficiently far to enable the Superintendent to present his plan for the reorganization of his staff including such changed duties as he then finds expedient.

9. That a schedule be set up providing by September, 1954, for the establishment of new boundaries for all schools; the closing of the Military Road School; the relief of pupil-overcrowding in those elementary schools and junior high school listed in the schedule on pages 7 and 8; the beginning of the merging of the McKinley and Armstrong Technical High Schools; the opening of both Teachers Colleges on a de-segregated basis; and by September, 1955, the complete de-segregation of all schools in the system.

The Superintendent further recommends that he be authorized to prepare an estimate of funds to be sought through appropriation covering such expenses as will be incurred in the de-segregation process that can not be met from funds already appropriated.

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The Superintendent is submitting a separate report covering amendments to existing legislation which he considers necessary to the de-segregation program.

Respectfully submitted

HOBART M. CORNING
Superintendent of Schools

The Superintendent made the following statement:

"I think there are probably two points that rise above all others as being points of misunderstanding or difference of opinion, and I would like to speak, if I may, to those two points quite briefly by way of further explanation.

The two points I have in mind are the choice to remain in the present school until completion of that level and the dates for the various steps to be taken for the completion of the de-segregation plan. Now with respect to the first of those two points, the plan proposed by the Superintendent would grant the option to all presently enrolled pupils to (1) remain in their present schools until completion of that level, whether that be elementary, junior high school or senior high school, or (2) to transfer to the school which under the new boundaries will serve areas in which they reside. Every student would be given that option.

It is important to bear in mind that this choice obtains only until a child finishes the school in which he is presently enrolled and that every pupil new to a school by reason of promotion, change of residence, or transfer from another school must attend the school serving his residence area.

It is the firm belief of the Superintendent that this plan is educationally sound, that it is essential to the educational development of children, and that it will result in a

minimum of disruption to the entire school system and to this community.

The advocacy of this plan is based upon the following considerations:

1. The option to remain in present schools until graduation will apply to pupils now in both Division 1 and Division 2 schools.

2. These same children will have equal opportunity to transfer to the schools that will serve their places of residence under newly established boundaries. *Indeed all pupils entitled to such transfers will have priority over any children previously attending the school but living outside the new boundaries.*

3. Therefore, any pupil who wishes to attend the school serving his residence area under the new boundaries may do so.

4. By this plan through the exercise of the options there is positive assurance that in all schools serving areas with mixed population there will be at the outset an admixture of the races.

5. Since every child has the right to attend the school in his home area if he chooses, it is difficult to find convincing arguments for arbitrarily transferring any child who may wish to remain in the school previously attended and who can be accommodated there.

6. The transition to an integrated school system should be accomplished with a minimum of disruption to the educational program of children.

7. Transfer of children from one school to another can have the following effects:

   A. Interruption of the continuity of instruction.

   B. The replacement of well established relationships with teachers and pupils by new associations.

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C. The loss to the pupil of the teacher who knows him as a person and who is acquainted with his educational background and needs.

D. Loss or at least interruption of the advantages of prestige and leadership which he has established.

E. Since in the secondary schools the course offerings are not identical, but are determined in large part by the requirements and demands of students, the Superintendent feels the need of the interim period to make sure that after all transfers are settled as few students as possible will be interrupted in their present planned curriculums, since courses can be organized with teacher transfers where necessary to obviate this kind of difficulty.

8. Transfer of all students initially would require a great many more moves of teachers and resulting reorganization of school staffs and school offerings than are necessary to accomplish the de-segregation process.

In considering this proposal of the Superintendent a controlling consideration should be the fact that *the purpose of public education everywhere is the welfare and progress of the child.* The Superintendent feels that unnecessary transfers to accomplish a desired goal immediately and to satisfy adult desires would be a blow to the welfare and progress of the child for whom the schools exist.

The second point to which I'd like to give further explanation has to do with the timing of the various steps to complete integration.

A point of view has been expressed that all children should be assigned to schools according to the newly established boundaries by September, 1954. For the following reasons the Superintendent believes that only the significant emergency transfers recommended should be made as of September, 1954.

1. Using the spot maps for all schools that have been prepared at the Superintendent's direction and the I.B.M. cards, representing 103,000 students, the drawing of new boundary lines can be completed earlier than September as originally estimated.

2. The assignment of pupils to schools according to the new boundaries, however, is not accomplished by indicating these boundaries on a map. The satisfactory accomplishment of this complicated process of transferring large numbers of children and preparing the schools to receive them involves the following steps:

   A. The actual drawing of new boundary lines for every school.

   B. The announcement of these new boundaries to the patrons of the schools together with the furnishing of sufficient explanatory material to enable them to understand how the new boundaries will operate.

   C. The securing of school choices signed by the parent of every child who is entitled to any option.

   D. The compilation of these choices to determine the total number of pupils to be accommodated in each school according to the new boundaries.

   E. The further readjustment where possible of boundary lines for any school which at this stage appears to be overpopulated.

   F. The listing by the building principals of all pupils to be transferred together with the preparation of the usual necessary transfer data including in the secondary schools the preparation of an individual transcript of record for each pupil.

   G. Notification to all parents whose children are to be transferred.

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H. The necessary reorganization of classes according to grade or subject matter following the adjustment in individual school enrollments.

I. The necessary changes in teacher assignments following the completion of pupil assignments.

J. The necessary building changes and moves where rooms now used for office purposes will be required for classes.

K. The moving of teacher and pupil furniture to accommodate the changed building enrollments.

L. The reallocation and transfer of equipment, textbooks, and classroom supplies.

All of these steps are essential to a smooth and efficient transition.

3. These steps can not be accomplished in the summer when the schools are not in session and pupils, teachers, parents and field officers are not available. Even though it is possible to require educational employees to serve during the vacation period any move in this direction would result in lowered morale at a time when it should be at its highest point. Furthermore, there would still be no means of communicating with pupils and parents.

4. It is highly important that the moving of so many children and teachers and the complete changeover on so vast a scale should be undertaken only after detailed planning and conferences.

5. It is the opinion of the Superintendent that the complete transition of the school system in a sound orderly way by September 1954 is administratively impossible.

The Superintendent in his May 25 report recommended that the transition be completed by September, 1955. It

was explained that complete de-segregation would be accomplished step-by-step during the school year beginning in September 1954. The first steps recommended for September involved the transfer of approximately 2700 children from 21 present Division 2 schools to 18 Division 1 schools to relieve serious over-crowding in the colored elementary and junior high schools. It also recommended the opening of the teachers colleges to both races and the merging of Armstrong and McKinley High Schools. The report did not detail the progressive steps which can be undertaken during the school year 1954-55. The steps which seem possible in present planning are:

1. Completion of boundaries by July 1, 1954.
2. Additional transfers as soon after the opening of the school year as possible by the application of the new boundaries in certain areas in which the number of pupils to be transferred is very limited.
3. The completion of de-segregation of the senior and vocational high schools by February 1, 1955.
4. Such other transfers as may be found possible and desirable when the actual fall enrollments are available.

I believe, Mr. Chairman, that that is about all I care to say other than to remind you that this plan was worked out by the staff with the Superintendent in a series of many meetings which were held, some of them night meetings, long sessions and have been given very careful consideration. It is our opinion that the slight amount of delay which is involved in this problem is essential for the orderly working out of this very complicated program. Furthermore, the slight delay recommended is not serious when we consider that the steps taken by us toward de-segregation in September and those which may be taken during the next school-year before the final decree of the

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Supreme Court is handed down are actually in advance of legal necessity.

Emphasis should be placed, therefore, it seems to me, not upon any incompleteness of the process in September, but upon the fact that changes made by that time are in advance of any final directive from the Supreme Court.

The Superintendent and his staff will be held responsible for the successful administration of plans for de-segregation. They should not, therefore, be required to follow a schedule which in their judgment cannot be met by orderly and well thought-out educational procedures. The sincere, honest, and objective opinion of the staff as to the time required and the methods to be used should be given consideration. I believe that that is all." Minutes of the Thirteenth (Special) meeting of the Board of Education, 1953-54 held May 25, 1954, and Recessed Session held June 2, 1954.

SUPERINTENDENT OF SCHOOLS
FRANKLIN ADMINISTRATION BUILDING
THIRTEENTH AND K STREETS NW.
WASHINGTON 5, D. C.

June 23, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

The Superintendent submit the following calendar of dates for the steps that have been or are to be taken to complete the program of de-segregation of the public schools of the District of Columbia

STEPS IN DE-SEGREGATION PROGRAM ALREADY ACCOMPLISHED

June 8	Temporary reorganization of the two Boards of Examiners into one Board under the direct chairmanship of the Superintendent.
June 10, 11, 12	Teacher examinations for elementary, junior high, and vocational high schools on a completely integrated basis.
June 11	Notices sent to all high school principals announcing that both Miner and Wilson Teachers Colleges are receiving applications for admission in September from any qualified person, regardless of race.
June 11	Instructions issued to Heads of Departments of Military Science and Tactics to prepare and submit suggested plan for integration of cadet program for 1954-55 school year.
June 14	Meeting of First Assistant and Associate Superintendents concerned, Directors of Health, Physical Education, Athletics, and Safety, and Directors of Athletics to discuss all sports programs for 1954-55 school year. Directors of Athletics to report back on June 24 with suggested schedules.
June 14	First field officer examination announced on a city-wide basis (five such announcements issued to date).
June 15	Completion of tabulation and listing of data from registration cards for approximately 100,000 pupils.
June 17	Preliminary steps completed to effect transfers of pupils in elementary, junior high, and senior high schools listed in Superintendent's report of May 25. (Proposed Schedule, pp. 7-8)
June 23	Revised legislative language submitted to the Board covering necessary amendments to existing law because of Supreme Court decision—

Concerning First Assistant Superintendents
Concerning Chief Examiners
Concerning Boards of Examiners
Concerning School Censuses

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STEPS IN DE-SEGREGATION PROGRAM TO BE ACCOMPLISHED

July 1	Superintendent to submit to Board maps and descriptive data to show new boundary lines for all elementary junior high and senior high schools.
	All necessary data concerning new boundaries to be furnished school principals and press to insure publicity reaching all school personnel and patrons.
July 1	Superintendent to submit recommendations for merging of all lists of persons eligible for appointment to all teacherships on all levels.
July 6	Completion of estimate for 1956 budget for funds needed to convert McKinley High School to a modern technical school to permit the eventual closing of the present Armstrong Technical High School.
September 1*	*Use of new boundaries* on all levels for all pupils new to the public schools including kindergarten and first grade pupils entering the public schools for the first time.
September 13*	Evening schools to open for operation on an integrated basis.
September 13*	Transfers of selected Division 2 elementary school pupils who, because of present boundaries, are required to travel excessive distances where there are present Division 1 schools near their homes. This is possible as it involves a limited number of pupils and in no instance will require reorganization in a school receiving pupils or the transfer of furniture or equipment.
	Any similar cases on the secondary level will be considered on an individual basis.

* This step has not previously been reported to the Board.

September 13 Pupil changes indicated by the following table:

ELEMENTARY SCHOOLS

Pupils to be transferred from 12 schools in Division 2 to 14 schools in Division 1		Estimated number of pupils to be transferred	Resulting number of pupils in integrated schools based on June enrollments**
FROM	TO		
Bruce	Barnard		
Bryan	Benning		
Hayes	Blair		
Lovejoy	Brightwood		
Madison	Buchanan		
Maury	Burroughs		
Military Road	Edmonds		
Noyes	Kingsman	1503	6341
Park View	Langdon		
River Terrace	Petworth		
Slowe	Raymond		
Taylor	Rudolph		
	Wheatley		
	Woodridge		
Transfer of special cases of pupils travelling excessive distances to schools nearer their homes (18 schools)			
Bancroft	Patterson		
Congress Heights	Powell		
Eaton	Randle Highlands		
Hearst	Rudolph		
Janney	Simon	96	9603
Key	Stoddert		
Lafayette	Truesdall		
Orr	Tyler		
Oyster	West		

** This number does not include the schools which are integrated by the admission of pupils new to the school system and the new kindergarten and first grade pupils.

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		Estimated number of pupils to be transferred	Resulting number of pupils in integrated schools based on June enrollments**
JUNIOR HIGH SCHOOLS			
Pupils to be transferred from 5 junior high schools in Division 2 to 3 junior high schools in Division 1			
FROM	**TO**		
Browne Eliot Langley Miller Randall	Eastern Jr.-Sr. Jefferson Sousa	844	3050
SENIOR HIGH SCHOOLS			
Pupils to be transferred from Armstrong to McKinley High School		460	1230
TEACHERS COLLEGES			
Admission of applicants without regard to race			908
EVENING SCHOOLS			
Opening Evening Schools to all students			8677
Totals		2903	29809

September 13 — Completion of building organizations including the transfer of teachers in some schools.

September 13 — Completion of transfer of furniture and equipment and textbooks and classroom supplies between schools affected by pupil transfers.

October 1-15 — Explain to all pupils the options provided either for remaining in present schools or transferring to new schools.

** This number does not include the schools which are integrated by the admission of pupils new to the school system and the new kindergarten and first grade pupils.

Hold meetings for parents of all children who are qualified to request options to explain the choices although no assurance can at that time be given whether the options can be approved for February 1 or for a later date.

Written statements to be filed not later than November 11 confirming all options requested. Sixth, ninth and twelfth grade pupils not to be transferred.

The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February.*

January 31 1955*

Assign all junior high school graduates to senior high schools on the basis of the new boundaries.

Make such additional teacher transfers and school reorganizations as are necessary.

Effect such transfers at all levels as may produce a better balanced use of all school facilities, and at the same time be consistent with the educational program of the children themselves.

Arrange for building changes and transfers of equipment and supplies as are necessitated by the changed pupil assignments.

February to June 1955

Complete the processing of all options not acted upon for February with the consequent pupil transfer and reassignment of teachers on September 1, 1955.

Arrange for additional transfers of furniture and equipment and textbooks and supplies, where necessary.

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* This step has not previously been reported to the Board.

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September 1, 1955*	The Superintendent announces one further important step in the integration process which is now presented. This will involve the closing of the Cardozo High School by June, 1955, and the merging of the Wilson and Miner Teachers Colleges in the present Cardozo building in September, 1955. The rezoning of the senior high schools has revealed such an overage of seating space that Cardozo can be closed and the pupils accommodated in the remaining senior high schools, freeing the Cardozo building for college use. It is planned also at the same time to open a junior high school unit in the same building to serve as a laboratory school for the new merged college. The Superintendent will submit a subsequent and more detailed report on this new plan. As the Superintendent studies the entire process of integration and discovers additional steps which can be taken he will advise the Board of Education.
September 1, 1955	All steps will have been taken to complete desegregation of the public schools. Technically, desegregation will have begun in all schools in September, 1954, since the admission of all pupils including kindergarten and first-grade pupils new to the public schools will be on the basis of the new boundaries. All senior high schools will, in addition, be further integrated by the admission of all junior high school graduates in February, 1955, on the basis of the new boundaries.

The Superintendent recommends that the Board of Education approve this schedule and authorize the Superintendent to proceed administratively to carry out the various steps enumerated.

Respectfully submitted,

H. M. Corning
Hobart M. Corning
Superintendent of Schools.

The Superintendent submitted the following report:

"September 22, 1954

"To the Board of Education
of the District of Columbia

"Ladies and Gentlemen:

"Because of the important and far reaching changes that have accompanied the opening of the public schools, I am presenting this summary of the happenings thus far in September.

"By September 10, the first working day for teachers, the staff officers had completed their work of reorganization of schools in accordance with the steps in the desegregation program presented to the Board in June. Eligible registers of applicants for teacherships had been merged and appointments had been made to fill vacancies from these merged lists. Other teachers had been transferred to meet changed school populations. Many pupils—in addition to those promoted from the elementary to the junior high schools and from the Junior high schools to the senior high schools—had been transferred to new schools according to the plans formulated in the late spring. Furniture had been moved to meet changes in building use and supplies, equipment, and textbooks had been readied for a new and different opening school day.

"At the first teachers meetings in more than one-fifth of the building for the first time colored and white teachers were side by side as they participated in the final plans for the return of their pupils on the following Monday. In the afternoon elementary school personnel gathered before the television screens in their respective buildings to receive my direct greetings.

"There was admittedly tension across the city on the opening day. Much careful preparatory work has been done—not only in the way of checking and oiling the machinery of school administration—but more deeply and of far greater importance in increased understanding and

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sympathetic acceptance of the many variations in cultural relationships. Some of this had been accomplished by city-wide, official workshop sessions and some by the participation of hundreds of school employees on a wholly voluntary basis in meetings, discussions and study in order to be better prepared to meet changes such as now were set into action by the pronouncement of the Supreme Court in May, 1954, on the subject of segregation in the public schools of the United States.

"We no longer ring bells to summon our pupils to school. On Monday, September 13, without signal and beginning long before nine o'clock, children left their homes for school—about 97,000 of them, many to go to buildings near their homes which they had not hitherto even entered. To help in this day of transition police officers were available near every school building in the city to watch traffic conditions, to assist at street crossings, and in general to cooperate in the beginning of a new kind of school system.

"I had heard some rumors of the possibility of friction on this opening day, but as the morning passed I received no appeals for assistance, no word of difficulties, but on the contrary reports of an amazingly successful opening in which parents, children, and teachers outdid themselves in a determined cooperative effort that resulted in a very satisfying record. Children were excused at 12:15 this first day in order that teachers and school officers might have the remaining hours to complete the jobs that were still to be done before the first full day of the study, work and plan that is provided for our pupils program.

"The opening day of school is always almost wholly out of the hands of the central school officers and the full responsibility for the activities that day lies in the field. I can, therefore, unreservedly commend to the Board all the teachers and officers in the field because of their performance on that Monday and during the days that have followed which have been wholly free from untoward incidents. Building visits have been made to many schools

during these days and the reports are the same—fine spirit, pleasant relationships, and a buzz of coordinated activities that spell a good school in full operation.

"There have been some unhappy and some disappointed individuals. There have been a number of parents who have sought transfers for their children because of the effect which the changes have made in their own families. In some instances it has been possible to meet their requests, in others not.

"Early in the summer I began to receive letters requesting consideration in the placement of pupils in September. Some of the problems presented were caused by the new boundaries, some by the fact that pupils new to the system were required to enter the school serving the areas of their residence while their brothers and sisters were attending another school; thus dividing the family, some because of physical conditions which necessitated special consideration. The long distances which some pupils were required to travel caused parents to ask for transfers without waiting for the options provided for in the Superintendent's plan.

"I therefore appointed a committee of eight school officers to review these cases and to come to a decision in each one. This committee consisted of two senior high principals, two junior high principals and two directors of elementary education and the Executive Assistant to the Superintendent and the Administrative Assistant to one of the First Assistant Superintendents.

"The work of this committee has not been completed, although, of the almost 500 letters already processed it has been possible to make favorable adjustment for approximately 60 per cent. Some of these requests were at first denied but because of changed circumstances and administrative action it was possible later to give favorable action. About 10 per cent of the cases have been rejected, and the remaining 30 per cent are dependent on the options plan. Replies to parents giving the committee decisions were delayed because of the great number of interviews

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and telephone calls which had to be handled by the co-chairmen.

"There are approximately 200 additional cases before the committee for review. Many of these, however, will be taken care of by the options which have been called for in the elementary and senior high schools and which will be called for in the junior high schools on September 23. The greatest single problem presented in these letters is that of the divided family. Parents will now be able to exercise their options to have their children transferred to the school serving their area and in this way, if they so desire, have their families together in the same school.

"As rapidly as possible any remaining cases which cannot be solved by the exercise of the options will be processed by special committee.

"Considerable reference has been made to changes in our schools this fall. For the purpose of record, these are the steps in the desegregation plan accomplished during these opening days:

> "New kindergarteners, new first graders, and all pupils attending Washington schools for the first time entered schools on the basis of the new boundaries.
>
> "More than 3000 elementary and junior high pupils transferred to schools in general nearer their homes to relieve overcrowded school centers.
>
> "About a hundred children travelling excessively long distances last year were permitted to transfer to much nearer schools.
>
> "At the Thomson and Walker-Jones schools classes were organized experimentally on a lower pupil-teacher ratio and special arrangements have been made to provide in these schools increased medical, nursing, and psychiatric service. These experiments have the sponsorship of the Commissioners' Youth Council.
>
> "In the former Military Road School, a center for not more than twenty mentally retarded children is being established in which the three special teachers provided in the 1955 Appropriations Act will work.

"The merging of the McKinley and Armstrong High Schools was begun with the transfer of several hundred children to McKinley.

"Both Miner and Wilson Teachers Colleges were opened to all qualified applicants.

"All evening schools were opened on an integrated basis.

"Since the opening of schools the calendar has been stepped up so far as the filing of 'options' applications is concerned:

"On the senior high school level about 460 such applications are now being processed.

"Applications for options on the elementary level have been called for and notices concerning such applications on the junior high school level will be issued on September 23.

"No guarantee can of course be made that all the applications will be approved.

"To enrollment of 97,000 on the opening day had increased to more than 103,000 on Friday, September 17.

"This report is for the information of the Board and I wish to express for myself and the officers our appreciation of the staunch support we have had from board members during this period. I think that the Board members will understand my pride in what has been done this fall and in the manner in which it has been accomplished. I repeat my admiration for the fine work that has been done by the school personnel and the understanding and cooperation of the community as a whole.

"Respectfully submitted,

(Signed) H. M. Corning
Hobart M. Corning
Superintendent of Schools"

Minutes of the Fourth (Stated) Meeting of the Board of Education, 1954-55 September 22, 1954, pp. A-18-A-22.

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APPENDIX B

Circular of the Superintendent of Schools of the District of Columbia

PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA
FRANKLIN ADMINISTRATION BUILDING
WASHINGTON 5, D. C.

Superintendent's Circular No. 79
March 9, 1954

To All School Officers:

At the meeting of the Board of Education held on December 16, 1953, the Superintendent advised the Board of Education that he planned to set up a series of meetings in the general field of intercultural relationships. The first meeting which was in the nature of a seminar was held on March 3, for members of the Superintendent's staff and members of the Board of Education. It was felt that since meetings of this sort are to be planned throughout the school system it would be well to start with a pilot meeting for chief administrative officers and board members. Since additional meetings are to be called it is desirable that field officers and teachers know the general nature of the meeting which was held on March 3.

To assist in this meeting three experts in the field were brought to Washington:

Dr. John L. Milligan, Assistant Commissioner of Education in charge of Intercultural Affairs, Newark, New Jersey.

Dr. Dan W. Dodson, Professor of Education and Director of Curriculum and Research Center for Human Relations Study, New York University.

Mr. William E. Vickery, Education Director, National Conference of Christians and Jews.

The Superintendent opened the meeting by stating its general purpose which was "to create a climate for general

understanding and improved relationships among the various segments of our population." The Superintendent stated that the seminar was not geared to any particular type of school organization but that there is need for better intercultural relationships whether the schools continue to be segregated or whether integration is ordered.

The Superintendent called attention to the comments of one civic leader who contended that too much emphasis has been placed upon the preparation of the white population. This leader contended that a four-way preparation is needed—a preparation of the colored population for right attitudes if integration is ordered and preparation against the disappointment if segregation is continued; on the other hand, the preparation of the white population for the adjustments which will be necessary if integration is ordered and preparation for the development of right attitudes if segregation is continued. It would seem that this analysis and advice are good and that better intercultural understandings and relationships are desirable and needed whatever the circumstances may be.

The Superintendent stated further that the seminar was not dealing "with segregation or integration as such or with the advantages and disadvantages of either system, but that we are dealing rather with the problem of developing desirable human understandings and relationships as we live together and work together for the education of all the children—no matter under what general plan the schools are organized."

The Superintendent stated that the workshop should be characterized by a down to earth consideration of the following topics:

1. Practical problems in the field of intercultural relationships now existing.
2. Practical problems in interracial relationships which may present themselves if schools are integrated.
3. Practical solutions of these problems.

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4. Procedures for breaking down prejudices and misunderstandings.

5. Methods of developing cooperative and harmonious effort among the patrons of the schools and all school personnel.

6. General nature of meetings to be held.

During the months of April and May a series of seminars is being set up which will make this sort of experience available to all officers in the field. This is done in the hope that field officers in turn will provide similar experiences for the teachers with whom they are associated. The exact dates of these subsequent seminars have not been set. Neither can announcement be made at this time of the leaders who will assist the groups. Complete announcement will be issued soon. A general meeting will be held for teachers also before the close of school.

Yours very sincerely,

HOBART M. CORNING
Superintendent of Schools

APPENDIX C

Extracts from the Minutes of The Board of Education of the District of Columbia

MINUTES OF THE SEVENTH (STATED) MEETING OF THE BOARD OF EDUCATION 1952-53 DECEMBER 17, 1952

[p A-30f] Mr. Tobriner stated he wishes to present a matter of new business to the Board at this time. He stated it is known by everyone that cases involving segregation in school systems have been argued before the Supreme Court of the United States and among those cases is the case of Bolling against Sharpe which involves the constitutionality of the present segregated system in the District of Columbia. Accordingly, Mr. Tobriner continued, there is a possibility that the Court at some time in the future, near or far, will hand down a ruling which may possibly involve the end of segregation in the District of Columbia. Mr. Tobriner stated he is advised that the Superintendent of Schools is in the process of making plans for that possibility. Mr. Tobriner stated further he feels the Board of Education would be highly derelict in its duty if it did not take into account that possibility and make preparations for that eventuality. Mr. Tobriner thereupon made a motion that the Board at its next stated meeting or adjournment thereof, through its President and its Superintendent, request to appear before it leading citizens of this community, officials of the District of Columbia, members of the clergy and group representatives to give the Board the benefit of their views on two subjects: (1) the question of the mechanics of integration, if it should be ordered, and, (2) what educational preparation might be deemed necessary in order to make integration, if it is ordered, work more freely. The motion was seconded by Colonel Hamilton.

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Mrs. Phillips stated that the mechanics of this matter might be contained in the decision of the Court with which Mr. Tobriner agreed.

As a suggestion from the Chair, Acting President Steinem stated it was his personal feeling, inasmuch as the Board of Education has been represented by counsel, that before the Board goes on record adopting or rejecting the pending motion, it should consult with the Corporation Counsel, D. C. who represented the case of the District of Columbia before the Supreme Court, to ascertain whether any action of the Board, might, in any way, be prejudicial to the presentation of his case.

In support of the pending motion as he said he understood it, Colonel Hamilton stated the motion has nothing to do with the ultimate action of the Court and the Board is not trying to influence the Court one way or the other. Colonel Hamilton stated further that Mr. Tobriner by his motion is suggesting that the members of the Board give this matter some thought and seek advice from cross sections of the community.

Mr. Faulkner stated he felt Mr. Tobriner's motion would be a good one if and when the Court should decide that segregation is illegal. He stated that he also felt Mr. Tobriner's motion was therefore premature at this time and that he would oppose it on that ground.

[p A-32f]

The Superintendent stated he had two observations to make. First, he said, as he understands Mr. Tobriner's motion, the purpose of the meeting would not be to argue whether or not the public schools should be segregated or integrated and, therefore, that issue would be left entirely out of the meeting. The purpose of the meeting would be to get the advice of organized citizenry in the community on how the public school system could operate best if the Supreme Court decides that the public schools are to be integrated. p A.33. The Superintendent stated that as he further understands the motion, the testimony to be given

at such a meeting would, of course, be wholly advisory on the part of those who appear and the Board of Education "would not necessarily follow any of the suggestions indeed (sic) that are brought in." The Superintendent stated that as a matter of fact it is very important at some time or other to get community reactions on the two points which Mr. Tobriner has included in his motion and the only misgiving that he has about the meeting is as to its immediacy—the next Board meeting—together with whether or not in the judgment (sic) of the Corporation Counsel the meeting might be something which would prejudice the opinion of the Court one way or the other. The Superintendent said that is a point about which the lawyers could better give advice. As to the question . . .

Colonel Hamilton suggested that a special evening meeting be held by the Board as the Board does hold evening meetings with citizens on budget requests because he could not conceive of there being enough time for this matter at an afternoon Board meeting if the Board is to transact its other business also.

Mr. Tobriner thereupon amended his pending motion to provide that the meeting be held either at a regular or adjourned meeting of the Board or at such special meeting as the President desires to call. This amendment was accepted by Colonel Hamilton, the seconder of the motion.

The Superintendent asked if the Board wished the calling of such a meeting by the President of the Board to be dependent upon the advice of the Corporation Counsel. Mr. Tobriner replied that he did not believe the Corporation Counsel's advice was at all material on this matter, that the matter is with the Court and the Supreme Court is not going to be prejudiced by what the Board does or does not do after the case has been submitted.

[p A-34] The motion as amended was put and carried with Colonel Hamilton, Miss Parker, Mrs. Williams, Mr. Williams and Mr. Tobriner voting in the affirmative and Mrs. Phillips and Mr. Faulkner voting in opposition to the motion.

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MINUTES OF THE EIGHTH (STATED) MEETING OF THE BOARD OF EDUCATION 1952-53 JANUARY 21, 1953

[p A-36ff]

The Superintendent submitted the following report which he read:

"January 21, 1953

"To the Board of Education of the
District of Columbia

"Ladies and Gentlemen:

"At the meeting of the Board of Education held on December 17, 1952, the following motion was passed by vote of the Board:

> "That at a regular or adjourned meeting of the Board or at such special meeting as the President desires to call, the Board, through its President and its Superintendent, request to appear before its leading citizens of this community, officials of the District of Columbia, members of the clergy and group representatives, to give the Board the benefit of their advice on two suggestions (sic) (1) the question of the mechanics of integration if it should be ordered and (2) what educational preparation might be deemed necessary in order to make integration, if it is ordered, work more freely.

"In the discussion of this motion, it was clearly set forth that the purpose of the meeting is not to permit arguments as to whether the schools should be segregated or integrated and that the advice of community organizations would be sought at this meeting only on the two questions set forth in the motion.

"As a result of discussions which have been held by the Superintendent and his staff on this subject, the officers and the Superintendent are unanimously of this opinion that this meeting when called would be more helpful to the Board of Education and the discussion by citizen groups would be more meaningful if opportunity would first be

given to any organization or individuals in the community to submit in writing to the Superintendent of Schools their advice on the two questions contained in the motion.

[p A-37] The Superintendent would tabulate the views that are expressed in such statement and report to the Board of Education a summary which would be a general pattern of the thinking of the community on these two important questions. This summary would then be used by the individuals and groups who may be invited to appear before the Board of Education in accordance with the Board actions above referred to. The community reactions to this problem is of course important. At the same time the Superintendent presents the summary of community opinion or shortly thereafter, he will present to the Board of Education the result of his own study, with the officers of the administrative procedures which would be involved.

"This suggestion and recommendations are given not to supersede or circumvent the action of the Board in authorizing the calling of a meeting, but rather as a preliminary step in order to assure that the meeting, when called will be of more specific help than would otherwise be possible.

"The Superintendent recommends, therefore, that the Board of Education approve this as a preliminary step and authorize the public announcement that any interested organization or individual in the community is invited to submit its suggestion in writing, that the advice and suggestions should be confined to the two questions proposed in the Board actions and that the written statements be submitted to the Superintendent of Schools on or before February 4, 1953."

. . .

[p A-38] There was a feeling on the part of some of the members that the deadline of February 4, would be too short a time. Mr. Tobriner suggested that the deadline could be extended if necessary.

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MINUTES OF THE ELEVENTH (STATED) MEETING OF THE BOARD OF EDUCATION 1952-53 APRIL 15, 1953

[p A-13f] The Superintendent submitted the following report:

"April 15, 1953

"To the Board of Education of the
District of Columbia

"Ladies and Gentlemen:

"At the meeting of the Board of Education held on January 21, 1953, the Board on recommendation of the Superintendent, authorized a public announcement to be made that any interested organizations or individuals submit suggestions in writing on (1) the question of the mechanics of integration if it should be ordered, and, (2) what educational preparation might be deemed necessary in order to make integration, if it is ordered, work more freely.

"In his report to the Board on January 21, 1953, the Superintendent indicated that he would submit a summary of the statements submitted which would be a general pattern of the thinking of the community on these two important questions. Attached hereto is a summary of the suggestions received together with an alphabetical list of the organizations and individuals who submitted communications. This summary is submitted for the information of the Board in the belief that it may be helpful to the Board in evaluating public opinion as expressed in these written statements."

The Superintendent stated that copies of the summary had been placed in the books of the members for this meeting. Colonel Hamilton asked if the Superintendent has a recommendation to make at this time. The Superintendent replied he did not and that he was still working on the matter in a series of meetings. Mr. Williams asked if the analysis in the summary reflected the thinking of

the Administration and the Superintendent replied that it did not. Mr. Williams asked when the Superintendent would present his recommendation. The Superintendent replied that he would probably report next month and that "if there is a decision earlier than the next month" he will be ready earlier than the next meeting to present a plan to the Board.

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HAROLD B. WI

BRIEF FOR RESPONDENTS

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
PETITIONERS,

v.

C. MELVIN SHARPE, ET AL., RESPONDENTS.

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DIVISION OF PRINTING AND PUBLICATIONS—D. C. GOVERNMENT

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, ET AL.,
PETITIONERS,

v.

C. MELVIN SHARPE, ET AL., RESPONDENTS.

BRIEF FOR RESPONDENTS

A final judgment of the United States District Court for the District of Columbia dismissing a complaint for injunction and declaratory judgment is here for review, by writ of certiorari, before judgment by the United States Court of Appeals for the District of Columbia Circuit. The petitioners, plaintiffs in the District Court, sought admission to the Sousa Junior High School, a junior high school in Division 1 of the public school system of the District of Columbia, which division encompasses the several schools for white pupils, contending that the separation of white and Negro children in the public schools violates Article I, Sec. 9, Clause 3 of the Constitution of the United States, the Fifth Amendment to the Constitution of the United States, Title 8, Sections 41 and 43 of the United States Code, and Chapter I, Article 1, Section 3 and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

OPINION BELOW

A final order dismissing the complaint of the petitioners, plaintiffs in the United States District Court for the District of Columbia, appears in the record (R. 19). It is not reported in any official reporter system.

GROUNDS OF JURISDICTION

After a final order of dismissal of the complaint was entered by the United States District Court for the District of Columbia on April 9, 1951 (R. 19), notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed by petitioners, plaintiffs in the District Court, on April 10, 1951 (R. 20). After briefs were filed in the United States Court of Appeals for the District of Columbia Circuit by both the petitioners and respondents, but before argument was had in that court, this Court, in a Per Curiam opinion dated October 8, 1952 entered jointly in the cases of *Brown* v. *Board of Education of Topeka, Briggs* v. *Elliott,* and *Davis* v. *County School Board of Prince Edward County, Virginia,* Nos. 8, 101 and 191 respectively, October Term, 1952, continued said three cases for argument so that a petition for certiorari might be filed herein under the provisions of 28 U. S. C. § § 1254(1), and 2101(e). A petition for writ of certiorari was filed herein by petitioners on October 24, 1952 seeking review of the judgment of the United States District Court for the District of Columbia, which petition was granted on November 10, 1952. Jurisdiction of this Court is accordingly predicated upon the provisions of Title 28, United States Code, Sections 1254(1) and 2101(e).

QUESTIONS PRESENTED

In the opinion of the respondents the questions presented herein are:

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(1) Whether the complaint filed by petitioners in the United States District Court for the District of Columbia states a claim on which relief can be granted.

(2) Whether Acts of Congress providing for the establishment and maintenance of a dual school system in the District of Columbia are constitutional.

STATEMENT OF THE CASE

The statement of the case incorporated in the brief filed by petitioners sets forth as facts most of the allegations of their complaint filed in the District Court rather than stating them merely as allegations. There are also a few statements which are in error and, accordingly, respondents believe that the following is a correct presentation of the facts:

A complaint filed in the United States District Court for the District of Columbia alleges in substance the following:

> The corporate petitioner, Consolidated Parent Group, Inc., is an organization having for its objective, among others, "abolition of segregation and other discriminatory practices now invoked upon minority groups in the public schools and recreational areas of the District of Columbia."
>
> The adult petitioners are taxpayers and citizens of the United States and of the District of Columbia, required by law to send their respective children, minor petitioners, to public schools in the District, and are subject to criminal prosecution for failure so to do. The minor petitioners are Negroes, are residents of the District of Columbia, are within the statutory age limits of eligibility to attend public schools of said District, and were, by the principal of Sousa Junior High School, on the 11th day of September, 1950, and during the time when the respondents were receiving students for enrollment and instruction in Sousa Junior High School, a public school in the District of Co-

lumbia, refused admission and excluded from enrollment and instruction therein solely because of their race or color.

Subsequently, minor petitioners appealed to the Associate Superintendent of Schools in charge of white vocational and junior high schools in the District of Columbia, to the First Assistant Superintendent of Schools, Divisions 1-9 (now Division 1), restricted to white pupils, to the Superintendent of all public schools in the District of Columbia, and to the Board of Education. The several school officials refused admission and excluded the minor petitioners from enrollment and instruction in Sousa Junior High School, solely because of their race and color, and the Board of Education upheld the action of these school officers.

Defendants in the action filed in the District Court, who are now the respondents, are members of the Board of Education, the several school officers heretofore mentioned, and the First Assistant Superintendent of Schools, Division 10-13 (now Division 2), restricted to colored pupils.

The minor and adult petitioners, allegedly on their own behalf and on behalf of others similarly situated, together with the corporate petitioner, also allegedly acting on behalf of itself and all Negro citizens of the United States residing in the District of Columbia, "similarly situated", on November 9, 1950 filed the complaint (R. 1-14), in the District Court, against the respondents in their respective official capacities. The suit sought a declaratory judgment that the respondents are without right to construe certain Acts of Congress so as to exclude the minor petitioners from Sousa Junior High School on account of their race or color, and sought interlocutory and permanent injunctions restraining the respondents from so excluding the minor petitioners and requiring them to admit the minor petitioners to said school. The complaint is based upon alleged violation of Article 1, Section 9, Clause 3 of the Constitution, the Fifth Amendment to the Constitution, Sections 41

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and 43 of Title 8 of the United States Code, and Chapter I, Article 1, Section 3 and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

The complaint alleges that the minor petitioners "do now attend a junior high school in said District."

Contrary to the allegation in paragraph 4 of the complaint (R. 4), the compulsory school attendance law of the District of Columbia, 43 Stat. 806 (set out in Appendix B of petitioners' brief), does not require attendance upon a *public* school.

Subsequently, the respondents, through counsel, filed a motion to dismiss the complaint (R. 18).

The District Court granted the motion to dismiss (R. 19).

SUMMARY OF ARGUMENT

Petitioners brought this action in the district court to require respondents, members of the Board of Education and school officials, to admit Negro children to Sousa Junior High School, a school established and maintained for white children. The complaint charges that the minor petitioners are deprived of "enjoyment of the educational opportunities afforded" in Sousa Junior High School in violation of the Civil Rights Act, the United Nations Charter, Article I, Section 9, Clause 3 of the Constitution, and the due process clause of the Fifth Amendment. The complaint admits, however, that the minor petitioners "do now attend a junior high school" in the District and contains no allegation that any educational opportunity available in Sousa Junior High School is not available in the junior high school which minor petitioners "do now attend." These fatal deficiencies of the complaint not only justified the district judge in dismissing the complaint but required that he do so.

A series of Congressional enactments between 1862 and 1866 providing for the establishment of a dual school system in the District of Columbia were reenacted by Congress in 1874 as part of the Revised Statutes of the District. This Court construed these enactments as requiring the maintenance of the dual school system by so referring to them in the case of Plessy v. Ferguson, in 1896.

The highest court of the District of Columbia has on two occasions, in 1910 and in 1950, construed the Revised Statutes of the District as requiring the maintenance separate schools for white and colored children. Indeed, Congress itself in a number of enactments for the District of Columbia between 1874 and 1951 has treated and dealt with the dual school system as an established fact. Since this Court ordinarily accepts the construction and interpretation by the highest court of the District of Columbia of purely local laws, that court's construction and interpretation of these purely local laws should be accepted herein.

Even slavery was constitutional under the Fifth Amendment—it required a constitutional amendment to end it. When slavery in the District of Columbia was abolished by Congress before the adoption of the Thirteenth Amendment, "due process" commanded payment for the property thus taken. Separate schools for white and colored children were set up by the very same legislators who proposed the Fourteenth Amendment and who enacted the Civil Rights Acts. Thus their contemporaneous judgment was that a dual system of schools is constitutional. During the years following the Civil War, when political rights for Negro citizens were being established by constitutional amendments and legislation, an integrated school system for the District was not considered by the Congress to be an essential part of the rights. Indeed, after the dual system had been in operation for over a quarter century, some of the outstanding Negro spokesmen of the community insisted that the continuance thereof is essential to the maximum development of the race.

Dual school systems have been many times decided by this Court to be constitutionally valid under the Fourteenth Amendment, which contains an "equal protection" clause as well as a "due process" clause. In view of these decisions and the oft-enunciated rule that the due process clauses of the two Amendments are similarly construed, the dual system in the District of Columbia cannot be violative of the Fifth Amendment.

Beyond the fact that there was such a close tie between the Fourteenth Amendment, the Civil Rights Acts and the laws set-

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ting up the dual school system in the District, efforts to specifically include integration of District schools in an amendment of the Civil Rights Act failed of passage in Congress and, indeed, the enactment of the Revised Statutes in 1874 repealed by implication any concept that the earlier Civil Rights Act denounced the dual school system.

The provisions of the United Nations Charter do not constitute the equivalent of valid congressional enactments nor do such Charter provisions have the effect of repealing by implication federal, State or municipal laws in conflict therewith. The "human rights" and "fundamental freedoms" mentioned in Article 1 and Article 55 of the Charter are not defined anywhere therein, but are no greater than the rights and freedoms guaranteed to Americans by the federal Constitution. These Articles, as well as Article 56, are non-self-executing rather than self-executing provisions and must be implemented by legislation to override established local law.

Since the laws establishing separate schools for white and Negro children in the District of Columbia had for their purpose the giving rather than the denial of educational opportunity, it connot be said that such laws constitute a legislative pronouncement of guilt and punishment of the Negro people without trial. These laws are not, therefore, Bills of Attainder, and certainly the construction thereof so as to require the maintenance of the dual school system cannot be considered violative of the constitutional prohibition against Bills of Attainder.

The duty of the courts is to interpret, not to enact, legislation. The policy or wisdom of the maintenance of a dual school system is beyond the power of courts to even consider. One branch of government should not encroach upon the domain of another and statutes should not be adjudged invalid except for manifest necessity. Since the two parts of the dual school system are conceded to be equal, if the long established policy of their maintenance in the District of Columbia is to be struck down, the Congress and not the Court is the body to make that decision.

ARGUMENT

I

The Complaint Filed Below States No Cause of Action Because, Inter Alia, it Fails to Set Forth Any Injuries To the Petitioners.

The complaint filed by the petitioners in the District Court (R. 1-14) in the name of five minors and their parents, all Negro residents of the District of Columbia, and a corporation known as Consolidated Parent Group, Inc., allegedly on behalf of the named plaintiffs and all other Negro citizens residing in the District of Columbia, and similarly situated, sought a declaratory judgment and temporary and permanent injunctive relief against the members of the Board of Education of the District of Columbia, the Superintendent of Schools, the two First Assistant Superintendents of Schools, an Associate Superintendent of Schools, and the Principal of the Sousa Junior High School. The complaint alleged that the exclusion of the minor plaintiffs from the Sousa Junior High School was solely because of their race and color, and that this exclusion violated Sections 41 and 43 of Title 8 of the United States Code, violated Article I, Section 9, Clause 3 of the Constitution of the United States, violated the Fifth Amendment to the Constitution, and violated Chapter I, Article 1, Section 3, and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

It is implicit in the complaint, and it is a conceded fact, that the Sousa Junior High School is a part of Division 1 of the local school system, the schools in which division are allocated for the instruction of white children. Although it is complained that the several violations enumerated above result from the failure to admit the minor petitioners to this particular school, it is alleged in paragraph 3 of the complaint that the minor petitioners "do now attend a junior high school in said District" (R. 4).

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Erroneously, the complaint alleges that adult petitioners are required by law to send their children to *public* schools and are subject to prosecution for failure so to do. The law (43 Stat. 806, Secs. 31-201 and 31-207 D. C. Code, 1951), set out in petitioners' brief, Appendix B, requires only that adult petitioners shall cause their children to be instructed, publicly or privately, and does not require them to go to *any* school.

There is a total absence from the complaint of any allegation that the minor petitioners are not receiving in the junior high school in the District of Columbia which they now attend all of the educational opportunities afforded in the Sousa Junior High School. From this failure to negative enjoyment of educational opportunities, it may be assumed that the minor petitioners are, in fact, enjoying the same or equal educational opportunities as are afforded in the Sousa Junior High School. There is also a total failure to enumerate educational opportunities enjoyed at the Sousa Junior High School. Without specific allegations to the contrary it must be assumed that the minor petitioners who "do now attend a junior high school in said District" enjoy all of the educational opportunities afforded in any junior high school in the District of Columbia.

In *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, this Court said:

> "When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209. The burden is not sustained by making allegations which are merely the general conclusions of law or fact."

No directly comparable case has been found, but a closely analogous allegation to those made by the petitioners is the oft-used allegation of arbitrary and capricious action. In *Wilkinson* v. *Hines,* 64 App. D. C. 5, 73 F. 2d 514, the United States Court of Appeals for the District of Columbia, said at page 8:

> "We are of the opinion also that the allegations in appellant's petition that the 'respondent acted arbitrarily and capriciously, without evidence to support his decision, and beyond the scope of his authority', are not averments of fact, but conclusions of law, and are not sustained by the other allegations of the petition."

Again in *National War Labor Board* v. *Montgomery Ward & Co.,* 79 U. S. App. D. C. 200, 144 F. 2d 528, certiorari denied, 323 U. S. 774, this same court, speaking through Judge Edgerton, said:

> "Judicial interference with administration is sometimes necessary but always serious. * * * A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast."

This Court in *Silberschein* v. *United States,* 266 U. S. 221, 225 used language particularly applicable to the case at bar, as follows:

> "The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious."

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If it be argued that the liberality of the Federal Rules of Civil Procedure has obviated the necessity for pleading facts to show arbitrariness or, as in this case, denial of educational opportunity, the answer may be found in *Sheridan-Wyoming Coal Co., Inc.* v. *Krug*, 83 U. S. App. D. C. 162, 168 F. 2d 557, where the court said:

> "The rules of Civil Procedure provide that a complaint shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief'. The Rule was intended to obviate the technicalities of pleading and, particularly, long and verbose allegations of evidentiary facts. With that objective we are in unqualified accord. However, a 'claim' cannot be stated in the form of a legal conclusion, without more. * * *. The minimum under the Rule is that the adversary party must be sufficiently advised to prepare his defense, *and that the court must be sufficiently informed to determine the question presented.* Defenses cannot be made to legal propositions in the abstract, *nor do mere legal conclusions present questions upon which the court can pass.* Justiciable cases and controversies arise upon facts." (Emphasis supplied.)

See, to the same effect, *Marranzano* v. *Riggs National Bank*, 87 U. S. App. D. C. 195, 184 F. 2d 349, 351.

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, Mr. Justice Brandeis said at page 346:

> "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

Justice Brandeis then listed seven items constituting the series of rules. The fifth, found at page 347, is as follows:

> "5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."

To the same effect see *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Corporation Commision* v. *Lowe*, 281 U. S. 431, 438.

II

A. Acts of Congress Providing for Education of Children of the District of Columbia Require such Education in a Dual School System and have been so Construed by this Court.

B. Construction of Locally Applicable Laws by the Highest Court of the District of Columbia is Normally Accepted by this Court.

A.

Among the contentions of petitioners is one that the several Acts of Congress providing for the establishment and maintenance of schools in the District of Columbia do not require the maintenance of a dual system.

The enactments of Congress which in unambiguous terms specifically direct that separate schools be maintained for the education of white and colored children of the District of Columbia begin with the Act approved May 20, 1862. That Act and others on the same subject enacted prior to June 22, 1874 were carried into the Revised Statutes of the District of Columbia, approved on that date.[1] Thus, although the requirement for separate schools was originally decreed by Congress at a time when the Negro was not a citizen, Congress reenacted that requirement six years

[1] Act of May 20, 1862, 12 Stat. 394; Act of May 21, 1862, 12 Stat. 407; Act of July 11, 1862, 12 Stat. 537; Act of June 25, 1864, 13 Stat. 187; Act of July 23, 1866, 14 Stat. 216; Act of July 28, 1866, 14 Stat. 343.

Sections 281, 282, 283, 306, 310, 314 and 1296 of the Revised Statutes D. C. (Act of June 22, 1874, 18 Stat. Part. 2) embodying the foregoing Acts are set out in Appendix A.)

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after the adoption in 1868 of the 14th Amendment. So conclusively was the requirement stated that this Court, in *Plessy* v. *Ferguson*, 163 U. S. 537, 544-545, cited the pertinent sections of the Revised Statutes of the District of Columbia as an illustration of laws requiring such separation.

In legislation enacted by Congress for the District of Columbia subsequent to the Revised Statutes, Congress dealt with the system of separate schools as an established fact. Thus, the Act approved June 6, 1900, 31 Stat. 564 (enacted by the 56th Congress, which also enacted the D. C. Code of 1901), established a paid Board of Education of seven members and provided for two assistant superintendents, "one of whom, under the direction of the superintendent, shall have charge of schools for colored children; * * *." The Act of June 20, 1906,[2] which established the present Board of Education, authorized the Board, upon recommendation of the Superintendent of Schools, to "* * * appoint one white assistant superintendent for the white schools and one colored assistant superintendent for the colored schools * * *." In the District of Columbia Teachers' Salary Act of 1945 (59 Stat. 488), approved July 21, 1945, the provisions of the Act of 1906 with respect to assistant superintendents were repeated and extended in Title V, page 498, Section 12, and in addition, separate boards of examiners and separate chief examiners for the white and colored schools were provided for by Sections 13 and 14 of that Title. The District of Columbia Teachers' Salary Act of 1947,[3] approved July 7, 1947, contained almost identical provisions in Title V, Sections 11, 12 and 13. As late as the Act approved October 24, 1951, by which the District of Columbia Teachers' Salary Act of 1947 was amended, Congress in Section 8 thereof[4] provided for appointment by the Board of Education, on

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[2] 34 Stat. 316.
[3] 61 Stat. 258.
[4] 65 Stat. 605.

the recommendation of the Superintendent of Schools, of "a chief examiner for the board of examiners for white schools and a chief examiner for the board of examiners for colored schools."

B.

The United States Court of Appeals for the District of Columbia Circuit has directly passed upon these Acts of Congress in three cases, *Wall* v. *Oyster,* 36 App. D. C. 50, *Carr* v. *Corning* and *Browne* v. *Magdeburger,* the latter two decided jointly, 86 U. S. App. D. C. 173, 182 F. 2d 14. Reference to the record and briefs in the case of *Wall* v. *Oyster*[5] shows that, contrary to the characterization of that case set out in petitioners' brief, the question of the requirement for a dual system of schools in the District was raised and the consitutional validity thereof was attacked. In paragraphs 8 and 9 of the amended petition (for writ of mandamus) filed May 7, 1910, it was alleged that Sections 281 to 285, 293 and 294 of the Revised Statutes of the United States Relating to the District of Columbia do not expressly, but only by implication, prohibit the attendance of colored children at white schools, and that insofar as said legislation attempts to exclude colored children from white schools it is unconstitutional and void because it violates the Fifth Amendment to the Constitution. True, the appellant's brief devotes but one sentence to this proposition, but the appellees, as members of the Board of Education, fully briefed the point and the opinion of the court specifically decided:

> "A statute enacted in 1864, and afterwards carried into the Revised Statutes of the District,

[5] Bound volume available in the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit and in the Bar Association Library, United States Court House, Washington, D. C.

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> provided for the maintenance of separate free schools for white and 'colored' children, affording like facilities and advantages to each. D. C. Rev. Stat. secs. 281, 282, 306, 310, 314."

The court thereupon declared that the power of Congress, exercising all the functions of a state legislature in the District of Columbia, to provide for separation of white and colored children in the public schools has been effectually settled by this Court and cited *Plessy* v. *Ferguson, supra.*

In the *Carr* and *Browne* opinion Judge Prettyman for the Court of Appeals reviewed in extenso the history of the enactments by which separate schools were created and maintained in the District, and concluded, commencing on page 18, that the enactments cannot be read with any meaning except that the schools for white and colored children were then intended to be separate. The opinion then goes on to dispose of the contention that the provisions of the Revised Statutes have since been repealed and demonstrates that no subsequent enactment by the Congress can be so construed. Indeed, by pointing to a number of later Acts, the court demonstrates the continuing intention of Congress to maintain the dual school system in the District. Since these statutes are purely local in scope and confined in their operation to the District of Columbia, the oft-expressed rule of this Court that it will ordinarily accept the construction and interpretation thereof by the highest court of the District of Columbia should be applied. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285; *D. C.* v. *Pace,* 320 U. S. 698, 702. *Cf. American Security and Trust Co.* v. *District of Columbia,* 224 U. S. 491; *United Surety Co.* v. *American Fruit Products Co.,* 238 U. S. 140; *Busby* v. *Electric Utilities Union* 323 U. S. 72; *Fisher* v. *United States,* 328 U. S. 463.

III

The Dual School System in the District of Columbia is Not Violative of the Fifth Amendment to the Constitution of the United States.

There is no doubt that Congress, under the provisions of Article I, Section 8 of the Constitution, has exclusive legislative authority over the District of Columbia. The nature, extent, and breadth of that power is nowhere better delineated and better documented than in the opinion of the United States Court of Appeals for the District of Columbia in *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246. Therein it is pointed out that the power of Congress to legislate for the District of Columbia is not subject to the restrictions placed on State legislatures and is as extensive as is the power of Congress to legislate generally for the nation.

Acting under that broad authority this member of the Trinity which makes up the Government of the United States enacted laws providing for the establishment and maintenance of a dual school system in the District.[6] These enactments stem from the period before the Thirteenth, Fourteenth and Fifteenth Amendments. At that time the due process clause of the Fifth Amendment was regarded as a bulwark for the protection of the property rights of the white and colored slave owners.[7]

When Congress undertook to abolish slavery in the District of Columbia,[8] it appropriated a million dollars to purchase from their owners the freedom of the approximately 3100 slaves in the District.[9]

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[6] See Sections of Revised Statutes, D. C., Appendix A.

[7] See *Emancipation in the Dist. of Col.* Ex. Doc. No. 42, 38th Cong. 1st Sess. for evidence that free Negroes were slave owners in the District of Columbia although, it appears, some bought freedom of relatives.

[8] Act of April 16, 1862, 12 Stat. 376.

[9] $993,406.35 was expended for 3100 slaves according to report of Commission on purchase of freedom of slaves, 38th Cong. 1st Sess., House of Representatives, Ex. Doc. No. 42.

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For seventy-five or eighty years after the adoption of the Constitution and its first ten Amendments in 1789, civil and political rights for the Negro, while advocated by many, were not thought to be required by the Fifth Amendment. Indeed, slavery flourished thereunder. Not until the adoption of the Fourteenth and Fifteenth Amendments and the passage of the first Civil Rights Act did our forebears believe that there was legal foundation for the extension of any of the rights of citizenship to the colored man in this country. Even then, as will be pointed out hereinafter, his education in separate schools was not inveighed against by legislation. Quite the contrary was true.

At just about the time when the Fourteenth Amendment, containing, as it does, prohibitions upon the States against deprivation of life, liberty or property without due process of law and against denial to any person of the equal protection of the laws, was proposed in 1866, the same Congress which proposed it enacted some of the laws providing for separate schooling for the white and colored children in the District of Columbia. Judge Prettyman of the United States Court of Appeals for the District of Columbia Circuit thus commented thereon in his opinion for the court in the *Carr* and *Browne Junior High* cases, *supra*, 86 U. S. App. D. C. 173, 182 F. 2d 14, 18:

> "These various enactments by the Congress cannot be read with any meaning except that the schools for white and colored children were then intended to be separate. Moreover, it is significant, in respect to the constitutional points made here, that two of these statutes were enacted by the same Congress which proposed the Fourteenth Amendment and at almost the same time as that proposal. The Amendment was proposed by the Congress on June 16, 1866, and these acts were dated July 23, 1866, and July 28, 1866."

At page 16-17 in the *Carr* and *Browne* opinion, *supra*, the court said:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Consitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did. Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance. *We do not believe that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country.*"
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> "The Supreme Court has consistently held that if there be an 'equality of the privileges which the laws give to the separated groups', the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect."

Cited for these propositions are a number of federal and State decisions and a number of cases in this Court, among which is *Plessy* v. *Ferguson*, *supra*, 163 U. S. 537. In the recent case of *Adamson* v. *California*, 332 U. S. 46, 53, the Court uses language which might well have been written to describe the decision of *Plessy* v. *Ferguson*, *supra*:

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"It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment."

In their brief in the Court of Appeals in this cause counsel for petitioners laid great stress upon the *Sweatt* [10] and *McLaurin* [11] decisions of this Court. Here they have scarcely mentioned these two recent decisions dealing with education of colored youth. Undoubtedly they have come to the realization that both cases were decided solely on the proposition that the educational opportunities afforded to the respective Negro appellants therein were not equivalent or substantially equal to those furnished to white students. Indeed, some of the language used in the opinions by the Chief Justice actually supports the position of the respondents herein. In the *Sweatt* opinion, at page 635-636, the following is found:

"In *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351 (1938), the Court, speaking through Chief Justice Hughes, declared that 'petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders *facilities for legal education substantially equal* to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.' • • •
In accordance with these cases, petitioner may claim *his full constitutional right*: legal *education equivalent to that offered by the State to students of other races.* Such education is not available to him in a separate law school *as offered by the State.* We cannot, therefore, agree with respondents that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), requires affirmance of the judg-

[10] *Sweatt* v. *Painter,* 339 U. S. 629.
[11] *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

> ment below. Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." (Emphasis supplied.)

Thus is there a reaffirmation of the long line of decisions of this Court sustaining the constitutional validity of the dual school system provided the facilities available to white and colored children are substantially equal.[12]

Decisions in *McCabe* v. *Atchison T & SF Ry.*, *Gong Lum* v. *Rice, and Missouri ex rel. Gaines* v. *Canada*,[13] were enunciated by jurists who were either at the time of the decision or were later to become Chief Justices of the United States.

In the *McCabe* case in 1914 Mr. Justice Hughes affirmed the correctness of the proposition:

> "* * * the question could no longer be considered an open one, that it was not an infraction of the Fourteenth Amendment for a state to require separate, but equal, accommodations for the two races."

In the *Gong Lum* case in 1924 Mr. Chief Justice Taft, for the Court, quoted from *Cumming* v. *Richmond County Board of Education*,[14] *Plessy* v. *Ferguson, supra,* and a number of federal and State decisions to arrive at the conclusion that separate schools for white and colored children are not in violation of the Constitution and that the requirement that a Chinese child should attend a colored school was constitutionally a question for each State to decide for itself.

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[12] *Plessy* v. *Ferguson* (1896), 163 U. S. 537; *Cumming* v. *Board of Education* (1899), 175 U. S. 528; *McCabe* v. *Atchison T. & SF Ry.* (1914), 235 U. S. 151; *Gong Lum* v. *Rice* (1927), 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada* (1938), 305 U. S. 337; *Mitchell* v. *United States* (1941), 313 U. S. 80; *Sipuel* v. *Board of Regents* (1948), 332 U. S. 631; *Sweatt* v. *Painter* (1950), 339 U. S. 629.

[13] See footnote 12 for citations.

[14] Ibid.

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And in *Gaines* v. *Canada, supra,* which was cited with approval in the later cases of *Sipuel* v. *Board of Regents* and *Sweatt* v. *Painter,* Mr. Chief Justice Hughes, in 1938, relying on the *Plessy, McCabe* and *Gong Lum* cases, said:

> "The State has sought to fulfill that obligation [providing advantages for higher education to Negroes] by furnishing equal facilities in separate schools, a *method the validity of which has been sustained by our decisions.*" (Emphasis supplied.)

Mr. Justice Black and Mr. Justice Reed concurred in the opinion written by the Chief Justice in the *Gaines* case.

This case was decided scarcely fourteen years ago with only a single dissent by Mr. Justice McReynolds, who thought that equal facilities even outside the State were constitutional. What has changed the Constitution in the past fourteen years?

Considerable emphasis is placed by petitioners upon language used by this Court in *Hirabayashi* v. *United States,* 320 U. S. 81, *Korematsu* v. *United States,* 323 U. S. 214, and *Ex parte Endo,* 323 U. S. 283. They also quote from the cases of *Meyer* v. *Nebraska,* 262 U. S. 390, *Pierce* v. *Society of Sisters,* 268 U. S. 510, *Farrington* v. *Tokushige,* 273 U. S. 284, and *Oyama* v. *California,* 332 U. S. 633. Examination of these and other cases cited by petitioners shows that they fall into three classes:

1. Cases in which there was a clear invasion of rights protected by *specific* provisions of the Civil Rights Acts;

2. Cases in which there were *complete* denials of rights or privileges secured by the equal protection clause of the Fourteenth Amendment or in one case, the due process clause of the Fifth Amendment; and

3. Cases in which confinement in concentration camps and other extreme restrictions were practiced upon Japanese citizens purely as war emergency measures.

Taking their cue from three cases involving citizens of Japanese descent who were completely denied every semblance of equality of treatment for security reasons during World War II (*Hirabayashi* v. *United States, supra, Korematsu* v. *United States, supra,* and *Ex parte Endo, supra*), petitioners assert that since there is no issue of national security present, in order to justify separate schools for white and colored pupils respondents are required to show that there is some more pressing public necessity which requires a dual school system in the District of Columbia. There are several answers to this proposition.

In the first place, petitioners are not deprived of anything as were the parties in the cases they have cited. *Hirabayashi* was subjected to a curfew regulation while his white brothers were not. *Korematsu* and *Endo* involved incarceration in concentration camps solely because of race. In *Meyer* v. *Nebraska* complete denial of the right to teach German to pupils was involved. *Pierce* v. *Society of Sisters* concerned the outlawing of parochial and private schools, and the *Farrington* case involved an attempt to put out of business foreign language schools in Hawaii. The complete denial of the right to own land was concerned in the *Oyama* case and freedom to engage in one's chosen occupation concerned the Court in *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, and *Yick Wo* v. *Hopkins,* 118 U. S. 356. In the case at bar the complaint recites in paragraph 3 thereof that the minor petitioners "do now attend a junior high school in said District" (R. 4), and on page 34 of their brief petitioners assert unequivocally "Here there is no question of equality of facilities."

Secondly, petitioners charge that separation in the public schools is "*aimed* at Negroes," that (as set forth in italics on page 21 of their brief) "* * * no legitimate educational purpose is served by the classification and distinction of pupils solely on the basis of race and color * * *," and that separation stamps them with a "badge of inferiority."

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There can be no doubt that among a large segment of the people of the District of Columbia, which is almost 100 miles south of the Mason and Dixon line, there are attitudes which are antipathetical to the co-mingling of the races in schools or otherwise. Indeed, the Court can take judicial notice that racial tensions exist and racial clashes have occurred considerably further north in New York, Detroit, Chicago, and other communities in which there is no separation in schools. This being so, upon what basis do petitioners assume and assert that separate schools for white and colored pupils are maintained solely to stigmatize the colored children? Why do they quote from a brief filed in the *Sweatt* case (petitioners' brief 41): "the institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational * * * development * * *"? The facts are otherwise. Even Gunnar Myrdal in his work "An American Dilemma," so often quoted by the opponents of separation, acknowledges in Chapter 41 thereof that some Negroes prefer the separate school even for the North. He quotes Dr. W. E. B. Du Bois, a prominent Negro educator and publisher and former officer of the National Association for the Advancement of Colored People, " * * * A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad." It is not felt that the Court will be burdened by repeating here the quotation from Dr. Du Bois found at page 33-34 of appellees' brief in the companion case of *Briggs* v. *Elliott* (No. 101):

> "It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally

rendered its life a living hell. Such parents want their child to 'fight' this thing out,—but, dear God, at what a cost! Sometimes, to be sure, the child triumphs and teaches the school community a lesson; but even in such cases, the cost may be high, and the child's whole life turned into an effort to win cheap applause at the expense of healthy individuality. In other cases, the result of the experiment may be complete ruin of character, gift, and ability and ingrained hatred of schools and men. For the kind of battle thus indicated, most children are under no circumstances suited. It is the refinement of cruelty to require it of them. Therefore, in evaluating the advantage and disadvantage of accepting race hatred as a brutal but real fact or of using a little child as a battering ram upon which its nastiness can be thrust, we must give greater value and greater emphasis to the rights of the child's own soul. We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated." *Does the Negro Need Separate Schools?*, 4 J. of Negro Ed. 328, 330-31 (1935)."

History shows that such concerns as these expressed by Dr. Du Bois are quite probably the reason for the establishment and maintenance of the dual school system in the District. Certainly they were important considerations.

According to Dr. William S. Montgomery, a distinguished Negro educator,[15] appointed Assistant Superintendent in charge of colored schools in the District of Columbia September 1, 1900 and retired in 1924 after serving 47 years in the colored school system,

"It was natural at the beginning for the great majority of the teachers in colored schools to be

[15] *Washington—Past and Present, a History*, Vol. 1, pp. 443-444.

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> white, but in 1869 the instructors were half and half—as many colored as white—and as competent colored ones came forward they were given the preference in employment, not because of greater fitness from an intellectual or professional point of view, *but on account of an element, mighty in its force and results, sympathy with and ability and willingness to enter into and appreciate the feelings and aspirations of the learner.* * * * Of the early colored teachers words of eulogy fail; *their monument is the system to-day.*" (Emphasis supplied.) [16]

The monument of which Dr. Montgomery wrote is the system of separate but equal schools for colored children which petitioners would destroy!

In the hearings preceding the passage of the Act of June 20, 1906,[17] the organic act of the present school system in the District, many distinguished Negro citizens and educators insisted on autonomy for the colored schools. Professor William A. Joiner of Howard University, chairman of a committee of colored leaders, after presenting to the House Committee a letter from his group, said, in part,[18]

> "I think, Mr. Chairman, that that embodies the main sentiment as expressed by that organization, an organization composed of those whose minds have led them into literary pursuits and those who have given attention to the best welfare and interest of their people. It may seem strange that this particular word 'colored' or the idea of colored schools thrusts itself into this argument. I would it where not so. Facts are stubborn things, and

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[16] "Historical Sketch of Education for the Colored Race in the District of Columbia, 1807-1905" which is incorporated as part of the "Report of the Commissioners of the District of Columbia for the year ended June 30, 1905," Vol. IV (Report of Board of Education), Washington Government Printing Office, 1905, pp. 118-119.

[17] 34 Stat. 316.

[18] Report of hearings before the Sub-Committee on the several school bills relating to the reorganization of the schools of the District of Columbia. Washington: Government Printing Office 1906, p. 200.

> when we deal with facts we must deal with them as they exist and not as we would that they were; and so, Mr. Chairman, it becomes our province and our duty to do what we can to see that in the administration of school affairs in that most precious birthright of equality of opportunity spoken of by President Eliot (of Harvard) that there will not be the slightest divergence from the division, 'unto him who needs, and most unto him who needs most.'"

Professor Lewis B. Moore, of Howard University, testifying before the Commitee said, in part:[19]

> "* * * Give us what is being asked for here by the colored citizens, give us that, and we shall conduct under the guidance of the board of education the colored schools of the District of Columbia in such a way as to produce just as good results as are produced anywhere else in this country."

Following this and other testimony of like import, the House Committee reported on the Act of 1906,[20] in part:

> "The bill does not change the number of assistant superintendents, merely enlarging the power of the colored superintendent so that he shall, besides having jurisdiction over the colored grade schools, also have entire jurisdiction over the colored normal, high, and manual-training schools. This was done at the earnest solicitation of the colored educators who appeared before the committee and was heartily indorsed by the superintendent of Howard University. The hearings developed that a great deal of friction had arisen between the director of high schools and the teachers in the colored high school, and to avoid this it was the unanimous opinion and desire of all who testified that not only should the colored superintendent have entire con-

[19] Ibid, p. 217.
[20] House Report No. 3395, 59th Congress, 1st Session, p. 3.

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> trol, but that the colored schools in every instance should be designated as colored schools, so that no possible mistake could arise in that regard."

The views expressed by these eminent Negro educators were accorded sympathetic and enlightened recognition by Congress in the enactment of the Act of 1906, and by every succeeding Congress which legislated on the subject until 1951.[21] *Clearly the purpose of Congress was to serve the cause of the Negro in education rather than the contrary.* The wisdom of the course pursued by Congress to achieve that purpose is not for the courts to decide. As was said in the License Tax Cases,[22] at page 469, "This court • • • cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." *Hilton* v. *Sullivan,* 334 U. S. 323, 339; *Teamsters Union* v. *Hanke,* 339 U. S. 470, 478-479; *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604, 618-619; *Wickard* v. *Filburn,* 317 U. S. 111, 129; *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 650-651; *United States* v. *Butler,* 297 U. S. 1, 62-63; *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 447-448; *Sunshine Coal Co.* v. *Adkins,* 310 U .S. 381, 394. In the very recent case of *Hurd* v. *Hodge, supra,* 334 U. S. 24, cited by petitioners, the Court, at page 34, alludes to the fact that public policy can be ascertained only by reference to statutes. In footnote 15 the Court cites *United States* v. *Hutcheson,* 312 U. S. 219, 235, and *Johnson* v. *United States,* 163 F. 30, 32. In the latter case, the court said:

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated

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[21] See Acts of July 21, 1945, 59 Stat. 488, July 7, 1947, 61 Stat. 258 and Oct. 24, 1951, 65 Stat. 605, more fully described in Point II A of this brief.
[22] 5 Wall. 462.

> its will, however indirectly, that will should be recognized and obeyed."

When in 1910 the question of constitutional validity of separate schools was first presented to the District of Columbia Court of Appeals in *Wall* v. *Oyster,* 36 App. D. C. 50, and hardship or injustice was pleaded, Mr. Chief Justice Shepherd, for that court, said at page 58:

> "It has been urged that a cruel hardship will be inflicted upon the petitioner by the conclusion at which we have arrived. It may be, however, that greater evils would result from a different one. *Be that as it may, our province is to interpret legislation, not to enact it.*" (Emphasis supplied.)

Judge Prettyman of that court in the recent case of *Carr* v. *Corning, supra,* said:

> "*Such problems* [the co-existence of different races in the same area] *lie naturally in the field of legislation,* a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance." (Emphasis supplied.)

And Mr. Justice Frankfurter for this Court in *Secretary of Agriculture* v. *Central Roig Refining Co., supra,* said as late as February 6, 1950:

> "but the issue was thrashed out in Congress; Congress is the place for its reconsideration."

Finally, while this Court has tacitly approved the dual system of schools in the District of Columbia in but one case, *Plessy* v. *Ferguson, supra,* it has many times cited that case in support of its uniform holdings over many years that the Fourteenth Amendment, which applies only to the States and which contains an equal protection clause, does not

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prohibit the maintenance of dual school systems. It is settled that the equal protection clause of the Fourteenth Amendment does not apply to the District of Columbia, "* * * that Amendment being directed to the States. The Fifth Amendment, of course, does apply, but contains no equal protection clause."[23]

Mr. Chief Justice Stone in *Detroit Bank* v. *United States*, 317 U. S. 329, which cites, among others, *Currin* v. *Wallace*, 306 U. S. 1, and *Steward Machine Co.* v. *Davis*, 301 U. S. 548, said:

> "Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and *it provides no guaranty against discriminatory legislation by Congress.*" (Emphasis supplied.)

Moreover, it is well established that the Fourteenth Amendment does not incorporate the provisions of the first eight Amendments, *Louisiana ex rel Francis* v. *Resweber*, 329 U. S. 459; *Adamson* v. *California*, 332 U. S. 46, *Wolf* v. *Colorado*, 338 U. S. 25. Conversely, it has been held that the general scope of the prohibitions of the Fifth Amendment as against the Federal Government is measured by the scope of the Fourteenth Amendment as against the states. "* * * the legal import of the phrase 'due process of law' is the same in both amendments." *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329. See also *Twining* v. *New Jersey*, 211 U. S. 78, 101. In *Heiner* v. *Donnan*, 285 U. S. 312, the court said at p. 326:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same."

Cf. Farrington v. *Tokushige, supra*, 273 U. S. 284; *Ellis* v. *United States*, 206 U. S. 246; *Bromley* v. *McCaughn*, 280 U. S. 124.

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[23] *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d. 843, 846.

In *Hurd* v. *Hodge, supra,* 334 U. S. 24, 35, the Court concluded its opinion by saying:

> "We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. . . . It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against descriminatory action of federal courts than against such action taken by the courts of the States."

If the public policy of the United States prohibits action or limitation of action in the District of Columbia because it is prohibited in the States, public policy as pronounced in Acts of the Congress applying to the District of Columbia certainly ought to prevent the invalidation in the District of the purpose of those Acts unless there is an unequivocal finding that identical action by the several States is prohibited by the Constitution.

In fine, not only was integration in schools not required by the Fifth Amendment, but slavery was lawful thereunder. It required an Amendment of the Constitution to rid the country of that evil practice. The Fifth Amendment contains no "equal protection" clause and does not prohibit Congress from passing discriminatory laws so long as constitutional due process is preserved. Contemporary legislative history demonstrates that the Fourteenth Amendment, which does contain an "equal protection" clause, was not at the time of its proposal or adoption thought to be a bar to a dual school system in the District

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of Columbia. Numerous decisions of this and other courts over the years have sustained the view of the framers of the Fourteenth Amendment, of the Civil Rights Acts, and of the laws providing for the District's dual school system that the last are not in conflict with the first two. Since the Fourteenth Amendment contains a "due process" clause and decisions of this Court hold that the "due process" provisions of the Fifth and Fourteenth Amendments must be measured by the same standards, mere separation for educational purposes in schools, where facilities are substantially equal, cannot be struck down by the Court in the light of history and of prior decisions. If it be the will of the people that separate schools be abolished, then the people, and they alone, through their elected representatives or through constitutional convention, should express that will. The people of the United States through the legislative process have heretofore expressed themselves upon this most serious problem. The Court, if it follows its own precedents, should not presume to trespass upon the domain of another branch of government of equal dignity with it.

IV

The Dual School System of the District of Columbia Does not Violate the Civil Rights Acts.

In their complaint filed in the District Court petitioners allege that the refusal by respondents to admit the minor petitioners to Sousa Junior High School violates Sections 41 and 43 of Title 8 of the United States Code relating to civil rights. Section 41 of Title 8, U. S. C., according to *Hurd* v. *Hodge,* 334 U. S. 24, 30, Footnote 7, and to the Historical Note appearing thereunder in the United States Code Annotated, was revised from the Civil Rights Act of May 31, 1870, which was from the Civil Rights Act of April 9, 1866, and reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 43 of Title 8 of U. S. C., which, according to the Historical Note appearing thereunder in the United States Code Annotated, is from the Act of April 20, 1871, reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Petitioners cite *Hurd* v. *Hodge*, 334 U. S. 24, in support of their position that the Civil Rights Acts are violated by the laws establishing the dual school system of the District, but they admit in their brief that this case involved Section 42 of Title 8, U. S. C., and not Sections 41 or 43 of that title. Section 42 relates specifically and solely to the right "to inherit, purchase, lease, sell, hold, and convey real and personal property." That, on the basis of Section 42, the restrictive covenant was held to be unenforceable in a federal court, is no ground for a contention that separate schools for the races violates the Civil Rights Acts when schools are not mentioned therein at all. Indeed, as will be pointed out hereinafter, all

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references to schools were specifically deleted from bills which became the Acts, and the *Carr* and *Browne Junior High* cases, *supra*, 86 U. S. App. D. C. 173, 182 F. 2d 14, decided subsequent to *Hurd* v. *Hodge*, eloquently set forth why the Civil Rights Acts do not apply to District of Columbia schools.

In the annotations found in the United States Code Annotated there are but two cases cited under the subdivision of "Education" in connection with application of these two sections of Title 8, U. S. C. One is a state decision, *Cory* v. *Carter*, 48 Ind., 327, 17 Am. Rep. 738, decided in 1874, and the other is *Bluford* v. *Canada*, decided by the District Court of the United States for the Western District of Missouri in 1940 and found in 32 Fed. Supp. 707.[24]

In the Indiana case the court had before it a statute which provided for the levying of school taxes on a uniform basis without regard to race or color of the owner of the property taxed, but further provided that the enumeration of children for school purposes should be in separate lists of white and colored children and that they should be educated in separate schools. The court pointed out that the Congress which submitted the Fourteenth Amendment to the States for ratification had, within a few days of that action, passed two acts providing for separate schools in the District of Columbia and that a later Congress, in 1873, passed an amendment to the separate school laws of the District but continued the dual system in effect. Commenting thereon the court said,

> "The action of Congress * * * is worthy of consideration as evincing the concurrent and aftermatured conviction of that body that there was nothing whatever in the amendment which pre-

[24] While two other cases *Davis* v. *Cook*, 80 F. Supp. 443 and *McLaurin* v. *Oklahoma*, 87 F. Supp. 526, are cited under this subdivision in the 1951 Supplement to U.S.C.A., neither mentions Title 8, Secs. 41 or 43 or the Civil Rights Acts.

> vented congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; * * *.
>
> "This legislation of congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification."

Similarity of the foregoing statement by the Supreme Court of Indiana in 1874 with the observation of Judge Prettyman in *Carr* v. *Corning* and *Browne Junior High School Parent Teachers Association* v. *Magdeburger, supra.* is noteworthy. The Indiana court, at page 752, speaking of what is now known as Section 41, Title 8 of the United States Code, said:

> "* * * admitting it to be valid, that it does not relate to or bear upon the right claimed in this case, for it purports only to confer upon negroes and mulattoes the right, in every State and Territory, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and the full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and subjects them to like pains and penalties. * * *. In this nothing is left to inference. Every right intended is specified."

The court concluded that the Indiana statute violated neither the Constitution nor the Civil Rights Act.

In the modern case of *Bluford* v. *Canada, supra,* 32 F. Supp. 707, the action was grounded specifically upon Section

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43 of Title 8 of the United States Code. It was brought by a Negro citizen of Missouri against the Registrar of the University of Missouri for his refusal to admit the plaintiff into the University to pursue a course in journalism. District Judge Collett, citing cases in this Court, said:

> "The State has the constitutional right to furnish equal facilities in separate schools if it so desires."

The Court then quoted from *Cumming* v. *Board of Education*, 175 U. S. 528, 545:

> "We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

In dismissing the complaint Judge Collett said (p. 711):

> "Until and unless plaintiff alleges facts which demonstrate an unlawful deprivation of her constitutional rights defendant may not be held liable therefor."

It will be remembered that the complaint in the instant case shows on its face that the minor petitioners "do now attend a junior high school in said District."

But reliance on State or district court decisions is not necessary. This Court and the United States Court of Appeals for the District of Columbia Circuit have both alluded to the close tie between the Civil Rights Act and the Fourteenth Amendment, and the latter court has pointed

out why the dual school system of the District does not offend against the Act. In *Hurd* v. *Hodge, supra,* 334 U. S. 24, 32-33, Mr. Chief Justice Vinson for the Court said:

> "In considering * * * the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.
>
> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."

In the *Carr* and *Browne* cases, *supra,* Judge Prettyman, for the District of Columbia Circuit Court, said at page 17:

> "We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights Cases, and the fact that in 1862, 1864, 1866 and 1874 Congress * * * enacted legislation which

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> specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect."

While Judge Prettyman's conclusion needs no buttressing, it is interesting to note that opponents of the dual school system have pointed to the fact that bills introduced to accomplish the outlawing of separate schools in the District of Columbia failed of passage in the 40th, 41st and 42nd Congresses.[25] They also point out that the Civil Rights Act of 1875, as originally introduced by Senator Charles Sumner, forbade segregation throughout the United States in and outside the District of Columbia, "in conveyances, theaters, inns and *schools*," but that, as finally passed, the restriction against separation in schools was stricken therefrom.[26]

Moreover, Section 43 of Title 8, U.S.C. provides a right of action for "the *deprivation* of any rights, privileges, or immunities *secured by the Constitution and laws*." The *Carr* and *Browne Junior High* cases, *supra*, rightfully hold that education of colored children in separate schools of the District is *not* a deprivation of rights, privileges or immunities secured by the Constitution or laws. Hereinbefore it has been demonstrated that separate schools for colored children were intended to serve rather than deprive them.

Petitioners apparently regard or attempt to dignify the Civil Rights Act as a constitutional provision. At best the Civil Rights Act is only an Act of Congress. In effect then, they are saying that certain Acts of Congress violate other Acts of Congress. Unless, therefore, one accepts the unwarranted conclusion of petitioners that the series of enactments providing for the dual school system in the District does not require such separate-

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[25] Brief amicus curiae for the Committee of Law Teachers Against Segregation in Legal Education, filed in the Supreme Court of the United States in *Sweatt* v. *Painter*, October Term, 1949, pages 12 et seq.

[26] Ibid., page 14. See Act of Mar. 1, 1875, 18 Stat. 335, Chap. 114.

ness, their position regarding the alleged violation of the Civil Rights Act is untenable. Not only is there the presumption that Congress when legislating knows of and takes into account existing laws but, as hereinbefore pointed out, the resolution submitting the Fourteenth Amendment to the States, the Civil Rights Act, the separate school laws, and amendments to the latter two, were considered and enacted by the same sessions of Congress which necessarily had intimate knowledge of the problem. The last amendment of the Civil Rights Act was in 1870 and shortly thereafter in 1874 the Revised Statutes of the District of Columbia were enacted. If, therefore, the provisions of the Civil Rights Acts of 1866 and 1870, upon which petitioners rely, ever required integration in the schools, that requirement was repealed by implication upon the passage by Congress of the Revised Statutes in 1874 reaffirming its conclusion that the District should have a dual school system.

V

The Dual School System of the District is Not in Violation of the Charter of the United Nations.

Petitioners contend that refusal to admit the minor petitioners to the Sousa Junior High School deprives them of fundamental freedoms in violation of certain sections of the Charter of the United Nations.

At the outset it must be noted that, in their brief, they have limited their charge to a violation of paragraph (c) of Article 55 of the Charter, whereas in their complaint filed in the District Court they made no such limitation but charged generally a violation of Article 55. This variation from the complaint to the brief is not accidental. When Article 55 is read as it appears in Chapter IX of the Charter with Sections (a) and (b) preceding Section (c), an entirely different view is obtained of the real pur-

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pose of the Section. Section 3 of Chapter I is also slightly misquoted in petitioners' brief. This, like Article 55(c), should be read in context with its surrounding sections for proper perspective. For clarity, Article 1, Chapter I, and Articles 55 and 56 of Chapter IX are set out in the margin in their entirety [27] exactly as they appear in 59 Stat. 1035 et seq., and in Department of State Publication 2353, International Organization and Conference Series 74.

Petitioners assert and emphasize that the United Nations Charter is a treaty to which the United States is a signatory and that under Article VI, Clause 2 of the Constitution, it is "the supreme Law of the Land."

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[27] "Chapter I—Purposes and Principles—*Article 1*—The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggresion or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends."

"Chapter IX—International Economic and Social Cooperation—*Article 55*—With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56—

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

But, according to the Constitution and the decided cases, treaties are only a part of the supreme law of the land. As was said by this Court in *Edye* v. *Robertson*, 112 U.S. 580, at page 599:

> "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate."

It is fundamental in international law that there are two kinds of treaties — self-executing and non-self-executing. The latter does not supersede local laws which are inconsistent with it. In *Foster* v. *Neilson*, 2 Pet. 253, 314, Chief Justice Marshall said:

> "* * * Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act — the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court."

To the same effect see:

Edye v. *Robertson* (1884) 112 U. S. 580
Robertson v. *General Electric Co.* (1929) 32 F.2d 495
Ex parte Dove (1925) 49 F.2d 816
Aguilar v. *Standard Oil Co.* (1943) 318 U.S. 724

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In *Robertson* v. *General Electric Co., supra,* Judge Parker, Senior Judge of the Fourth Circuit, on pages 500 and 501 of 32 F. 2d, cites and quotes from leading authorities on interpretation of treaties, including that of *Foster* v. *Neilson, supra,* an opinion of Attorney General William H. H. Miller, and the case of *Rousseau* v. *Brown,* 21 App. D.C. 73, and arrives at the same conclusion.

The latest decision on the point is that of *Fujii* v. *State,* 242 P. 2d 617. In that case the Supreme Court of California sitting en banc decided on April 17, 1952 that the same provisions of the United Nations Charter here relied on by petitioners were not intended to supersede existing domestic legislation. The opinion by Chief Justice Gibson of that court carefully analyzes and documents its discussion of the law of treaties and concludes, as do respondents, that Articles 1, 55 and 56 of the Charter are non-self-executing.

In the language of the court (p. 620):

> "It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. * * * Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

> "The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals."

While the decision of the Supreme Court of California was not unanimous, all the judges concurred in the conclusion regarding the ineffectiveness of the United Nations Charter to supersede local laws.

The language concurred in by the two late Justices of this Court, Justice Rutledge and Justice Murphy, quoted by petitioners from *Oyama* v. *California*, 332 U. S. 633, when read in context, shows that it is but one paragraph, unnecessary to the conclusion, in a concurring opinion covering twenty-four printed pages, that the opinion of the Court covering fourteen printed pages and several dissenting opinions covering fifteen more printed pages failed to even mention the United Nations Charter, that the proposition involved in the case was the *complete denial* to Japanese aliens of the right to own land in California, and that while the late Justices Rutledge and Murphy allude to the provisions of the United Nations Charter as being a national pledge to which the alien land law of California does violence, they studiously avoided even suggesting that the federal law completely denying citizenship to the same persons is at all affected by these Charter provisions. Considered thus the expressions of these late lamented liberal justices lose the force that petitioners attribute to them. Neither do Justices Black and Douglas, in their mention of the provisions of Articles 55 and 56 of the Charter and the relationship of those provisions to the alien laws of California, make any reference to the federal law similarly discriminatory so far as Japanese aliens are concerned. It would be a strange construction, indeed, if the provisions of the Charter could be held to repeal a State law but not to repeal a federal statute having an identical basis for discrimination.

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Parenthetically it may be noted that all distinctions for naturalization based on race have been repealed by Public Law 414, 82nd Congress, Chapter 477, 2nd Session (66 Stat. 163), which becomes effective December 24, 1952, but that law excludes from admission to the United States "(11) Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy,"[28a] and makes less stringent the requirements for admission to this country of those who are the subject of religious persecution in other lands, "whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith."[28b] Thus, the Congress, to whom ought to be made all applications for changes in law to meet modern concepts, has, long after the adoption of the United Nations Charter and after court decisions actually[29] are allegedly[30] holding that the provisions of the Charter strikes down existing local law and requires this country to take "separate action" to promote observance of "human rights," enacted legislation establishing limitations for admission into this country based on polygamy, a subject which may well, to other signatories of the Charter, be considered one of the "human rights," and making a distinction based on religion, albeit the intention is to help those persecuted.

On page 58 of their brief petitioners refer to the case of *Balfour, Guthrie and Company* v. *United States*, 90 F. Supp. 831. Reference to this opinion by District Judge Goodman of the Northern District of California, Southern Division, shows that the United Nations Organization was permitted to maintain a suit against the United States for loss of merchandise shipped by the UNO on a United States owned vessel under the "Suits in Admiralty Act" authorizing this type of suit against the United States, and by

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[28a] 66 Stat. 163, Sec. 212 (11).
[28b] 66 Stat. 163, Sec. 212 (31) (b).
[29] *Fujii* v. *State* (intermediate Appellate Court decision), 217 P. 2d 481.
[30] Various cases cited pp. 57-61 petitioners' brief.

virtue of the existence of the United Nations Charter. The effect of the decision is simply that the United Nations Organization is an entity which may sue in its own name. As a matter of fact, in *Curran* v. *City of New York*, 77 N. Y. S. 2d 206 (affirmed 88 N.Y.S. 2d 924), also cited by petitioners, the Supreme Court of New York specifically held that the United Nations Organization cannot be sued by virtue of the provisions of the International Organizations Immunities Act, although that court also held that the United Nations Organization is a legal entity by virtue of the provisions of the Charter and is capable of owning land in the United States.

Judge Manley O. Hudson, one of the outstanding authorities in the field of international law,[31] after the decision of the *Fujii* case by the intermediate appellate court in California, 217 P. 2d 481, wrote an article thereon which is extremely critical of the opinion of the court which rendered the earlier decision. The article appears at page 543 et seq. of the American Journal of International Law for July 1950.

Judge Hudson, after pointing out that the Preamble of the United Nations Charter states that "'We the peoples of the United Nations' are determined 'to reaffirm faith in fundamental human rights,'" and, reciting the provisions of Article I, Section 3 of the Charter, says:

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[31] Chairman of the International Law Commission of the United Nations (over which he presided at Lake Success and, in June 1950, at Geneva); President of the American Society of International Law; since 1923 the Bemis Professor of International Law at the Harvard Law School; from 1933 to 1945 a Judge of the Permanent Court of Arbitration at The Hague, under appointments by the President of the United States; from 1936 to 1946 a Judge of the Permanent Court of International Justice at The Hague, elected by the Assembly and Council of the League of Nations; Consultant on International Law to the Naval War College at Newport; author of "Cases on International Law," texts and many treatises and articles on this and related subjects; member of the *Institut de Driet International;* Director of the Harvard Research in International Law in its draft convention on territorial waters; Advisor to the United States Delegation at The Hague Conference on Codification of International Law in 1930; Lecturer in Academy of International Law at The Hague 1925; Editor of American Journal of International Law since 1924.

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"This statement of a general purpose of the Organization does not impose an obligation on the United States as a Member of the United Nations to take any specific action.

"Article 13 (1) provides that the General Assembly shall initiate studies and make recommendations for the purpose of

> "b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

"This article relates entirely to the powers of the Assembly rather than to obligations of Members, and recommendations by the General Assembly do not have a binding character."

With reference to Article 56, he has the following to say:

> "* * * The obligation imposed by Article 56 is limited to cooperation with the United Nations. The extent and form of its cooperation are to be determined by the government of each Member."

It is obvious from the Charter itself that the framers did not intend that the provisions with reference to human rights and fundamental freedoms, as set forth in Article 55, should be self-executing or should have any binding effect upon Member nations. In Article 61 there is provision for the establishment of an Economic and Social Council to consist of 18 Members elected by the General Assembly. Article 62 provides for the Functions and Powers of the Economic and Social Council. The language of Section 2 of Article 62 is significant. It provides:

> "(2). It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."

Sections 3 and 4 of Article 62 authorize the Economic and Social Council to prepare Draft Conventions for submission to the General Assembly, and to call international conferences on the subject.

Commenting on the provisions of Article 62 (2), supra, Judge Hudson says:

> "* * * This provision, like Article 13 (1), refers only to the competence of a principal organ of the United Nations, whose recommendations are not obligatory."

and goes on to point out that similar language in Article 76 relating to the trusteeship system "merely states an objective of the trusteeship system."

After reciting the general law as laid down in *Foster* v. *Neilson, supra*, 2 Pet. 253, and other cases, Judge Hudson continues:

> "* * * Of course a single treaty may contain both kinds of provisions—some which are, and some which are not, self-executing. This view was taken by Chief Justice Stone in *Aguilar* v. *Standard Oil Co.* (New Jersey) (1943), 318 U. S. 724, 738.
>
> "The Charter is a treaty to which the United States is a party; it is 'made under the authority of the United States,' within the provision of Article 6 (2) of the Constitution. Some of its provisions may have been incorporated into the municipal law of the United States as self-executing provisions; this has been thought to be true, for example, of provisions in Articles 104 and 105 concerning the legal capacity of the Organization and its privileges and immunities. (*Curran* v. *City of New York* (1947), 77 N. Y. S. (2d) 206, 212).
>
> *Clearly, however, the Charter's provisions on human rights have not been incorporated into the municipal law of the United States so as to supersede inconsistent State legislation, because they are not self-executing.* They state general pur-

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poses and create for the United States only obligations to cooperate in promoting certain ends. Insofar as the United States is concerned, they address themselves 'to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court.' Apart from action taken by Congress to implement them, the application of the Charter's human rights provisions is not for a court to undertake. * * *

"The 'human rights and fundamental freedoms' referred to in Article 1 (3) and 55 (c), 62 (2), and 76 (c) are not defined in the Charter of the United Nations. In the effort to promote 'respect for and and observance of' them, no organ of the United Nations has been endowed with legislative power. * * *" (Emphasis supplied.)

A commission created under Article 68 of the Charter drafted what is denominated the Universal Declaration of Human Rights which was adopted by the General Assembly on December 10, 1948.[32] The General Assembly proclaimed this Declaration:

"as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Mrs. Franklin D. Roosevelt, the representative of the United States, speaking about the Declaration on the day before its adoption said:[33]

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[32] Official Records, 3rd Session, Part I, pp. 71-77; Dept. of State pub. 2381, Int. Org. and Conf. Series III, 20.

[33] Dept. of State Bulletin, Vol. 19, No. 494, Dec. 19, 1948, p. 751.

> "* * * my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social and cultural rights stated in the declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. * * *"

Previously, before the Third Committee of the General Assembly, Mrs. Roosevelt stated that "the draft Declaration was not a treaty or international agreement," and that if it was adopted it would not be "legally binding."[34]

Commenting in his article on these official proclamations and statements, Judge Hudson said:

> "After these official statements, no doubt can exist as to the character of the Declaration. It is in no sense binding on the Government of the United States, and its provisions have not been incorporated in our national law."

Judge Hudson reaches the following conclusions concerning the first *Fujii* (intermediate appellate court) decision:

> "The Human Rights Commission of the United Nations is now engaged in drafting a second instrument—a Covenant on Human Rights. If this Covenant is signed and ratified by the United States, and if it is brought into force by a sufficient number of nations, it will be on a wholly different basis from that of the Declaration. It is designed to be a treaty between various nations. As such, depending on a text which has not yet been finalized, its self-executing provisions might be incorporated into American law; *the United States is currently insisting that its provisions should not be self-executing. The California court would seem to have anticipated events which may or may not transpire in the future.*" (Emphasis supplied.)

* * * * * * *

[34] Official Records, Third Committee, 3rd Session, Part I, p. 32.

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> "Clearly a court is not the appropriate agency to determine for the Government of the United States the particular way in which it should 'cooperate with the United Nations.' * * *"

Not only, as has been demonstrated, are the provisions of the Charter themselves indicative that they are not binding upon Member Nations so far as the statements therein contained relate to "human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," but the statement of Edward R. Stettinius, Jr., Chairman of the United States Delegation to the San Francisco Conference which drafted the Charter, in his report to the President of the United States bears this out. The report, dated June 26, 1945,[35] by the then Secretary of State, says in part:

> "The pledge as finally adopted was worded to eliminate such possible interpretation. It pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization *without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.* (Emphasis supplied.)
>
> "To remove all possible doubt on this score the following statement was unanimously approved and included in the record of the Conference (Report of the Rapporteur of Committee 3 of Commission II):
>
> > 'The members of Committee 3 of Commission II are in full agreement that *nothing contained in Chapter IX* (which contains Articles 55 and 56) *can be construed as giving authority to the Organization to intervene in the*

[35] Dept. of State Pub. 2349, Conference Series 71 pp. 115-116.

domestic affairs of member states."[36] (Emphasis supplied.)

Mr. Stettinius also stressed this point in the hearings on the Charter before the Senate Committee on Foreign Relations in 1945, as follows:

> "Because the United Nations is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendations upon the member states." [37]

The same point was emphasized by Mr. Leo Pasvolsky, one of the American draftsmen of the Charter, who gave the following explanation of the Chapter of the Charter which contains Articles 55 and 56:

> "The objective here is to build up a system of international cooperation in the promotion of all of these important matters. The powers given to the Assembly in the economic and social fields in these respects are in no way the powers of imposition; they are powers of recommendation: powers of coordination through recommendation."[38]

The fact that, under the United Nations Charter, provision in made for an Economic and Social Council and that action has been taken to adopt a Declaration of Human Rights, indicates, of itself, that the pledges in the Charter by the signatory powers requiring them to promote "universal respect for, and observance of, human

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[36] Hearings before the Committee on Foreign Relations, United States Senate—Revised—July 9-13, 1945, pp. 105-106.

[37] Hearings before the Committee on Foreign Relations, United States Senate 1945—Part I, p. 45.

[38] Hearings before the Committee on Foreign Relations, U. S. Senate 1945—Part I, p. 133.

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rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," is nothing more than a statement of principles not binding on the signatory powers without individual action by the legislative authority of each. The further fact that the United Nations Organization is now preparing for submission to the Member nations a Covenant on Human Rights to further implement the provisions of the Charter is additional evidence of this fact. In a recent address, David A. Simmons, Esq., former President of the American Bar Association, a member of the Committee on the United Nations of the American Bar Association, and, with Judge Joseph M. Proskauer, the draftman at San Francisco of the original Human Rights provisions in the United Nations Charter, said:

> "The particular rights that had been discussed by the consultants, and those that at least this consultant had in mind, were the ones declared in our Bill of Rights. These include the right to life, liberty and property, equality before the law, immunity from torture and inhuman punishment, presumption of innocence, a fair and open trial, the right to counsel, no *ex post facto* laws, and, of course, freedom of speech, freedom of religion, and the right of assembly. *Our concern was that other people of the globe, who were subjects with no assertable rights, should be entitled to the same rights which our forefathers attained for us and which, by several wars, we have preserved for ourselves and extended to others.*"[39] (Emphasis supplied.)

This statement indicates that the intention was to protect only the human rights and fundamental freedoms protected by the American Constitution and, since dual school systems have been held to be constitutional, the elimination

[39] Report by Committee on United Nations, International Law Section, American Bar Association, filed Sept. 1950, p. 7.

of separate schools was not among the items the drafters had in mind.

Articles 55 and 56 of the Charter contain no definitions of "human rights" or "fundamental freedoms." In Article 55 the signatory powers pledge themselves to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." But the civil and social standards and the ideals of the fifty-odd Member Nations are widely divergent. The United States, for instance, considers polygamy to be contrary to its ideology and social standards. Another nation may consider polygamy to be a human right and a fundamental freedom.

It is understood that some of the nations of the near east separte their children in schools by sexes. Is this a "fundamental freedom" with them, and, as used in Article 55, does fundamental freedom without distinction as to sex mean that a member nation must or must not separate its children by sex?

How divergent are political rights for women among the many nations that comprise the United Nations Organization? The United States considers political rights for women as being a fundamental freedom. Yet it is recognized that sharp distinctions between the sexes may be made by legislatures. "Just a short time ago the State of Connecticut adopted a law barring women from standing at bars even if they are not drinking[40] *** the State of Washington passed a law making it unlawful to sell liquor to women except when seated at tables. * * *.'"[41] Such distinctions would not be held violative of the Constitution, yet, if petitioners be right in their contention, all these laws would be struck down by Article 55 of the United Nations Charter. In upholding a law of Michigan deny-

[40] "Danger to America: The Draft Covenant on Human Rights" by William Fleming, Am. Bar Asso. Jour. Vol. 37, No. 11, pp. 816-817, quoting from the New York Times, July 12, 1951; ("To the same Effect see Laws of the State of Washington, 1949, Chap. 5, p. 13").

[41] Ibid.

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ing a license as a bartender to any female unless she be the wife or daughter of the male owner of a licensed liquor establishment, Mr. Justice Frankfurter for the Court in *Goesaert* v. *Cleary*, 325 U. S. 464, 465-466 (a case decided more than three years after the ratification by the United States of the United Nations Charter) said:

> "Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. * * * The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."

Without extended research, it may be asserted without fear of contradiction that the right of a man to rid himself of an unwanted wife is as easy or as difficult among the many Member nations as it is among the 48 States of the United States. Again without extended research, there is strong likelihood that among the human rights and fundamental freedoms of some nations of the world who are members of the United Nations all property must be held by males and cannot be titled in females, all of which is contrary to our concept.

The provisions contended for by the petitioners as being the law of the land and invalidating laws prescribing a dual school system in the District of Columbia relate to distinctions as to sex as well as race. If they be correct, then the laws in the District of Columbia providing limited working hours[42] and minimum pay [43] for females are also violative of the United Nations Charter, and the provisions of the local law giving preference to women in the allow-

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[42] Act. of Feb. 14, 1914 (38 Stat. 291) as amended; Title 36, Chap. 3, D. C. Code 1951.

[43] Act of Sept. 19, 1918 (40 Stat. 960) as amended; Title 36, Chap. 4, D. C. Code 1951.

ance of alimony,[44] maintenance,[45] and counsel fees[46] would be now in violation of the law of the land. These may seem to be absurdities, but they are necessary implications from the position assumed by petitioners. If they are absurdities, then the proposition that provisions of the United Nations Charter make invalid Acts of Congress providing for a dual school system in the District of Columbia is no less absurd.

VI

Laws Providing for a Dual School System Do Not Constitute a Bill of Attainder.

Paragraph 14 of the complaint filed by petitioners in the District Court reads as follows:

> "14. The defendants, and each of them, are construing and applying Acts of Congress so as to require them to deny to the minor plaintiffs, and other Negro children similarly situated, admission to and to exclude them from attendance as pupils at the Sousa Junior High School for no other reason than because of their race or color, in violation of Article I, Section 9, Clause 3, of the Constitution of the United States which forbids a Bill of Attainder."

Although the charge in the complaint is that the *construction* of certain Acts of Congress by the respondents requires them to engage in conduct which violates the constitutional provision against a Bill of Attainder, the contention in their brief is that there is a direct violation of Article I, Section 9 of the Constitution. It is undisputed that Article I, Section 9 of the Constitution relates to

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[44], [45] and [46] Act of Mar. 3, 1901 (31 Stat. 1346) as amended; Title 16 Secs. 410, 411 and 412, D. C. Code 1951.

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powers denied to Congress and not to powers denied to District school officials or to the Board of Education of the District of Columbia. Nowhere in the complaint is there a charge that Congress, against whom the prohibition of Article I, Section 9 of the Constitution is directed, has passsed a Bill of Attainder. The complaint in this regard is, therefore, deficient, and this deficiency affords the Court ground for disregarding the contention that Article I, Section 9 of the Constitution has been violated.

Respondents have, however, a complete answer to the proposition on its merits. The Acts of Congress allegedly unlawfully construed are not specified, but obviously the allusion is to the Acts of Congress set forth in Appendix A and referred to in the case of *Carr* v. *Corning, supra,* 86 U. S. App. D. C. 173, 182 F. 2d 14, which provide for a dual school system in the District of Columbia.

The constitutional prohibition against Bills of Attainder so far as the Federal Government is concerned (and, indeed, so far as the States are concerned as that prohibition is set forth in Article I, Section 10 of the Constitution) has existed from the time of the adoption of the Constitution in 1789. It is remarkable that, with the numerous attacks on dual school systems over the years, no one has ever suggested heretofore that laws establishing them constitute a Bill of Attainder. This Court has remarked upon an analogous situation in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368. In passing upon the question of the invocation of a three-judge court in the case of an attack upon the constitutionality of an act of the legislature of the Territory of Hawaii, the Court said at page 379:

> "While it is sometimes said that action, where the power to act is unquestioned, can hardly be said to be a precedent for a future case, where as here the responsibility was on the courts to see that the

three-judge rule was followed, we think it significant that no one sought to apply § 266 to Hawaii."

Two recent cases decided by this Court on the subject of Bill of Attainder are *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, and *United States* v. *Lovett, et al.*, 328 U. S. 303, in both of which the Court reviewed and analyzed at length the law and early decisions concerning Bills of Attainder.

The *Garner* case relates to a municipal ordinance requiring loyalty oaths and affidavits.

United States v. *Lovett* was an appeal from a judgment of the Court of Claims allowing to Robert M. Lovett, Goodwin B. Watson and William E. Dodd, Jr., recovery against the United States for services rendered the Federal Government. Congress, in the Urgent Deficiency Appropriation Act of 1943, provided that no part of the funds made available under that or any other Act should be used to pay any part of the salary or compensation of Watson and Dodd after November 15, 1943 unless, prior to that date, they were appointed to positions in the government service by the President, by and with the advice and consent of the Senate. In the opinion by Mr. Justice Black, the Court affirmed the judgment of the Court of Claims, holding that the above provision of the Urgent Deficiency Appropriation Act of 1943 constituted a Bill of Attainder. It was pointed out that, from the hearings and debate which preceded the passage of the Act, the purpose of Congress was (p. 314)

> "clearly * * * to 'purge' the then existing and all future lists of Government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job. What was challenged, therefore, is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers."

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The Court, (p. 315) quoting from *Cummings* v. *Missouri*, 4 Wall. 277, 323, defined a Bill of Attainder as follows:

> "A bill of attainder is a legislative Act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."

Further referring to the *Cummings* case and the case of *Ex parte* Garland, 4 Wall. 333, the Court said:

> "Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

Applying this rule to the situation then before the Court in the *Lovett case*, Mr. Justice Black said (p. 316):

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, * * * acceptance of bribes by members of Congress, * * * or by other government officials, * * * and interference with elections by Army and Navy officers * * *."

There is nothing in the complaint which shows, as to these petitioners, punishments of any kind or conditions such as those which prompted the Court to declare an Act of Congress a Bill of Attainder in the *Lovett* case or in any of the cases alluded to in that opinion. Lovett, Watson

and Dodd were singled out by name for attainder by Congress and were absolutely prohibited, to all intents, from thereafter working for the Federal Government, because Congress decided, without a judicial trial, that these three men were guilty of subversive activities and unfit to hold a federal job. They were convicted without judicial proceedings, which is the very abuse against which the prohibition was written into the Constitution.

The petitioners herein and others similarly situated have not been convicted nor has punishment been inflicted upon them without judicial trial; neither have they been denied the right to receive education. The attention of the Court is again invited to the allegation in paragraph 3 of the complaint that the minor petitioners "do now attend a junior high school in said District," and to the fact that, for aught that appears of record, they therein receive all the educational opportunities afforded to any child in any junior high school.

The *Cummings* case, *supra,* involved a Catholic priest who was convicted of preaching as a minister without taking an oath of loyalty as a prerequisite to practicing his profession, and the *Garland* case, *supra,* involved an attorney who sought leave to practice his profession without taking a similar oath.

In the *Garland* case, Mr. Justice Field, who wrote the opinion for the Court in both that case and the *Cummings* case, said, at p. 377:

> "As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

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The full description of a Bill of Attainder as found at page 323 in the *Cummings* case is as follows:

> "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Referring to the requirement of an oath of loyalty from members of the clergy, the Court in the *Cummings* case said (p. 320):

> "The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."

Further, on the same page, the Court made the observation:

"The deprivation of any rights, civil or political, *previously enjoyed,* may be punishment; * * *."

In the very recent *Garner* case, *supra,* 341 U. S. 716, 722, Mr. Justice Clark for the Court affirmed this observation of Mr. Justice Field in 1867, holding that "punishment is a prerequisite." To constitute punishment, he said, there is a requirement of deprivation of [illegible] privilege previously enjoyed."

How can there possibly be claimed to be punishment in the sense required for a Bill of Attainder where the minor petitioners have never "previously enjoyed" education in the District of Columbia in an integrated school system?

Petitioners attempt to torture the definition of a Bill of Attainder to establish their point. On some four pages, commencing with page 37 of their brief, they cite and quote from a substantial number of publications to draw respondents into a psychological, anthropological and sociological discussion on the effects of social and other distinctions between the white and colored pupils of America. Among these are names of psychologists and references found in "Appendix to Appellants' Brief" filed jointly in the pending companion cases of *Brown* v. *Board of Education of Topeka, Briggs* v. *Elliott* and *Davis* v. *County School Board of Prince Edwards County,* Nos. 8, 101 and 191, respectively. Respondents neither concede as true that which is attempted to be established by the references, nor take issue therewith. They point out, however, that statements[47] and writings[48] of other scientists do take issue with those

[47] Testimony of Dr. H. E. Garrett, *Davis* v. *County School Bd.,* No. 191, pp. 550, 551-553 and 559-560.

[48] *The Cult of Equality,* by S. O. Landry; *A Comparison of Negro and White College Students by Means of the American Council Psychological Examination,* by A. M. Shuey, Dept. of Psychol., N. Y. Univ., Jour. of Psychol., 14, 1942, 35-52; *The Problem of Equating the Environment of Negro-White Groups of Intelligent Testing in Comparative Studies,* by H. G. Canady, Dept. of Psychol., W. Va. State College, Jour. of Soc. Psychol., 17, 1943, 3-15; *Trends in Discussions of Intelligence: Race Differences,* by P. Witty and S. Garfield, Northwestern Univ., Jour. of Ed. Psychol., 33, 1942, 584-95; *Negro-White Differences in Mental Ability in the United States,* by H. E. Garrett, Prof. of

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cited by petitioners and those set forth in the "Appendix". Analysis of the social-scientific references cited in opposition to the dual school system shows that much of the material cannot even be classified as scientific conclusion. It is nothing more than expression of opinion. The senior circuit judge of the United States characterized it in *Briggs* v. *Elliott*, 98 F. Supp. 529, 537 as "theories advanced by a few educators and sociologists." In this connection, the attention of the Court is invited to the testimony of Dr. Henry E. Garrett, head of the department of psychology of Columbia University, at the trial before the district court in Richmond in the *Davis* case, that psychology is a very young science,[49] that results of psychological tests are subject to interpretation by the testor, and that, accordingly, the predilection of the psychologist conducting a test may strongly influence the conclusion to be derived therefrom.[50] Accordingly, the theories of the social scientists relied upon by petitioners are not entitled to consideration as the coldly impartial findings of objective searchers for truth. But even if they had that dignity, it is respondents' position

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Psychol., Columbia Univ., Scientific Monthly, 65, 1947, 329-333, *The Intelligence of Jewish College Freshmen as Related to Parental Occupation*, by A. M. Shuey, Dept. of Psychol., N. Y. Univ., Jour. of Applied Psychol. Vol. XXVI, No. 5, Oct. 1942, 659-668; *Non-Academic Development of Negro Children in Mixed and Segregated Schools*, by I. B. Prosser, Univ. of Cinn., Unpublished Doctors Thesis available in D. C. Public Library on Interlibrary loan from Univ. of Cinn. Library; *Personality Difference Between Negro and White College Students, North and South*, by J. R. Patrick and V. M. Sims, Jour. of Abnorm. and Soc. Psychol. 29, 1934-35, 181-201; *A Racial Comparison of Personality Traits*, by O. W. Eagleson, Jour. of Applied Psychol. 22, 1938, 271-274; *Further Data on the Influence of Race and Social Status on the Intelligence Quotient*, by A. H. Arlitt, Phychological Bulletin, 18, 1921, 95-96; *Intelligence and Nationality of Wisconsin School Children*, by R. Byrnes, Jour. of Soc. Psychol., 7, 1936, 455-470; *Implications of Military Selection and Classification in Relation to Univ. Mil. Train.*, by R. K. Davenport, Jour. of Negro Ed., 15, 1946, 585-594; *A Study of the Relation Between Mental and Physical Status of Children in two Counties, of Ill.*, by G. A. Kempf and S. D. Collins. U. S. Pub. Health Rep. 44, 1929, 1743-1784; *Intelligence of Chinese and Japanese Children*, by P. Sandiford and R. Kerr, Jour. of Ed., Psychol., 17, 1926, 361-367; *The Settlement of Negroes in Kent County, Ontario, and a Study of the Mental Capacity of their Descendants*, by H. A. Tanser, Chatham, Ont.: Shepherd Pub. Co., 1939, p. 187; *A Study of Natio-Racial Mental Differences*, by N. D. M. Hirsch, Genetic Psychol. Monographs. 1, 1926, 231-406.

[49] Record p. 547, *Davis* v. *County School Bd.*, No. 191.

[50] Ibid. p. 561 and 563-564.

that such theories do not constitute a valid basis for the reversal by this Court of the long line of its holdings ever since the Civil War, and the necessary result of such reversal: amendment of the Constitution of the United States by construction.

Even if there are ill effects, as contended by petitioners, they cannot be classified as punishments as that term is used in the definition of a Bill of Attainder. The laws requiring a dual school system were not enacted with any idea of deprivation or of denial or of punishment, nor was there any intention to take away something which formerly was had by the "easily ascertainable group." On the contrary, the laws setting up schools for colored were enacted at a time when members of that race were afforded no schooling whatsoever. The purpose of the laws was to give rather than to take away, was to afford opportunity rather than deny opportunity, was to aid rather than to punish. Twist, turn and torture the words as they may, petitioners cannot make bills of pains and penalties or bills of attainder out of laws setting up schools for a people who were once deprived of education.

CONCLUSION

The position of the respondents with regard to the attack upon the maintenance of a dual school system in the District of Columbia is, (1) that sections of the Revised Statutes and subsequent enactments by Congress require the maintenance of that system, (2) that this Court and the highest court of the District have so held, (3) that the principle of separation of the races in schools and otherwise does not violate the Civil Rights Act nor the United Nations Charter and does not violate either the Fourteenth Amendment, which provides for "equal protection of the laws," nor the Fifth Amendment which has no equal protection clause, (4) that if the time has come to integrate

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the schools of the District of Columbia the reasons therefor and the arguments in favor thereof should be placed before the Congress who made the laws, and (5) the Court should not be asked to, nor should it when asked, disturb the situation as it finds it, however strongly the Justices may be impressed with arguments for the need of change.

The position which the Court should take in this controversy, it seems to respondents, is best summed up by expressions made or concurred in by such eminent jurists as Justices Cardozo, Brandeis and Stone. In *United States* v. *Constantine*, 296 U. S. 287, 298-299, all three concurred in this dissenting language by Mr. Justice Cardozo:

> "The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. *Fletcher* v. *Peck*, 6 Cranch 87, 130; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. *Ogden* v. *Saunders*, 12 Wheat. 213, 270. The warning sounded by this court in the *Sinking-Fund Cases*, 99 U. S. 700, 718, has lost none of its signifiance. 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our in-

> stitutions depends in no small degree on a strict observance of this salutary rule.' I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue."

In *United States* v. *Butler, supra,* 297 U. S. 1, Mr. Justice Stone said at page 78-79:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

Finally, respondents adopt the language of Chief Judge Parker in one of the latter paragraphs of *Briggs* v. *Elliott, supra,* 98 F. Supp. 529:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segrega-

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tion is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics."

It is respectfully submitted that the judgment of the District Court is correct and should be affirmed.

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APPENDIX A

APPENDIX A

Revised Statutes of the District of Columbia

Sec. 281. It shall be the duty of the school-board to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school-funds, to be determined by the numbers of white and colored children, between the ages of six and seventeen years, to the payment of teachers' wages, to the building or renting of school-rooms, and other necessary expenses pertaining to said schools, to exercise a general supervision over them, to establish proper discipline, and to endeavor to promote a thorough, equitable, and practical education of colored children in said portion of the district.

Sec. 282. Any white resident shall be privileged to place his or her child or ward at any one of the schools provided for the education of white children in said portion of the district he or she may think proper to select, with the consent of the school-board; and any colored resident shall have the same rights with respect to colored schools.

Sec. 283. The school-board is authorized to receive any donations or contributions that may be made for the benefit of the schools for colored children by persons disposed to aid in the elevation of the colored population in the District, and to apply the same in such manner as in their opinion shall be best calculated to effect the object of the donors; the school-bard to account for all funds so received, and to report the same to the legislative assembly.

Sec. 306. It shall be the duty of the proper authorities of the District to set apart each year from the whole fund received from all sources by such authorities applicable to purposes of public education in the cities of Washington and Georgetown such a proportionate part of all moneys received or expended for school or educational purposes

in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years in the respective cities bear to the whole number of children, white and colored, between the same ages, for the purpose of establishing and sustaining public schools in said cities for the education of colored children; and such proportion shall be ascertained by the last reported census of the population of said cities made prior to such apportionment, and shall be regulated at all times thereby.

Sec. 310. It is made the duty of the trustees to provide suitable rooms and teachers for such a number of schools in Washington and Georgetown as, in their opinion, will best accommodate the colored children in the various portions of said cities.

Sec. 314. The funds obtained for educational purposes in accordance with the preceding section shall be applied to the education of both white and colored children, in the proportion of the numbers of each between the ages of six and seventeen years, as determined by the latest census report that shall have been made prior to such apportionment.

Sec. 1296. All acts of Congress passed prior to the first day of December, one thousand eight hundred and seventy-three, relating to the District of Columbia, any portion of which is embraced in the foregoing revision are hereby repealed; and the section applicable thereto shall be in force in lieu thereof; and this revision of the acts of Congress relating to the District of Columbia shall be subject to, and governed by the provisions of chapter seventy-four of the Revised Statutes of the United States, entitled "Repeal Provisions."

Approved June 22, 1874.

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Brief for Respondents on Reargument

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ~~8~~ 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

VERNON E. WEST,
Corporation Counsel, D. C.,
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PRINTING DIVISION—D. C. GOVERNMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 8

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

Brief for Respondents on Reargument

PRELIMINARY STATEMENT AND SCOPE OF BRIEF

A final judgment of the United States District Court for the District of Columbia dismissing a complaint for injunction and declaratory judgment is here for review, by writ of certiorari, before judgment by the United States Court of Appeals for the District of Columbia Circuit. The petitioners, plaintiffs in the District Court, sought admission to the Sousa Junior High School, a junior high school in Division 1 of the public school system of the District of Columbia, which division encompasses the several schools

for white pupils, contending that the separation of white and Negro children in the public schools violates Articles I, Sec. 9, Clause 3 of the Constitution of the United States, the Fifth Amendment to the Constitution of the United States, Title 8, Sections 41 and 43 of the United States Code, and Chapter I, Article 1, Section 3 and Chapter IX, Articles 55 and 56 of the Charter of the United Nations.

Oral argument was heard by this Court on December 10th and 11th, 1952.

On June 8, 1953 an order was issued restoring this and four companion cases to the docket and assigning them for rebriefing and reargument. Because certain terms of the order are believed to be specially significant in the matter of the scope of this brief, the order is set forth below with those terms emphasized.

Citation of the Opinion Below, the statements of the Grounds of Jurisdiction and Questions Presented, and the respondents' version of a proper Statement of the Case are set forth on pages 2-5 of the Brief for Respondents filed at the October Term 1952, and will not be here repeated.

The Order of June 8, 1953

(With Emphasis Supplied)

"Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions *insofar as they are relevant to the respective cases*:

"1. What evidence is there that the Congress which submitted and *the State legislatures and conventions* which ratified the *Fourteenth Amendment* contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

"2. If neither the Congress in submitting nor *the States* in ratifying *the Fourteenth Amendment* understood that compliance with it would require

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the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of *the Amendment*

(a) that future Congresses might, in the exercise of their power under § *5 of the Amendment*, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe *the Amendment* as abolishing such segregation of its own force?

"3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing *the Amendment*, to abolish segregation in public schools?

"4. Assuming it is decided that segregation in public schools violates *the Fourteenth Amendment*,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

> "The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires."

The emphasized words in the foregoing quotation of the Court's order demonstrate that all of the questions are intimately related to the 14th Amendment. Prior decisions support the view of counsel that the Court recognized that the Amendment applies only to the four State cases and anticipated that the questions would, therefore, not be relevant to the District case. In *Wight* v. *Davidson,* 181 U. S. 371, 384, the Court said:

> "* * * the 14th Amendment of the Constitution of the United States, * * *, in terms, operates only to control action of the states, and does not purport to extend to authority exercised by the government of the United States."

Indeed, it appears that not only does the 14th Amendment not apply to the Congress when legislating for the District, but this Court, on the same day that it announced the decision in *Wight* v. *Davidson,* said in *Cass Farm Co.* v. *Detroit,* 181 U. S. 395, 398, with reference to the 14th Amendment:

> "* * * that Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress, * * *."

In a number of places in their Brief on Reargument,[1] particularly on page 89, petitioners take the same view as do the respondents: that only the Fifth Amendment has any bearing on the constitutionality of laws providing for a

[1] Pp. 30, 32, 49, 51, 65 and 89.

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dual school system in the District of Columbia. Regarding locally applicable constitutional provisions, the United States Court of Appeals for the District of Columbia Circuit held that "The equal-protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states."[2]

This being so, counsel for respondents are of the opinion that none of the questions as propounded by the Court in its order of June 8th is relevant to this case. They nevertheless believe that they should endeavor to assist the Court by setting forth applicable principles that would come into play if the 4th and 5th questions propounded by the Court were predicated on a violation of the Fifth Amendment rather than the Fourteenth. Apparently petitioners' counsel also concluded that the first three questions propounded in the Court's order of June 8 last are inapplicable to the District for, in their Brief on Reargument, they have not undertaken to specifically answer any but the fourth and fifth questions.

While the Court's order of June 8, 1953 does not in terms preclude rebriefing and reargument of the whole question before the Court, it was, and still is, the view of counsel for respondents that the principal subject was completely and fully briefed at the October Term 1952 and that, in approximately ten hours of argument by counsel in the five pending cases involving the subject of separation of races in education, the Court had heard about all of the argument that it desired on those aspects of the subject outside the scope of the Court's questions. Petitioners, however, in addition to replying to the last two of the Court's questions, have filed a lengthy brief touching upon all of the points heretofore raised by them. A study of the brief shows that it actually contains not a single additional point beyond that which was contained in the original brief

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[2] *Hamilton National Bank* v. *District of Columbia*, 81 U. S. App. D. C. 200, 156 F. 2d 843, 846.

filed on behalf of petitioners, although it does attempt to lay special emphasis upon and to enlarge on one phase of the matter. Because counsel for respondents believe that the Brief for Respondents filed in 1952 is a complete refutation of all points raised by petitioners in both of the briefs submitted by them, this brief shall contain only answers to the Court's 4th and 5th questions and a general statement of respondents' position.

SUMMARY OF ARGUMENT

Accomplishment of integration of the two separate school systems in the District of Columbia or elsewhere requires something more than mere reshuffling of the pupils, and, therefore, immediate transition from the dual to a single school system, in the event the former is declared unconstitutional, does not necessarily follow. Proper indoctrination and instruction of teachers, and passage of necessary legislation, including appropriations for required changes, make the immediate change to a unified local system impossible.

Although no gradual adjustment appears necessary in the District of Columbia and none is recommended by respondents, the Court's equity powers are broad enough to permit such adjustment from a dual to an integrated school system, particularly in the light of the equality of facilities afforded petitioners under the prevailing system.

The magnitude of the problems encompassed in arranging for integration of schools in the several jurisdictions directly involved in the five cases before the Court is such that the framing of a detailed decree by this Court, even with the assistance of a Special Master, is not feasible. If separate schools for the races are declared unconstitutional, cognizance should be taken by this Court of the necessity for proper preparation for integration and the cases should be remanded to the respective district courts with instructions to order prompt preparation for integration and to order actual commencement and completion of integration within a reasonable period of time.

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ARGUMENT

I

Question 4(a)—In the Event that Separate Schools for White and Negro Children are Declared Unconstitutional, Immediate Transition from the Dual to a Single School System Does Not Necessarily Follow

Assuming that the Court should decide that segregation of the races in public schools is violative of the Constitution, it does not necessarily follow that, within the limits set by normal geographical school districting, either Negro or white children should forthwith be admitted to schools of their choice. In making this assertion counsel for respondents do not embrace the other extreme embodied as one suggestion made in the brief filed at the October Term 1952 by the United States as *amicus curiae* that integration of pupils be commenced on a first-grade level and extended by grades annually so as to stretch out over a twelve year period. It is conceded that, if necessary, a reshuffling of white and Negro pupils in the schools of the District of Columbia could be accomplished within a comparatively short time by a simple directive. But reshuffling of pupils alone does not effect integration of two presently independent school systems. "Integrate", as defined in *Webster's New International Dictionary* (2nd Ed. Unabridged-1946), means, *inter alia*,:

> "To form into one whole, to make entire, to complete, *to round out; to perfect.*" (Emphasis supplied.)

If the elimination of the dual school system is to afford even the minimum benefits which are claimed for a unified system, the transformation must, indeed, be rounded out and perfected. Mere recitation of figures demonstrates the magnitude of the undertaking. In early November there

were approximately 104,000 children in the public schools of the District, divided about 45,000 white and about 59,000 Negro. Seventeen hundred white and eighteen hundred Negro teachers, a total of about 3,500, were provided for instruction of these pupils.[3]

Counsel for respondents make no dire predictions of widespread bloodshed among intermingled pupils of the two races, but past experience in the field of local recreation[4] leads to the conclusion that some conflict is possible if proper preparation is not made and if supervising personnel are not adequately trained to guide the children. That tension between the races has existed elsewhere for many years and that numerous serious clashes have occurred as a result thereof was recognized by this Court as recently as April 28, 1952 in *Beauharnais* v. *Illinois*, 343 U. S. 250, 258-261. In both the Court's opinion and in dissents in that case are found such expressions as: (p. 259) "From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction"; (p. 261-262) "• • • tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings"; (p. 273) "But emotions bubble and tempers flare in racial • • • controversies • • •"; (p. 283) "Racial • • • biases and prejudices lead to charge and counter-charge, acrimony and bitterness".

In addition to the training given to the United States Park Police in 1949[5] (with refresher courses given annually thereafter), the Recreation Department of the District of

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[3] Letter from Superintendent of Schools, D. C. dated November 19, 1953—Appendix p. 1.

[4] See *Washington Post* of June 30, 1949 regarding clashes at Anacostia Swimming Pool June 19, 1949; and *Washington Evening Star*, August 6, 1949 and August 9, 1949 showing that the pool was closed July 1, 1949 and not reopened until after U. S. Park Police were trained in inter-group relations and the handling of racial tensions by Dr. Joseph Lohman, University of Chicago sociologist.

[5] See footnote 4, ante.

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Columbia, to properly prepare its personnel for interracial use of playgrounds (which, as pointed out in Petitioners' Brief on Reargument, is progressing in the District), recently completed a six-weeks course in inter-group relations for 36 of its workers.[6] As in any field of education, the number of those instructed was necessarily limited by the number that could be accommodated in one class. It must be remembered in connection with these programs of instruction that participation in recreation is on a voluntary basis, whereas attendance at school is compulsory, and that, accordingly, the need for instruction in proper handling of regrouped children in schools is even greater than in the recreation field.

It would seem that in order to round out and perfect the regrouping of 104,000 children in a community as far south as Washington, proper indoctrination of the 3500 teachers in the principles of inter-group relations is a prerequisite. Not only would such an educational program amongst this number of teachers consume a substantial amount of time for the teachers themselves, but the problems of locating suitable instructors in the subject and of financing the program are important considerations. The latter item would, of course, require appropriation of funds by the Congress both for the salary of the teachers while in training and for paying their instructors. The amount of time necessary to obtain such appropriations is unpredictable.

The prior preparation of teachers and of the public for integration is a subject that has been a matter of study in the past. In a bulletin published by the United States Office of Education (now a part of the U. S. Department of Health, Education and Welfare) entitled "*Education of Teachers for Improving Majority-Minority Relationships*"[7] prepared by Dr. Ambrose Caliver, eminent Negro

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[6] Letter from Superintendent of Recreation, D. C. dated November 23, 1953. Appendix p. 2.

[7] Bulletin 1944, 2.

educator and Senior Specialist in the Education of Negroes in the United States Office of Education, the following is found:

> "Conditions which are likely to prevail at the close of the present crisis demand that we know all our neighbors better, and that we attain knowledge of them as quickly as possible. This demand suggests the need of consideration of ways and means. One important agency we have to spread such knowledge is the schools, and teachers are the chief means, *but they must first be prepared.* Their interests, information, and attitudes must be developed in such a manner as to give them an appreciation of their responsibility to understand the profound social changes that are taking place, and a determination to help their pupils make the required transition as effectively as possible."[8]
>
> * * * * * * * * *
>
> "Another matter that is of extreme importance in developing better race relations through the schools is the attitude of the teacher. * * * The purpose of such courses is to influence the attitude of prospective teachers, who in turn will influence the pupils in the schools. The setting and atmosphere in which the course is conducted, which have an important effect in developing proper attitudes toward different minority groups, are largely provided by the attitude of the teacher."[9] (Emphasis supplied.)

Among other things, the publication above referred to reviews the facilities available to teachers for training in race relations and the author concludes that the facilities provided in the Nation's colleges and universities are few in number, poorly distributed and limited in scope, and that such courses as are available are not required of the student.[10] Other publications on the subject, including

[8] *Idem* p. 4-5.
[9] *Idem* p. 41.
[10] *Idem* p. 49, et seq.

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some 25 books and pamphlets contained in a newly compiled *Kit on Intergroup Education* prepared jointly by the American Teachers Association and the National Education Association, in cooperation with the United States Office of Education, support the strong conviction of educators that prior preparation of teachers and prior indoctrination of the public are essential prerequisites to effective integration of different racial groups.[11]

A second major consideration in effecting integration of the dual school system in the District of Columbia is the matter of teacher replacements and promotions. In the District of Columbia Teachers Salary Act of 1945 (59 Stat. 488, approved July 21, 1945) separate boards of examiners and separate chief examiners for the white and colored schools were provided for, and subsequent enactments (District of Columbia Teachers Salary Act of 1947 [12] and an amendment thereto in 1951 [13]) repeated and extended such provision. Pursuant to these Acts of Congress, rules were promulgated by the Board of Education of the District of Columbia under which separate examinations for teachers have been conducted and separate eligible lists compiled. There is no feasible way to combine the two lists, eligibles on which have, in some instances, preferential employment rights under the rules for as long as three years.[14] Such rules have the force and effect of law. *U. S. ex rel. Denny* v. *Callahan*, 54 App. D. C. 61, 294 Fed. 992. Without corrective legislation, the conflict of rights of the eligibles on the two lists would probably lead to extended litigation and, indeed, necessary appointments of teachers could not be

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[11] *Minority Problems in the Public Schools*, by Theodore Brameld, Professor of Educational Philosophy, University of Minnesota, and Special Consultant for Bureau for Intercultural Education (Harper Brothers 1946); *More-than Tolerance*, National Education Association of the United States, May 1946, p. 8-10; *From Sea to Shining Sea*, American Association of School Administrators, 1947 p. 46, et seq.

[12] 61 Stat. 258, approved July 7, 1947.

[13] 65 Stat. 605, approved October 24, 1951.

[14] Rules of Board of Education, D. C., App. p. 4 (see also letter from Superintendent of Schools, App. p. 1).

accomplished. Time within which such legislation can be obtained is not readily predictable.

From the foregoing it is clear that question 4(a) propounded by the Court must be answered in the negative.

II

Question 4(b)—In the Event That Separate Schools for White and Negro Children are Declared Unconstitutional, the Breadth of the Court's Equity Powers and the Factual Situation in the District Permits, But Does Not Necessarily Require, An Effective Gradual Adjustment to be Brought About

Since there is no allegation of inequality of facilities in the case involving public schools in the District of Columbia, there can be no doubt, with reference to the second part of question number four propounded by the Court, that the Court, if it finds the dual school system to be unconstitutional, may, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from the existing segregated to an integrated system. The attention of the Court is directed to the statement made on page 48 of the Brief for Petitioners on Reargument that:

> "Here there is no question of equality of facilities."

This fact is repeated in the "Conclusion" on page 96 of petitioners' latest brief:

> "Here no question of equality of facilities is in issue."

From *Sweatt* v. *Painter,* 339 U. S. 629, 635, counsel for petitioners quote the statement, "It is fundamental that these cases concern rights which are personal and present." They also cite *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 352;

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Farrington v. *Tokushige*, 273 U. S. 284; *Pierce* v. *Society of Sisters*, 268 U. S. 510 and *Meyer* v. *Nebraska*, 262 U. S. 390, to support the proposition that, if the dual school system in the District of Columbia is struck down as unconstitutional, the resulting change to a single system must be immediate. The *Sweatt* case, however, and all of the other cases that they cite were written against a background of either complete denial of educational opportunity or of such inferior facilities therefor as to amount to complete denial. Such is not the case in the District of Columbia. Indeed, on pages 93 and 95 of their Brief on Reargument counsel for petitioners "concede that there may well be difficulties and delays of a purely administrative nature involved in bringing about desegregation", and "concede the possibility of delay until the next school year by reason of administrative requirements." These concessions refute the theory of petitioners that a declaration of unconstitutionality requires *immediate* transition from the dual to a single school system. In effect they are saying, "We are being educated in separate schools, as to which we make no contention that there is not equality of facilities, but mere separation from our white brethren is unconstitutional and, although you may deny us those constitutional rights for a short time (which we think is only until the next school term) you may not deny them for a period beyond that which we think is a proper one."

In concluding that the Court *may* permit an effective gradual adjustment to be brought about, counsel for respondents do not suggest that a gradual adjustment would be desirable or, indeed, necessary. In the judgment of experts, integration might be accomplished in certain areas of the District before it is ordered in others if, as may possibly be the case, some teachers have been properly prepared to handle integration and others have not been properly instructed. In such a case, the integration of children in some schools may afford what may be termed "work-

shops" for the even better indoctrination of teachers yet to be instructed on the subject. Unless, however, competent authority should reach such a conclusion, respondents counsel conceive of no reason for "gradual adjustment" from a dual to a single unsegregated system if the former is unconstitutional.

The right of the Court, in exercising its equity power, to formulate decrees which take "into mind the complexity of the situation in all of its aspects and [give] weight to the many-sided considerations which must control * * *"[15] is well established. As was said in *United States* v. *Morgan*, 307 U. S. 183, 194, "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid and the manner of moulding its remedies may be affected by the public interest involved."

Again in *Virginian Railway Co.* v. *System Federation, Etc.*, 300 U. S. 515, 552, Mr. Justice Stone, speaking for the Court, said:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

The same Justice, in a later case (*Securities & Exchange Commission* v. *United States Realty Company*, 310 U. S. 434, 455) expressed an even more far-reaching doctrine, as follows:

> "A court of equity may in its descretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. *It may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay*

[15] *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 187.

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its hand in the public interest when it reasonably appears that private right will not suffer.'' (Emphasis supplied.)

No one will gainsay that, if integration is ordered, its perfection without conflict or difficulty and with an attitude of acceptance by all concerned is in the public interest. Where, as in the District of Columbia, there is a complete system of public schools for Negroes and where "there is no question of equality of facilities", "it would seem that (the Court) is bound to stay its hand in the public interest (for) it reasonably appears that private right will not suffer." Certainly private right will not suffer for the reasonable length of time that may be required to obtain from Congress necessary legislation and appropriations, to make necessary administrative arrangements and to properly indoctrinate teachers and the public to a radical change in the local educational system.

Again counsel for respondents make the point that they do not advocate and see no need for a protracted extension of the time for integration of the schools of the District if the same should be ordered. They do, however, firmly believe that an adequate time is necessary and advisable to accomplish the change in the manner in which acknowledged leaders in education believe that such a change should properly be accomplished.

III

Question 5—In The Event That Separate Schools for White and Negro Children Are Declared Unconstitutional, Without the Formulation of a Detailed Decree, and Without the Appointment of a Special Master, the Court Should Remand the Cases to the District Courts With Directions to Integrate Schools as Expeditiously as Conditions Warrant

For convenience, question number five propounded by the Court, although divided into four parts, will be answered as one.

Counsel for respondents are not in disagreement with the basic position taken by petitioners on pages 94-96 of their Brief on Reargument in answer to the several parts of the fifth question from the Court. It is not believed that, in the event the dual school system in the District of Columbia should be declared unconstitutional, this Court should formulate a detailed decree, and, accordingly, it follows that there is no necessity for the Court to appoint a special master to hear evidence with a view to recommending the terms for a detailed decree. It, of course, is not known to counsel for respondents whether the Court will hold unconstitutional the dual school systems involved in all of the cases now before it. It is assumed, on the basis of authorities and arguments set forth in Section III of the Brief For Respondents filed herein in 1952 (pp. 16-31, and particularly p. 30), that, since the Fifth Amendment, which applies to the District of Columbia, contains no "equal protection" clause as does the 14th Amendment, which applies to the States, unconstitutionality cannot be found here unless it is also decreed in the State cases. A holding by the Court of unconstitutionality of separate systems of schools for white and Negro children would present vast and varying problems in the five jurisdictions involved. Accordingly, the framing of detailed decrees would be a task which, frankly, it is not believed the Supreme Court is equipped to work out unless it should have testimony on the needs in each of the five jurisdictions through the medium of a Court appointed special master.

But if the Court should decree the separate school systems in the five jurisdictions before it to be unconstitutional, it is obvious that the whole question of the separation of the races in public school education would be settled throughout the United States—indeed, such a ruling might well affect the validity of all laws providing for separate but equal treatment of different races in areas other than that of public education. There is, therefore, every reason

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to believe that the problem of adjustment, in the event of such a ruling, would be of no less magnitude in the thirteen remaining jurisdictions in which there is separation in the schools by races than in the five which are now before the Court. Each such jurisdiction would be obliged to work out the details of adjustment through legislation, administrative changes, education of teachers, education of the public, etc.

In other words, eighteen separate political subdivisions of the United States would be obliged to make revolutionary changes in what has been described as "a way of life". The practical impossibility of framing detailed decrees to effect such vast changes in so many places is at once apparent.

Obviously, the forum for the preparation and direction of the transformation, if such a change is to be made, is the district court in each jurisdiction. Here there are readily available facilities and rules for the taking of testimony, for informal conferences for the working out of intimate details that may be necessary—indeed, for the judicial knowledge of local conditions so essential to effect adjustments in such a major and, at the same time, sensitive area.

The time that may be necessary to accomplish complete integration of the school system in the District of Columbia cannot here be foretold. Perhaps by cooperation between the leaders of Congress and local authorities, both administrative and judicial, the changeover could be effected in a short time. The soundest suggestion that counsel for respondents can make to the Court concerning the nature of the order, if unconstutionality is to be decreed, is that the Court make recognition of the necessity for proper preparation and changes which appear essential to perfect integration in all jurisdictions and remand the cases to the respective district courts with instructions for such courts to prepare decrees directing the immediate commencement of such preperation, with periodic

investigation by the district courts of the progress thereof, with direction that, in accordance with the principle of unconstitutionality of separation of races in schools, integration be commenced at the earliest possible date, and that complete integration be accomplished by a definite future date, not to exceed in any jurisdiction more than a maximum period of time.

IV

Summary of Position of Respondents

Counsel are aware of the expressed policy of the President of the United States to use the power of his office to terminate all forms of segregation in the Nation's Capital and are cognizant of steps taken by the Government of the District of Columbia in furtherance of that declared purpose of the President.

Because the subject of segregation has many facets, particularly in the light of governmental pronouncements and actions in the realm of improvement of race relations generally and in order to avoid any misconception concerning the basis of the arguments which have been advanced on behalf of respondents, it is deemed advisable to set forth below a clear and concise statement with reference thereto.

No attempt is made to debate the rightness or wrongness of the separation of children by races in the schools of the District of Columbia. For the reason that it is not believed that the sociological issue is involved, no poll has been taken of the individual respondents as to their views on that issue. From public utterances, counsel for respondents believe that, while some may favor a continuance of the dual school system in the District of Columbia, others of the respondents are strongly of the view that the time for integration has arrived.

As forcefully as the plain statement thereof can make it, counsel for respondents state to the Court that the position

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they take and have taken in argument and in the Brief for Respondents filed at the October Term 1952, is a strictly legal position which they, as officers of the Court, feel duty-bound to present because of their belief in its soundness.

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
MILTON D. KORMAN,
Assistant Corporation Counsel, D. C.,
LYMAN J. UMSTEAD,
Assistant Corporation Counsel, D. C..
Attorneys for Respondents,
District Building,
Washington 4, D. C.

SUPERINTENDENT OF SCHOOLS
FRANKLIN ADMINISTRATION BUILDING
Thirteenth and K Streets, N. W.
Washington 5, D. C.

November 19, 1953

Mr. Vernon E. West
Corporation Counsel, D. C.
District Building, Room 329
Washington 4, D. C.

Dear Mr. West:

In response to your request the following information is submitted:

The number of teaching positions filled as of October 23, 1953:

Division 1 (white schools)	1725
Division 2 (Negro schools)	1823
Total	3548

The total number of pupils enrolled in the public schools as of November 5, 1953:

Division 1 (white schools)	44,797
Division 2 (Negro schools)	58,961
Total	103,758

Separate lists of eligibles for teaching positions complied from separate examinations are maintained for Division 1 (white schools) and Division 2 (Negro schools).

Sincerely yours,

/s/ Hobart M. Corning

Hobart M. Corning
Superintendent of Schools

GOVERNMENT OF THE DISTRICT OF COLUMBIA
RECREATION DEPARTMENT
3149 Sixteenth Street, N. W.
Washington 10, D. C.

November 23, 1953

Vernon E. West, Esq.
Corporation Counsel, D. C.
District Building
Washington, D. C.

Dear Mr. West:

In reply to the inquiry from your office, we advise that our department conducted a twelve-session course in intergroup relations which terminated November 19, 1953.

This training program, organized by a staff committee, was given to 36 of our workers by the group-discussion technique, recognized as one of the more effective methods of inculcating this subject. The number was limited to 36 because it was felt that this was the maximum number that could be properly handled in one class by one instructor. In practice, this is perhaps too large a group for one teacher.

We believe that the twelve 2-hour sessions held during the six-week period did much to strengthen our workers' ability to administer an integrated program on our open units. The modification of attitudes which have prevailed over a long period of time usually requires a continuing program of training. In addition there must be a willingness on the part of our personnel to adapt themselves to the policies of the department. We believe the participants were receptive to the training and profited from it. Their training will continue on an informal basis through staff meetings, distribution of appropriate literature and discussions.

There were and are problems connected with the offering of such training to our personnel. Among these are financing, the time element, the matter of transportation, and

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the necessity of obtaining qualified experts to give the course. The first of these problems was solved for us through the generosity of eight organizations who paid the necessary expenses. These organizations were the National Conference of Christians and Jews, the Jewish Community Council of Greater Washington, the American Friends Service Committee, the Washington Interracial Workshop, the Washington Federation of Churches, the Catholic Interracial Council, the Washington Urban League and the Unitarian Fellowship for Social Justice.

To give the courses, the personnel had, of course, to be assembled in one place, and two alternatives were presented so far as time is concerned. Workers must either give their own time, or the employees must be relieved from the performance of their regular duties to take the courses in regular working hours. We adopted the latter.

So far as instructors are concerned, some six or eight qualified persons were located locally, but at least half-a-dozen experts in the field were imported to conduct parts of the program in this six-week course just completed.

We might mention that the Recreation Department has no funds with which to repeat the program on the same scale for other personnel of the Department to whom we would very much like to extend the training. For any future training, we shall attempt to recruit leadership from within our own organization or endeavor to obtain outside experts on a volunteer basis.

It is our view that the success of the non-segregated use of play areas is dependent to a large extent on the proper training of recreation directors.

We trust that this gives to you the information that you desire regarding our intergroup relations program.

Sincerely yours,

/s/ Milo F. Christiansen

Milo F. Christiansen
Superintendent of Recreation

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA

RULES FOR THE PUBLIC SCHOOLS

(With Revisions Thru November 1953)

CHAPTER VI

Boards of Examiners

Section 1. 1 There shall be two boards of examiners; one for division 1 and one for division 2. There shall be a chief examiner for each of said boards.

2. The boards of examiners shall consist of the superintendent of schools and not less than four nor more than six members of the administrative, supervisory, or teaching staff of the white schools, for the white schools; and of the superintendent of schools and not less than four nor more than six members of the administrative, supervisory, or teaching staff of the colored schools, for the colored.

3. The chief examiners of the boards of examiners shall be members of their respective boards. The chief examiner in division 1 shall act as secretary, and shall be the chief administrative officer of the board of examiners for division 1. The chief examiner in division 2 shall act as secretary, and shall be the chief administrative officer of the board of examiners for division 2.

4. The respective boards of examiners shall prescribe and conduct such examinations as may be necessary to carry out the requirements of the law and the rules and orders of the Board of Education. The boards of examiners are authorized to secure the assistance of such directors, heads of departments, principals, teachers, and other persons as the boards of examiners may deem necessary. They shall examine applicants for positions for which examinations are required by law, by the rules and regulations of the Board of Education, or by the superintendent of schools.

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5. The examinations conducted by the boards of examiners shall be designed to test the educational qualifications, knowledge, aptitude for the position sought, experience, and character of the applicant..

6. The boards of examiners shall originate and issue all such circulars of information and other printed or written matter concerning examinations as may be deemed necessary, copies of which shall be duly filed for record.

7. The ratings of both the written and oral examinations and of the supporting evidence required shall be made on a scale and in accordance with a plan determined by the respective boards of examiners and approved by the Board of Education.

8. The respective boards of examiners shall keep a permanent record of the standing of each candidate in each subject, including the oral examination, if held.

9. The respective boards of examiners shall report to the Board of Education, through the superintendent of schools, at the meeting next following the completion of any examination for which an eligible list is required, the names of the successful candidates arranged in order of rank, showing the total mark of each candidate.

10. The respective boards of examiners shall issue licenses to successful candidates in a manner and form prescribed by the Board of Education. These licenses shall be valid for periods from date of issue as follows: for teachers of evening schools, teachers of summer schools, three years; for teachers of day schools, librarians, research assistants, counselors, census supervisors, child labor inspectors, attendance officers, first aid nurse assistants, two years; for annual substitutes, and clerks, one year.

11. Following the approval by the Board of Education of the list of successful candidates in any examination, the respective boards of examiners shall prepare and submit to the Board of Education for record an eligible list consisting

of the names of all persons who have successfully passed examinations, in which eligible lists are required, for the same position or in the same subject or subjects, and whose eligiblity has not expired. The names of the successful candidates shall be arranged in order of rank in accordance with the total mark of each candidate, irrespective of the date of examination. The names of such persons thus arranged shall constitute an eligible list from which appointments shall be made in the manner provided in these rules.

12. The Board of Education may, on the recommendation of the superintendent of schools, remove from said eligible list the name of any person for failure to do satisfactory work as a substitute or temporary teacher, or for other sufficient cause.

13. The respective boards of examiners may make such regulations governing longevity placement in accordance with the Salary Act, and experience allowance in accordance with the Retirement Act, as said boards of examiners may deem necessary subject to the approval of the Board of Education.

14. The respective boards of examiners shall determine the amount of longevity placement to which teachers and other employees are entitled in accordance with their previous number of years of experience as prescribed by law and the rules and regulations of the Board of Education.

15. The respective boards of examiners shall determine the amount of credit experience to which teachers, officers, or other employees are entitled under the provisions of the Retirement Act.

16. The respective boards of examiners shall have control over and jurisdiction in all matters pertaining to the examinations required by law, or by the rules or orders of the Board of Education.

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CHAPTER IX

Appointment, Reinstatement, Reappointment, Resignation, and Retirement of Employees

I. Appointments

Officers

Section 1. * * *

Boards of Examiners

Section 2. * * *

Teachers

Section 3. 1. The order of making appointments of teachers shall be as follows:

First. Teachers whose period of probationary appointment has expired and whose service while on probation has been satisfactory;

Second. Teachers eligible to reinstatement from authorized leave of absence with preferred right;

Third. Teachers eligible to reinstatement from authorized leave of absence without preferred right;

Fourth. Teachers who have been retired because of disability and whose recovery has been certified by the Health Department and who have not reached the retirement age;

Fifth. Former teachers who have previously resigned from the Washington schools who are eligible for reappointment under these rules;

Sixth. Persons on the appropriate eligible list as a result of passing competitive examinations.

2. No person shall be appointed a teacher in the schools of Washington who has not been certified by the board of examiners concerned for the position to which he is to be appointed.

3. Probationary appointments of teachers shall be made in the order of their rank on the respective eligible lists.

Clerks and First Aid Nurse Assistants

Section 4. 1. The order of making appointments of clerks and first aid nurse assistants shall be as follows:

First. Clerks and first aid nurse assistants whose period of probationary appointment has expired and whose service while on probation has been satisfactory;

Second. Clerks and first aid nurse assistants eligible to reinstatement from authorized leave of absence with preferred right;

Third. Clerks and first aid nurse assistants eligible to reinstatement from authorized leave of absence without preferred right;

Fourth. Clerks and first aid nurse assistants who are eligible for reappointment after resignation as provided for herein;

Fifth. Clerks and first aid nurse assistants on the appropriate eligible list as a result of passing competitive examinations conducted by the board of examiners concerned.

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HAROLD B. WILLEY,

Brief for Respondents on Formulation of Decree

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
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PRINTING DIVISION—D. C. GOVERNMENT

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Exhibit 3 25

Report of the Superintendent of Schools to the Board of Education, dated June 23, 1954, setting forth a schedule of dates for completion of the program of desegregation of the public schools of the District of Columbia.

Exhibit 4 33

Action of Board of Education, completed September 10, 1954, suspending paragraph 4 of its declaration of policy.

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Affidavit of the Superintendent of Schools, dated November 12, 1954, setting forth progress of the program of integration of the public schools.

Exhibit 6 37

Affidavit of the President of the Board of Education, dated November 12, 1954, concerning Board action and views on integration.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
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v.

C. MELVIN SHARPE, ET AL., *Respondents.*

Brief for Respondents on Formulation of Decree

ARGUMENT

In the decision of this case on May 17, 1954 the Court concluded its opinion as follows:

> "For the reasons set out in Brown v. Board of Education, this case will be restored to the docket for reargument on questions 4 and 5 previously propounded by the Court. 345 U. S. 972."

In *Brown* v. *Board of Education,* the Court, on the same day, decided several State cases argued and reargued jointly

with this case. Therein the Court also ordered restoration of those cases to the docket for the same purpose. In the *Brown* case the Court observed: "On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question * * *. Because there are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity".

While, admittedly, the decision of this case presented to the respondents problems of considerable complexity, they have promulgated and put into effect in the public school system of the District of Columbia measures to accomplish education of pupils without regard to race in accordance with the decision of the Court.

Set forth in the appendix to this brief are the following:

Exhibit 1—Report, dated May 25, 1954, containing a declaration of policy concerning the question of integration in the public schools (approved by the Board of Education, May 25, 1954).

Exhibit 2—Report of the Superintendent of Schools to the Board of Education, dated May 25, 1954, outlining plans for the desegregation of all schools (approved by the Board of Education, June 2, 1954).

Exhibit 3—Report of the Superintendent of Schools to the Board of Education, dated June 23, 1954, setting forth a schedule of dates for completion of the program of desegregation of the public schools of the District of Columbia (approved by the Board of Education, June 23, 1954).

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Exhibit 4—Action of Board suspending paragraph 4 of its declaration policy.

Exhibit 5—Affidavit of the Superintendent of Schools setting forth progress of the program of integration of the public schools.

Exhibit 6—Affidavit of the President of the Board of Education concerning Board action and views on integration.

It will be seen from the foregoing exhibits that positive steps have been taken and are well under way for complete desegregation of pupils in the public schools of the District of Columbia, and that, according to the schedule approved by the respondents, the entire program will have been completed by September 1, 1955, i.e., before the beginning of the next full school year.

While Exhibit 6 shows that there was wide divergence of opinion among the respondent members of the Board of Education concerning the method and the timing of the program of desegregation and that some of the Board members are still not satisfied therewith, it further shows that the Statement of Principles, the General Plan and the Time Schedule were all approved by a majority of the Board. Except for a brief and mild expression of emotions in four or five schools above the elementary level, the transition has proceeded without incident.

Believing that their legal position on the principal question had been fully set forth in the original brief filed herein, counsel for respondents confined themselves in their Brief On Reargument to answers to questions 4 and 5 propounded by the Court in its order of June 8, 1953. Therein counsel set forth their position that a declaration of unconstitutionality of public schools does not require immediate transition to an integrated school system and recommended that this and other cases pending before the Court be re-

manded to the courts of original jurisdiction with instructions for such courts to order the commencement of integration at the earliest praticable date, with complete integration to be accomplished by a definite future date to be fixed by this Court, and with progress toward completion of the program to be periodically investigated by the lower courts.

Counsel for respondents adhere to the legal position set forth in their Brief on Reargument.

Unless, therefore, the Court disagrees with the first premise, i.e., that the unconstitutionality of segregated schools does not require an immediate transition to an integrated system, it is submitted that no directive of compliance with the decision of May 17th is necessary, because the time schedule which respondents have put into operation for the accomplishment of complete integration of the schools in the District of Columbia is as short as can reasonably be devised to establish, in orderly fashion, a school system which complies with the decision.

If the Court agrees with the last premise, then, it is submitted, the entire matter, so far as the District of Columbia school system is concerned, is, for all practical purposes, moot—at least upon the completion of the time schedule in the very near future the matter will be completely moot, and counsel for respondents submit to the Court that there will be no necessity for even the remand of this case to the United States District Court for the District of Columbia.

CONCLUSION

The basic legal position of counsel for respondents was fully set forth in their brief on reargument and nothing need be added thereto. Herein there is fully set forth a report of progress towards complete compliance with the decision of this Court which demonstrates that within less than ten (10) months from the date of final argument the controversy so far as the District of Columbia is concerned will be com-

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pletely moot. Under the circumstances, it is submitted that no directive from the Court is necessary for compliance with its ruling.

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District Building,
Washington 4, D. C.

EXHIBIT 1

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA

FRANKLIN ADMINISTRATION BUILDING

Thirteenth and K Streets, NW.

Washington 5, D. C.

C. Melvin Sharpe, President
Arcadia Near Phillips, Vice President
Wesley S. Williams
Mary H. Parker
West A. Hamilton
Walter N. Tobriner
Robert R. Faulkner
Margaret Just Butcher
Rowland F. Kirks
Elise Z. Watkins, Secretary
Hobart M. Corning
Superintendent of Public Schools

May 25, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

The Board of Education at its meeting held May 19, 1954, through its President, appointed the undersigned Board members as a Special Committee for the purpose of drafting principles for presentation to the Board at its special meeting on May 25, 1954, on the question of integration in the public schools.

This Special Committee held a meeting on May 22, 1954, in the Board Room of the Franklin Administration Building. Those present were the entire Special Committee, Colonel West A. Hamilton, Dr. Margaret Just Butcher and Miss Mary H. Parker, members of the Board of Education, the Superintendent of Schools and the Secretary of the Board.

The Special Committee voted unanimously to approve the following declaration of policy:

In the light of the decision of the Supreme Court of the United States in *Bolling* v. *Sharpe,* the Board of Education of the District of Columbia, believing it to be in the best interest of all citizens of the community of Washington, and necessary to the effective administration of an integrated system within the public schools, hereby adopts the following declaration of policy:

1. Appointments, transfers, preferments, promotions, ratings, or any other matters respecting the officers and employees of the Board shall be predicated solely upon merit and not upon race or color.
2. No pupil of the public schools shall be favored or discriminated against in any matter or in any manner respecting his or her relationship to the schools of the District of Columbia by reason of race or color.
3. Attendance of pupils residing within school boundaries, hereafter to be established, shall not be permitted at schools located beyond such boundaries, except for the most necessitous reasons or for the public convenience, and in no event for reasons related to the racial character of the school within the boundaries in which the pupil resides.
4. The Board believes that no record should be kept or maintained in respect to any pupil not enrolled in a public school on or prior to June 17, 1954, or in respect to any officer or employee not employed within

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the system on or prior to that date in which information is solicited or recorded relating to the color or race of any such person.

5. That the maximum efficient use shall be made of all physical facilities without regard to race or color.

In support of the foregoing principles, which are believed to be cardinal, the Board will not hesitate to use its full powers. It is pledged to a complete and wholehearted pursuit of these objectives.

We affirm our intention to secure the right of every child, within his own capacity, to the full, equal and impartial use of all school facilities, and the right of all qualified teachers to teach where needed within the school system. And, finally, we ask the aid, cooperation and goodwill of all citizens and the help of the Almighty in holding to our stated purposes.

The Special Committee recommends the approval by the Board of the above stated declaration of policy.

Respectfully submitted,

WALTER N. TOBRINER, *Chairman*
WESLEY S. WILLIAMS
ROWLAND F. KIRKS
Special Committee

EXHIBIT 2

SUPERINTENDENT OF SCHOOLS
Franklin Administration Building
Thirteenth and K Streets, NW.
Washington 5, D. C.

May 25, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

On Monday, May 17, 1954, the Supreme Court of the United States issued two opinions, one having to do with segregation in public schools in Kansas, South Carolina, Virginia, and Delaware, and the other with segregated schools in the District of Columbia. The first opinion declared that "such segregation is a denial of the equal protection of the laws" and the second opinion stated:

> 'In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.'

The latter opinion also restored to the docket of the Court the case of *Brown* v. *the Board of Education* for further argument next fall on certain aspects of the suit. This opinion placed upon the Board of Education and the Superintendent of Schools the responsibility for accomplishing the complete de-segregation of all public schools in the District of Columbia.

The transition from a segregated to a de-segregated type of school organization requires definite administrative decisions and practices. To accomplish the transition in Washington as rapidly and effectively as possible, basic principles need to be established which will govern all administrative procedures necessary in complying with the opinion of the Court. The Superintendent and his staff state as a basic premise that the schools will hereafter operate as a single

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system and that no reference will be made in any way to racial differences among its pupils or its employees.

The following general principles are calculated to make the best use of the total resources of the school system in plant and personnel, to serve the best interest of all the pupils, and to promote the general welfare of the community. To implement these principles, administrative attention must be directed toward steps which will assure the distribution of pupils and the assignment of employed personnel smoothly and expeditiously. These general principles are presented to the Board of Education for its consideration.

To the Board of Education
of the District of Columbia—2

May 25, 1954

1. *Complete de-segregation of all schools is to be accomplished with least possible delay.*

   De-segregation by grades or by levels would delay the process and would create administrative problems arising from confusion and inconsistencies.

2. *New boundaries are to be established for each school.*

   Definite boundaries will be established for each school to make the optimum use of the school by the pupils living in its immediate area.

   In sections of the city where schools are located very close to each other it will be impossible to set up separate boundaries for each school. In such instances, therefore, the boundaries will be for groups of schools rather than for individual schools.

   When the new boundaries have been established and the plan is in operation, adherence to the boundary limitations must be definite and without exception.

This does not mean, however, that there will be any change in the present practice of adjustments of any school boundaries by the Superintendent wherever changes in school population make such action necessary. These boundary readjustments during the period of transition to a de-segregated system will probably be more frequent than they are at present.

3. *Appointments and promotions of all school personnel are to be made on a merit system only and assignment will be in accord with the needs of the service.*

   The tenure rights of individuals as to salary level and rank will be maintained.

   The duties of some officers will necessarily be changed.

4. *The transition to a de-segregated system is to be accomplished by natural and orderly means.*

   Artificial and immediate reassignments of large numbers of pupils, teachers, and officers would be disruptive and will be avoided.

SCHOOL BOUNDARIES AND DISTRIBUTION OF PUPILS

One very significant aspect of the process of de-segregation is that concerned with the distribution of pupils among the various schools. It is evident that the reasonable and proper criteria for this distribution are:

1. the optimum use of all school buildings, and
2. the optimum accessibility of school buildings to the residences of pupils.

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These criteria necessarily require the establishment of definite zones to be served by each school or group of schools. The teachers colleges and the vocational and technical high schools because they are specialized in nature will continue to be city-wide in their services. In establishing zones for the optimam use of all school buildings, the objective will be to assign to each given school or group of schools an area calculated to give each building its fair share of the total pupil load in relation to its capacity.

Although it will not be possible to avoid all traffic hazards or to assure convenient public transportation in every case in considering the accessibility of a school account will be taken of these factors as well as the factor of distance to be travelled by the pupils.

To facilitate the establishment of proper boundaries for all school buildings on a de-segregated basis, the residence cards for all pupils now in the Washington public schools have been set up on the IBM accounting machines according to city blocks, by grade levels, and by schools now attended. In addition thereto each building principal is preparing a spot map to indicate the places of residence of all his pupils. The officers charged with the responsibility of establishing the boundaries will then be able to determine the number of pupils now enrolled in the schools who live in any given city block. They will also know the grade level and the school last attended by each pupil. The compilation of these data will assist in the establishment of the boundary limitations.

In order to provide stability, continuity, and security in the educational experiences of pupils during the transition period, it is agreed that it will be educationally sound to permit pupils at present enrolled in any school to continue in that school even though they are not living within the new boundaries. By this means immediate displacement of unnecessarily large numbers of pupils will be avoided. Progressively with the establishment of new boundaries all children will attend the schools serving the areas in which they live.

The following procedures will be needed to carry out this plan:

1. Fixed zones are to be established for each elementary, junior high and senior high school to insure balanced use of school facilities.

2. All pupils new to the school system or to a particular school level will be assigned to the schools designated to serve the zones in which they live.

To the Board of Education
of the District of Columbia—4

May 25, 1954

3. All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within the new boundaries of the school are not denied. If they prefer they may transfer to the school serving the zone in which they live. Elementary school pupils who change residence will be transferred to the school assigned to the area of the new residence.

4. Transfers from one school to another will be required when necessary to relieve overcrowded conditions.

In order to demonstrate how these proceedures will operate, the Superintendent suggests that the cases of the boundaries of two hypothetical schools (elementary, junior high or senior high) be considered: School "A", formerly a Division 1 school, and School "B", formerly a Division 2 school, serving areas within their new boundaries on a desegregated basis, the two areas being contiguous.

By the application of the foregoing procedures what children must attend and what children may attend School "A"?

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These *must* attend School "A"

1. All children living within the new boundaries who formerly attended School "A".
2. All children living within the new boundaries who are entering a school of that level for the first time.
3. All children who are newly residing in the area served by School "A".
4. Children now attending School "B" but living within the boundaries of School "A" if School "B" becomes overcrowded.

Those who *may* attend School "A"

1. Children now enrolled in Schol "A" whether or not their residence is within the boundaries of School "A" may continue to attend until their graduation subject to the following conditions:
   a. if School "A" becomes overcrowded, pupils previously attending School "A" who live in the area now served by School "B" or any other school will be transferred to that school.
   b. if further relief from overcrowding is necessary after all children not living in the area served by School "A" have been transferred, it will then be necessary to provide additional relief by further changing the boundaries of School "A".

To the Board of Education
of the District of Columbia—5

May 25, 1954

2. Any child living in the area of School "A" may attend that school if he so desires even though he may now be enrolled in School "B" or in some other school.

It should be noted that all children living within the boundaries of any given school will have first priority for attending that school.

These same regulations will apply to School "B", and to all other elementary, junior high or senior high schools in the city except those which are city-wide in their services.

The ultimate distribution of pupils strictly in accordance with established zones will be accomplished through the provisions of the principle that all pupils entering the elementary, junior high, or senior high schools for the first time shall be assigned to the schools designated to serve the zones of their residences. This applies equally to pupils entering the first grade, pupils promoted to junior high or senior high schools, pupils entering the Washington Public Schools for the first time, and pupils transferring from one area of the city to another.

Finally, authority for the placement of all pupils must be vested in the Superintendent of Schools and his staff, who will administer the plan within the framework of the policies enunciated by the Board of Education.

ASSIGNMENT OF EDUCATIONAL EMPLOYEES

A second major aspect of the process of de-segregation is that dealing with the distribution of the teachers, including librarians and counselors. The following procedures are recommended to govern the assignment of these employees. Here again it is felt that once policies are established through formal action of the Board of Education the school administration shall then be vested with final authority for determining the placement of school employees.

1. *Teachers now in service.*

   In general these employees will remain in their present assignments subject to the following conditions.

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a. They will be transferred only to meet the needs of the service and then only within the level and/or the subject matter fields of their preparation and experience.

b. When vacancies occur or when there is need for additional teachers in a given school, assignments to that school will be determined in accordance with the best use of available personnel. As is true at

present, a controlling consideration in the placement of personnel will be the general fitness and adaptability of an individual for a particular situation.

c. Requests of teachers for transfers will be honored as at present if the transfers are in accordance with the needs of the overall school organization.

2. *Appointment and placement of teachers new to the service.*

a. All appointments of teachers will be made from rated lists resulting from examinations to be held by a single Board of Examiners.

b. All assignments of new personnel will be in accordance with the needs of the service.

Another important aspect in the de-segregation process is the assignment of field officers. Since most of them are specialists in their field it is essential that consideration be given their training and experience.

1. *Principals and Assistant Principals now in service.*

The procedure for the assignment of assistant principals and principals now in the service will be the same as that prescribed for teachers.

2. *Directors, Assistant Directors, Heads of Departments, and other field officers.*

   Directors, assistant directors, and heads of departments, who at present serve the system on a divisional basis will be assigned to duties in the same fields of work on a city-wide basis. The duties of most of these positions fall logically into large areas, such as administration, supervision and improvement of instruction, and curriculum revision. Each of these officers will be assigned to some such area in his field on a city-wide basis and will serve all levels of the system.

3. Personnel in special departments and officers now operating on a divisional basis will be reassigned on a city-wide basis.

4. Newly appointed officers in these groups will be selected according to merit under the existing procedures for the selection and promotion of persons for officer positions, but on a system-wide basis.

The Superintendent is not yet prepared to make recommendations as to any formal changes in the functions of the

officers on his staff. The work involved in accomplishing desegregation in so large a school system will require the closely-knit and joint efforts of all these officers for a considerable period of time. They have been engaged in working out the detailed preparation of this plan and it will require their continued cooperative efforts in its inauguration. The responsibilities and duties of such officers as the Assistant to the Superintendent in charge of Business Administration, the Associate Superintendent in charge of Buildings and Grounds, and the Associate Superintendent in

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charge of Personnel are already city-wide in scope. The work which is at present the responsibility of the officers in charge of instruction and school administration and of educational research will in no wise be lessened by the change in the school system. It is the plan of the Superintendent to assign these officers eventually to duties that will be broadened and on a system-wide basis and which will provide opportunity for the initiation of new services and the development of others not at present sufficiently emphasized. These reassignments will result in considerably improved supervisory and administrative practices in the classrooms of all levels.

PROPOSED SCHEDULE

To begin the implimentation of the plan to de-segregate the public schools of the District of Columbia, the Superintendent proposes the following tentative schedule:

By September, 1954—

Completion by the building principals and their supervisory officers of the establishment of new boundaries for all schools except those that will continue to function on a city-wide basis.

Relief of present urgent situations in:

1. Elementary Schools

   a. To relieve overcrowding transfer a sufficient number of pupils:

      from the Slowe and Noyes Schools to the Woodridge, Langdon, and Burroughs Schools

      from the Bruce, Monroe, and Park View Schools to the Raymond, Petworth, Barnard, and Rudolph Schools

      from the Madison, Maury, and Lovejoy Schools to the Kingsman, Edmonds, and Blair Schools

from the Taylor, Hayes and Ludlow Schools to the Wheatley School

To the Board of Education
of the District of Columbia—8

May 25, 1954

from the Bryan and the Payne Schools to the Buchanan School.

from the River Terrace School to the Benning School.

b. To vacate the Military Road School, no longer needed for classrom purposes, transfer the pupils from that school to the Brightwood School.

2. Junior High Schools

a. To alleviate overcrowding transfer pupils:

from the Randall Junior High School to the Jefferson Junior High School

from the Browne, Eliot, and Langley Junior High Schools to the Eastern Junior-Senior High School

from the Kelly Miller Junior High School to the Sousa Junior High School.

NOTE: These transfers of elementary and junior high school pupils are proposed by the Superintendent because of almost emergency situations and in his opinion are deserving of approval at this time at first steps in the complete de-segregation process. He feels that no cases beyond these should be considered at this time.

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3. Senior High Schools

Begin the merging of the McKinley and Armstrong Technical High Schools by transferring to McKinley students in such courses as can be accommodated in the present classroom and shop facilities.

NOTE: The complete merger of these two schools will depend upon appropriation of necessary funds for construction and moving and purchase of equipment.

4. Teachers Colleges

While there is no urgent situation in the college enrollments, it is proposed that both Wilson and Miner Teachers College be opened to qualified students regardless of race and that the two institutions plan special course offerings so

that students in either one will be able to take advantage of such offerings in the other. A complete merging of the colleges cannot be accomplished at this time since there is not at present any building available which can accommodate so large an institution.

Attention is called to the fact that the suggestions proposed above providing for de-segregation in certain areas of the school system are in advance of any present requirement of the Supreme Court Opinion.

After the opening of the schools in September, the Superintendent will continue as rapidy as possible with the whole

program, taking into consideration the necessary steps, the most important of which are listed below:

1. Assigning pupils to schools on basis of new boundaries.
2. Preparing Board Orders for changed assignments of teachers and officers where necessary.
3. Carrying on programs of in-service training in intercultural relationships for all employees.
4. Conducting examinations based on amended legislation.
5. Establishing new eligible lists for teacher appointments.
6. Replanning city-wide student activities, such as sports, cadets, student government, and musical activities.
7. Relocating all field officers now occupying space which will be required for classroom use.
8. Making adjustments in allotments for postage, stores—clerks, and evening schools.
9. Moving furniture and classroom equipment.
10. Arranging for adjustments in the delivery of classroom supplies and textbooks to meet changed school enrollments.
11. Recommending to the Board necessary changes in its rules.

If the Board approves the Superintendent's plan and if there are no such setbacks as the failure to secure such legislative changes as the Corporation Counsel deems necessary or to secure funds that may be necessary to accomplish the physical changes in schools and in the redistribution of classroom equipment and supplies, the Superintendent feels

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that he can complete the changeover to a de-segregated system by September, 1955.

To the Board of Education
of the District of Columbia—10

May 25, 1954

It is the belief of the Superintendent that he cannot in September go beyond the steps outlined in this report because of the lack of sufficient time before the close of school in June as the presence of pupils, teachers and officers is essential to the carrying out of these plans. The official school calendar specifies June 17, as the last day for pupils; June 18, as the last day for teachers; and July 1 through August 31, as the summer vacation period for field officers. The field officers are, of course, subject to call during this vacation period if their services are needed.

The Superintendent submits this report for the consideration of the Board and recommends its approval. For the convenience of the Board he recapitulates below the specific recommendations that will require Board approval before he can begin the administrative steps looking to the actual de-segregation of the public schools of the District of Columbia:

1. As a basic premise, that the public schools operate hereafter as a single system without reference of any kind to or consideration of racial differences among its pupils or its employees.

2. That complete de-segregation be accomplished with the least possible delay according to the suggested schedule steps.

3. That the transition to a de-segregated system be made by natural and orderly means.

4. That new boundaries be established for each school to provide the optimum use of all buildings and the

optimum accessibility of schools to the places of residence of pupils.

5. That the assignments of pupils to schools be made on the basis of the steps outlined in the section, "School Boundaries and Distribution of Pupils," and according to the calendar established in the schedule.

6. That all appointments, promotions, and assignments of school personnel be made on the basis of merit only and in accordance with the needs of the service.

7. That the assignments of teachers, librarians, counselors, and field officers be made according to the policies outlined in the section, 'Assignment of Educational Employees.'

8. That members of the Superintendent's immediate staff continue in their present assignments until the whole process of de-segregation has proceeded sufficiently far to enable the Superintendent to present his plan for the reorganization of his staff including such changed duties as he then finds expedient.

To the Board of Education
of the District of Columbia—11

May 25, 1954

9. That a schedule be set up providing by September, 1954, for the establishment of new boundaries for all schools; the closing of the Military Road School; the relief of pupil-overcrowding in those elementary schools and junior high school listed in the schedule on pages 7 and 8; the beginning of the merging of the McKinley and Armstrong Technical High Schools; the opening of both Teachers Colleges on a de-segregated basis; and by September, 1955, the complete de-segregation of all schools in the system.

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The Superintendent further recommends that he be authorized to prepare an estimate of funds to be sought through appropriation covering such expenses as will be incurred in the de-segregation process that can not be met from funds already appropriated.

The Superintendent is submitting a separate report covering amendments to existing legislation which he considers necessary to the de-segregation program.

Respectfully submitted,

HOBART M. CORNING
Superintendent of Schools

EXHIBIT 3

SUPERINTENDENT OF SCHOOLS
Franklin Administration Building
Thirteenth and K Streets, NW.
Washington 5, D. C.

June 23, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

The Superintendent submits the following calender of dates for the steps that have been or are to be taken to complete the program of de-segregation of the public schools of the District of Columbia

STEPS IN DE-SEGREGATION PROGRAM ALREADY ACCOMPLISHED

June 8 Temporary reorganization of the two Boards of Examiners into one Board under the direct chairmanship of the Superintendent.

June 10, 11, 12 Teacher examinations for elementary, junior high, and vocational high schools on a completely integrated basis.

June 11 Notices sent to all high school principals announcing that both Miner and Wilson Teachers Colleges are receiving applications for admission in September from any qualified person, regardless of race.

June 11 Instructions issued to Heads of Departments of Military Science and Tactics to prepare and submit suggested plan for integration of cadet program for 1954-55 school year.

June 14 Meeting of First Assistant and Associate Superintendents concerned, Directors of Health, Physical Education, Athletics, and Safety, and Directors of Athletics to discuss all sports programs for 1954-55 school year. Directors of Athletics to report back on June 24 with suggested schedules.

To the Board of Education
of the District of Columbia—2

June 23, 1954

June 14 First field officer examination announced on a city-wide basis (five such announcements issued to date).

June 15 Completion of tabulation and listing of data from registration cards for approximately 100,000 pupils.

June 17 Preliminary steps completed to effect transfers of pupils in elementary, junior high, and senior high schools listed in Superintendent's report of May 25. (Proposed Schedule, pp. 7-8.)

June 23 Revised legislative language submitted to the Board covering necessary amendments to existing law because of Supreme Court decision—

Concerning First Assistant Superintendents

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Concerning Chief Examiners

Concerning Boards of Examiners

Concerning School Censuses

STEPS IN DE-SEGREGATION PROGRAM TO BE ACCOMPLISHED

July 1 Superintendent to submit to Board maps and descriptive data to show new boundary lines for all elementary, junior high, and senior high schools.

All necessary data concerning new boundaries to be furnished school principals and press to insure publicity reaching all school personnel and patrons.

July 1 Superintendent to submit recommendations for merging of all lists of persons eligible for appointment to all teacherships on all levels.

July 6 Completion of estimate for 1956 budget for funds needed to convert McKinley High School to a modern technical school to permit the eventual closing of the present Armstrong Technical High School.

To the Board of Education
of the District of Columbia—3

June 23, 1954

September 1* Use of new boundaries on all levels for all pupils new to the public schools including kindergarten and first grade pupils entering the public schools for the first time.

September 13* Evening schools to open for operation on an integrated basis.

September 13* Transfers of selected Division 2 elementary school pupils who because of present boundaries are required to travel excessive distances where there are

present Division 1 schools near their homes. This is possible as it involves a limited number of pupils and in no instance will require reorganization in a school receiving pupils or the transfer of furniture or equipment.

Any similar cases on the secondary level will be considered on an individual basis.

September 13 Pupil changes indicated by the following table:

ELEMENTARY SCHOOLS

Pupils to be transferred from 12 schools in Division 2 to 14 schools in Division 1		Estimated number of pupils to be transferred	Resulting number of pupils in integrated schools based on June enrollments**
FROM	TO		
Bruce	Barnard		
Bryan	Benning		
Hayes	Blair		
Lovejoy	Brightwood		
Madison	Buchanan		
Maury	Burroughs		
Military Road	Edmonds		
Noyes	Kingsman	1503	6341
Park View	Langdon		
River Terrace	Petworth		
Slowe	Raymond		
Taylor	Rudolph		
	Wheatley		
	Woodridge		

* This step has not previously been reported to the Board.
** This number does not include the schools which are integrated by the admission of pupils new to the school system and the new kindergarten and first grade pupils.

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To the Board of Education
of the District of Columbia—4

June 23, 1954

Transfer of special cases of pupils travelling excessive distances to schools nearer their homes (18 schools)		Estimated number of pupils to be transferred	Resulting number of pupils in integrated schools based on June enrollments**
Bancroft	Patterson		
Congress Heights	Powell		
Eaton	Randle Highlands		
Hearst	Rudolph		
Janney	Simon	96	9603
Key	Stoddert		
Lafayette	Truesdell		
Orr	Tyler		
Oyster	West		
JUNIOR HIGH SCHOOLS			
Pupils to be transferred from 5 junior high schools in Division 2 to 3 junior high schools in Division 1			
FROM	TO		
Browne	Eastern Jr. - Sr.		
Eliot	Jefferson	844	3050
Langley	Sousa		
Miller			
Randall			
SENIOR HIGH SCHOOLS			
Pupils to be transferred from Armstrong to McKinley High School		460	1230

** This number does not include the schools which are integrated by the admission of pupils new to the school system and the new kindergarten and first grade pupils.

To the Board of Education
of the District of Columbia—5

June 23, 1954

	Estimated number of pupils to be transferred	Resulting number of pupils in integrated schools based on June enrollments**
TEACHERS COLLEGES		
Admission of applicants without regard to race		908
EVENING SCHOOLS		
Opening Evening Schools to all students		8677
Totals	2903	29809

September 13 Completion of building organizations including the transfer of teachers in some schools.

September 13 Completion of transfer of furniture and equipment and textbooks and classroom supplies between schools affected by pupil transfers.

October 1-15 Explain to all pupils the options provided either for remaining in present schools or transferring to new schools.

Hold meetings for parents of all children who are qualified to request options to explain the choices although no assurance can at that time be given whether the options can be approved for February 1 or for a later date.

Written statements to be filed not later than November 11 confirming all options requested. Sixth, ninth, and twelfth grade pupils not to be transferred.

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The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their

** This number does not include the schools which are integrated by the admission of pupils new to the school system and the new kindergarten and first grade pupils.

To the Board of Education
of the District of Columbia—6

June 23, 1954

present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February.*

January 31, 1955* Assign all junior high school graudates to senior high schools on the basis of the new boundaries.

Make such additional teacher transfers and school reorganizations as are necessary.
Effect such transfers at all levels as may produce a better balanced use of all school facilities, and at the same time be consistent with the educational program of the children themselves.

Arrange for building changes and transfers of equipment and supplies as are necessitated by the changed pupil assignments.

February to June, 1955 Complete the processing of all options not acted upon for February with the consequent pupil transfer and reassignment of teachers on September 1, 1955.

Arrange for additional transfers of furniture and equipment and textbooks and supplies, where necessary.

September 1, 1955* The Superintendent announces one further important step in the integration process which is now presented. This will involve the closing of the Cardozo High School by June, 1955, and the merging of the Wilson and Miner Teachers Colleges in the present Cardozo building in September, 1955. The rezoning of the senior high schools has revealed such an overage of seating space that Cardozo can be closed and the pupils accomodated in the remaining senior high schools, freeing the Cardozo building for college use. It is planned also at the same time to open a junior high schol unit in the same building to serve as a laboratory school for the new merged college. The Superintendent will submit a subsequent and more detailed report on this new plan.

* This step has not previously been reported to the Board.

To the Board of Education
of the District of Columbia—7

June 23, 1954

As the Superintendent studies the entire process of integration and discovers additional steps which can be taken he will advise the Board of Education.

September 1, 1955 All steps will have been taken to complete de-segregation of the public schools. Technically, de-segregation will have begun in all schools in September, 1954, since the admission of all pupils including kindergarten and first-grade pupils new to the public schools will be on the basis of the new boundaries. All senior high schools will, in addition, be further integrated by the admission of all junior high school graduates in February, 1955, on the basis of the new boundaries.

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The Superintendent recommends that the Board of Education approve this schedule and authorize the Superintendent to proceed administratively to carry out the various steps enumerated.

Respectfully submitted,

/s/ H. M. Corning,

Hobart M. Corning
Superintendent of Schools.

EXHIBIT 4

SUPERINTENDENT OF SCHOOLS

Franklin Administration Building

Thirteenth and K Streets, N. W.

Washington 5, D. C.

POLL OF BOARD

September 8, 1954

To the Board of Education
of the District of Columbia

Ladies and Gentlemen:

The declaration of policy on the question of integration in the Public Schools of the District of Columbia approved by the Board on May 25, 1954, contains the following statement:

> "The Board believes that no record should be kept or maintained in respect to any pupil not enrolled in a public school on or prior to June 17, 1954, or in respect to any officer or employee not employed within the system on or prior to that date in which information is solicited or recorded relating to the color or race of any such person."

As the opening of the fall school term approaches, the inquiries as to the practical effects of integration in our schools are multiplying rapidly. Thus far we have stated that under the Board's adopted policy no record can be made available of the numbers of pupils or teachers by race.

It is doubtful whether any damage would be caused by releasing these numbers during this transitional stage. It is also doubtful whether it is to the public interest to refuse to furnish such information. The School Attendance Law requires that race be recorded for every pupil and the Board will recall that the Corporation Counsel opposed the request that this legislation be amended to discontinue recording of race.

The Superintendent recommends therefore that the Board suspend the operation of the above quoted portion of its declaration of policy to authorize him to record and release data showing the effects of integration in the public schools so far as the numbers of students and teachers are concerned, the suspension of the above quoted portion of the declaration of policy of the Board as to students to remain in effect until existing legislation is repealed or new legislation is enacted to support the Board's policy and the suspen-

sion of the above quoted portion of the declaration of policy of the Board in respect to the enumeration of teachers to be in effect until further action of the Board.

Respectfully submitted,

(signed) H. M. Corning

Hobart M. Corning
Superintendent of Schools

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(Mr. Sharpe out of town)
(signed) Arcadia Near Phillips
(signed) Wesley S. Williams
(signed) Mary H. Parker
(signed) West A. Hamilton
(signed) Walter N. Tobriner
(signed) Robert R. Faulkner
(signed) Margaret Just Butcher

(Dr. Kirks out of town)

Approved by the Board of Education by poll of board completed September 10, 1954.

Attest: Elise Z. Watkins
Secretary, Board of Education

EXHIBIT 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL., Respondents.

AFFIDAVIT OF HOBART M. CORNING, SUPERINTENDENT OF SCHOOLS, D. C.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared Hobart M. Corning, who, being first duly sworn, on oath deposes and says:

I am Superintendent of Schools of the District of Columbia and one of the respondents in the above-entitled cause. After the decision of May 17, 1954 in the above matter, the Board of Education, on May 25, 1954, approved a declaration of policy concerning the question of integration in the public school system of the District. (Exhibit 1). Thereafter, by Board action on September 8, 1954, paragraph 4 of the declaration of policy was suspended because it was found to be in conflict with an Act of Congress. (Exhibit 6). On the same date that the Board of Education adopted the declaration of policy above referred to, I submitted a report containing a general plan for desegregation of the schools. (Exhibit 2). My report was approved by the Board of Education on June 2, 1954.

On June 23, 1954 I submitted to the Board of Education a report containing a schedule of dates for the various steps in the program of desegregation of the schools, (Exhibit 3), which report was approved by the Board on that same date.

Soon after the opening of schools on September 13, 1954, I found that available classroom space permitted the taking of some of the steps in the integration program scheduled for February 1, 1955, and, in accordance with general authority, given me by approval of the general integration plan, to accelerate the time schedule, such steps were taken. This acceleration will not, however, result in completion of the program prior to September 1, 1955.

/s/ Hobart M. Corning
Hobart M. Corning

Subscribed and sworn to before me this 12th day of November, 1954.

Adam A. Giebel,
Notary Public, D. C.

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EXHIBIT 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954
No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,
v.
C. MELVIN SHARPE, ET AL., Respondents.

AFFIDAVIT OF C. MELVIN SHARPE, PRESIDENT, BOARD OF EDUCATION

DISTRICT OF COLUMBIA, *ss:*

Personally appeared C. Melvin Sharpe, who, being first duly sworn, on oath, deposes and says:

I am President of the Board of Education of the District of Columbia and one of the respondents in the above-entitled cause. The declaration of policy and the reports outlined in the affidavit of Dr. Hobart M. Corning (Exhibit 4) were considered by the Board of Education on the dates indicated therein and were approved as therein indicated.

Although there was a wide divergence of opinion amongst the members of the Board of Education concerning both the plans submitted to them by the Superintendent and the subsequently submitted time-schedule therefor, and sharp discussion took place in several of the Board meetings concerning both of these reports, said reports, as well as the "statement of principles" prepared by a committee of the Board, were adopted by Board action, and have been set into operation. There is still no unanimity of opinion among Board members that the plan submitted and the time schedule prepared by the Superintendent are the best that could be de-

vised. The principal objection at this point, by a minority of the Board, is that the transition is too rapid. Notwithstanding this view, the program of integration of the schools has been in effect since the opening of schools for the current term on September 13, 1954—indeed, much of the preparatory work for the commencement on that date of instruction on an integrated basis was accomplished prior thereto.

Since classes started, although some of the students in four or five schools on the junior high and high school levels expressed in a comparatively orderly manner for a period of a few days their emotions against integration, the program has proceeded, and integrated classes have been operating without incident.

/s/ C. Melvin Sharpe

C. Melvin Sharpe

Subscribed and sworn to before me this 12th day of November, 1954.

Adam A. Giebel,
Notary Public, D. C.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 84

SPOTTSWOOD THOMAS BOLLING, et al., *Petitioners,*

v.

C. MELVIN SHARPE, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

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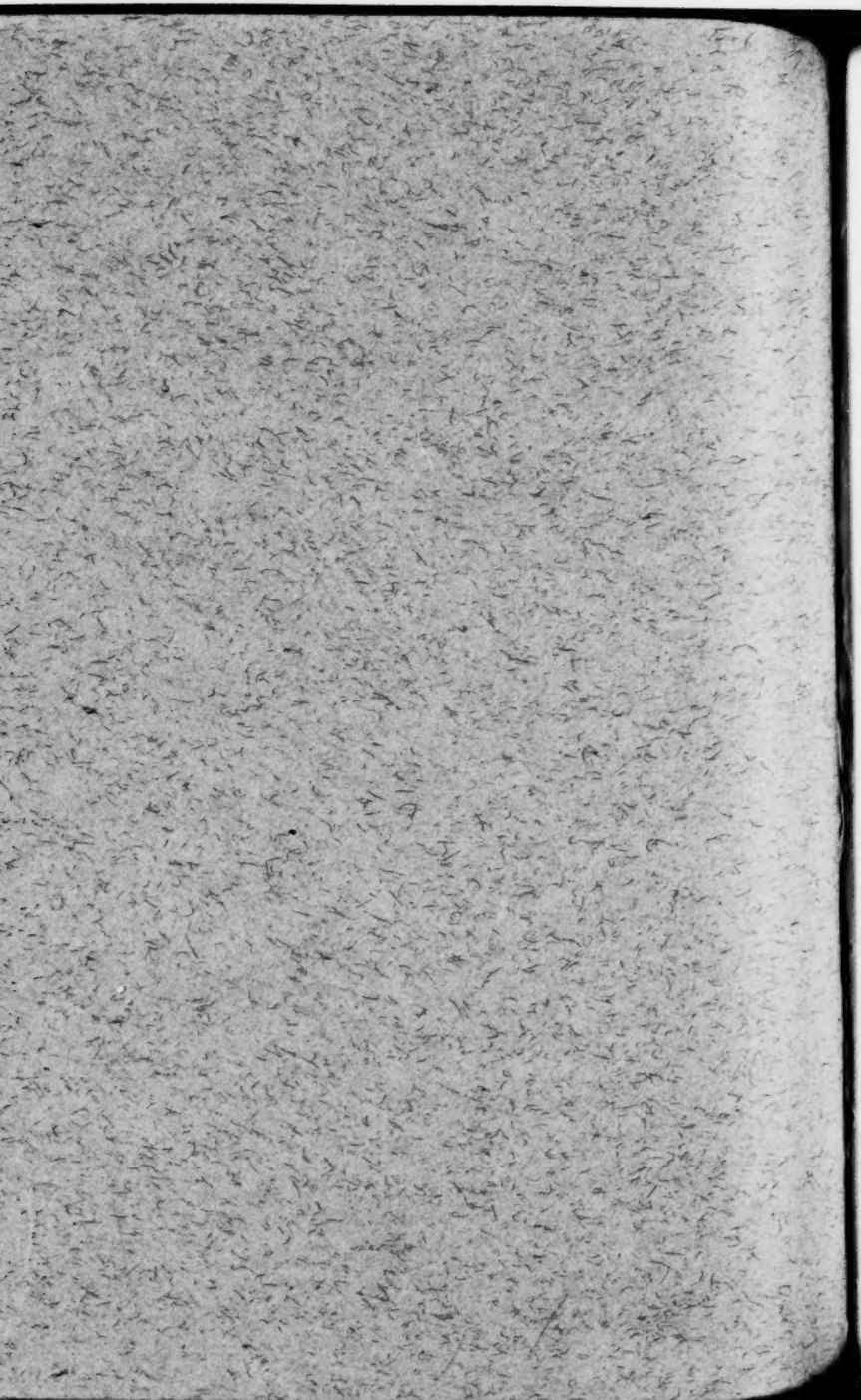
PHINEAS INDRITZ
National Counsel
American Veterans Committee

December 1, 1952
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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Supreme Court of the United States

OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, et al., *Petitioners,*

v.

C. MELVIN SHARPE, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF
AMERICAN VETERANS COMMITTEE, INC. (AVC)
Amicus Curiae

Preliminary Statement. This case raises for the first time in this Court the issue whether the Board of Education of the District of Columbia may constitutionally exclude Negro children, solely because of their race and color, from enrollment and instruction in a public junior high school of the District of Columbia which the Board sets apart for

the education exclusively of white children, and require Negro children to attend a public junior high school set apart for the education exclusively of colored children.[1]

In our *amicus* brief filed in one of the State cases now scheduled for argument with this case, we have indicated why we think a State cannot constitutionally do what the Board of Education is doing here. Brief of American Veterans Committee in *Brown* v. *Board of Education of Topeka, Shawnee County, Kansas,* No. 8. In this brief we shall, without repeating the argument there presented, indicate why such exclusion may not constitutionally be imposed by the Board of Education in the District of Columbia.

I. The right to be free from racial discrimination by governmental authority, guaranteed in the States under the Equal Protection Clause of the 14th Amendment, is guaranteed in the District of Columbia under the Due Process Clause of the 5th Amendment. The racial distinctions drawn by the District Board of Education are discriminatory and therefore unconstitutional.

This Court has characterized the Due Process clause of the Constitution[2] as "the compendious expression for all those rights which the courts must enforce because they are basic to our free society" [*Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949)]; as "a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people

[1] The reference in *Plessy* v. *Ferguson,* 163 U. S. 537, 551 (1896) to "acts of Congress requiring separate schools for colored children in the District of Columbia" was pure *dictum,* intended simply to indicate that segregation on railroad cars was less "obnoxious" than segregated schools in the District "the constitutionality of which does not seem to have been questioned" (p. 551). The decisions by the Court of Appeals in *Wall* v. *Oyster,* 36 App. D. C. 50, 54 (1910), and *Carr* v. *Corning,* 86 App. D. C. 173, 182 F. (2d) 14 (1950), rested squarely on *Plessy,* and neither case reached this Court.

[2] The Due Process Clause of the 5th Amendment imposes upon the Federal Government the same restraints as are imposed on the States by the Due Process Clause of the 14th Amendment. *Farrington* v. *Tokushige,* 273 U. S. 284, 299 (1927); *Heiner* v. *Donnan,* 285 U. S. 312, 326 (1932); *Twining* v. *New Jersey,* 211 U. S. 78, 101 (1908).

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as to be ranked as fundamental' . . . " [*Rochin* v. *California,* 342 U. S. 165, 169 (1952)].

One of these basic and fundamental rights is the right of every person to be free from discriminatory treatment by governmental power solely because of race.

This right was imbedded, by the adoption of the 14th Amendment, into our fundamental law and is part of the warp and woof of our country's basic beliefs. This Court has vindicated this right in many areas of our national life, including housing, land ownership and occupancy,[3] employment,[4] education,[5] political participation,[6] jury service,[7] transportation,[8] and many other areas. Such vindication has not been simply by implication—this Court has stated time and again that a governmental restriction based "wholly upon color" or aimed at particular racial groups "in the eye of the law is not justified" [*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 (1886)]; that "discriminations based on race alone are obviously . . . invidious" [*Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 203 (1944)]; that "racial discrimination . . . is at war with our basic concepts of a democratic society" [*Smith* v. *Texas,* 311 U. S. 128, 130 (1940)].

Still other decisions by this Court show clearly that the right to be free from governmentally imposed racism is so "basic to our free society" as to have become a right constitutionally accorded to free men under the Due Process

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[3] *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Hurd* v. *Hodge,* 334 U. S. 24 (1948); *Oyama* v. *California,* 332 U. S. 633 (1948).

[4] *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948); see also *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952).

[5] *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938).

[6] *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Schnell* v. *Davis,* 336 U. S. 933 (1949); *Lane* v. *Wilson,* 307 U. S. 268 (1939).

[7] *Ex parte Virginia,* 100 U. S. 339 (1880); *Virginia* v. *Rives,* 100 U. S. 313 (1880); *Cassell* v. *Texas,* 339 U. S. 282 (1950).

[8] *Mitchell* v. *United States,* 313 U. S. 80 (1941); *Henderson* v. *United States,* 339 U. S. 816 (1950).

clause of the 5th Amendment against arbitrary action by the Federal government or agencies acting under its authority. In *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525-527 (1926), this Court held that an arbitrary restriction directed solely against Chinese residents violated both the Due Process clause of the 5th Amendment and the Equal Protection clause of the Philippine Bill of Rights which has the same content as the Equal Protection clause of the 14th Amendment. In more recent cases, this Court, in considering the constitutionality of acts of Congress, said that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are therefore "immediately suspect" and "subject . . . to the most rigid scrutiny". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944). And in *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948), this Court ruled that a branch of the Federal Government may not do what the Equal Protection Clause of the 14th Amendment would clearly deny to a State Government. *Cf. United States* v. *Yount*, 267 Fed. 861, 863 (D., W. D. Penn. 1920).

True, the *Hirabayashi* and *Korematsu* cases did permit the Federal Government to restrict the rights of Americans of a single racial group (those of Japanese ancestry) during the period following the attack on Pearl Harbor. But those restrictions were allowed only because of the "pressing public necessity" occasioned by the sudden onslaught of the holocaust of war. More specifically, the restrictions on American residents of Japanese ancestry were there allowed solely because it was thought that loyalty to the race of the group dominant in the aggressor country might, during the period of war, be incompatible with loyalty to the United States. It was therefore said that because of "the danger of espionage and sabotage, in time of war and threatened invasion" the racial distinction there drawn was "relevant to the measures for our national defense

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and for the successful prosecution of the war" . . . to prevent "an invasion of our West Coast." *Hirabayashi* at p. 100; *Korematsu* at p. 223. Its "single aim was the protection of the war effort against espionage and sabotage . . . it was an espionage and sabotage measure." *Ex Parte Endo*, 323 U. S. 283, 300, 302 (1944). And this Court subsequently emphasized that what *Hirabayashi* and *Korematsu* sustained was "a war measure" whose racial distinctions were excused by "only the most exceptional circumstances." *Oyama* v. *California*, 332 U. S. 633, 646 (1948).

It is unnecessary here to debate the merits of the *Hirabayashi-Korematsu* "loyalty" test, in the light of our Constitution which abhors racism in all its manifestations. In this case no "pressing public necessity" to safeguard our country against foreign aggression, espionage or sabotage is asserted to justify separation of white and colored children in the public schools of the District of Columbia. Nor does the District rely even on the overworked assumption of "race conflict". No such danger brews when white and colored children sit next to each other in street cars, swim in the same pools, eat in the same restaurants, picnic informally in the same parks, shop in the same stores, or worship in the same churches. It is entirely clear that permitting these children, who are subject to the laws of the community and the disciplines of parental and school authority, to attend the same public school will not produce either an over-riding public danger within the meaning of the *Hirabayashi-Korematsu* exception to the general doctrine that the Federal government may not validly impose restrictions based solely on race, or any other kind of real public danger. See Part III of this Brief.

Indeed, the District neither asserts that public school segregation has a reasonable relationship to the legitimate objectives of public education, nor does it furnish any justification whatsoever for that segregation. It relies simply on the "separate but equal" doctrine of *Plessy* v. *Ferguson*,

163 U. S. 537 (1896), implicitly recognizing that racial discrimination forbidden by the 14th Amendment is also forbidden by the 5th Amendment. But as we show in our Brief in *Brown* v. *Board of Education of Topeka* (No. 8, this Term), the "separate but equal" doctrine is not a valid constitutional basis upon which a State may compel white and colored children to go to separate public elementary schools, solely because of their race, and thereby impose on them a racial discrimination forbidden by the 14th Amendment.[9] The *Plessy* doctrine is an equally invalid justification for the same action by the District of Columbia Board of Education which violates the Constitutional guarantee against racial discrimination implicit in the present content of the Due Process Clause of the 5th Amendment.

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[9] The Appellees in the South Carolina case (No. 101, Brief, p. 15) and in the Virginia case (No. 191, Brief, p. 12-13), which are being argued with this case, have suggested, largely on the basis of an intimation in *Carr* v. *Corning*, 86 App. D. C. 173, 177, 182 F. (2d) 14, 18 (1950), that the 39th Congress, which proposed the 14th Amendment, implicitly interpreted it to permit compulsory segregation of white and colored children in public schools. They say this because the 39th Congress enacted two acts for the benefit of the then existing schools for colored children. One of these, the act of July 23, 1866 (14 Stat. 216), was intended to clarify that the apportionment of tax funds between the then existing schools for white children and schools for colored children, an apportionment required under a previous statute (act of June 25, 1864, 13 Stat. 187), was to be made by the cities of Georgetown and Washington as well as by the County of Washington. The other, the act of July 28, 1866 (14 Stat. 343), authorized the donation of certain lots to trustees for the sole use of schools for colored children in the District of Columbia. But these acts simply provided certain limited benefits to colored children in an existing situation. Neither act established the segregation, nor can either act be construed as a constitutional judgment by Congress as to the scope and content of the 14th Amendment. None of the debates indicates such an intent. Indeed, the sponsor of these acts, Senator Morrill of Maine (36 Cong. Globe, 39th Cong., 1st sess., p. 1753), vigorously opposed racial distinctions. See *ibid.*, pp. 570-571. Congress by these acts simply "supported the effort to take care of" the colored children "without ratifying every phase of the program." *Ex parte Endo*, 323 U. S. 283, 303 (1944). Nor did either Congressional failure to integrate the schools or any subsequent Congressional legislation or appropriations in support of the existing dual system freeze that segregation pattern into the fabric of our fundamental Charter of Liberty.

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II. The impossibility of providing equality of educational opportunity to every child in the District of Columbia public schools within the framework of the segregated system is so plain that no remedy, short of abolition of compulsory separation by race, can prevent the inequality forbidden by the Constitution.

The physical and educational disparity between the separate public schools for white and colored children in the District of Columbia has been extensively analyzed. See, e. g., Strayer, *Report of a Survey of the Public Schools of the District of Columbia* (Govt. Printing Off., 1949); opinion of Judge Edgerton in *Carr* v. *Corning*, 86 U. S. App. D. C. 173, 181-194, 182 F. (2d) 14, 22-35 (1950); Rept. of President's Committee on Civil Rights, *To Secure These Rights*, 90 (Govt. Printing Off., 1947); Rept. of National Committee on Segregation in the Nation's Capital, *Segregation in Washington*, 75-81 (1948); Federation of Civic Associations, D. C., Committee on Education, *A Brief Comprehensive Report on the Public Educational Facilities for Colored Children in the District of Columbia* (1952). These studies document the conclusion of the President's Committee on Higher Education that "the separate and equal principle has nowhere been fully honored. Educational facilities for Negroes in segregated areas are inferior to those provided for whites. Whether one considers enrollment, over-all costs per student, teachers' salaries, transportation facilities, availability of secondary schools, or opportunities for undergraduate and gradute study, the consequences of segregation are always the same, and always adverse to the Negro citizen . . . This Commission concludes that there will be no fundamental correction of the total condition until segregation legislation is repealed." *Higher Education for American Democracy*, vol. II, pp. 31, 35 (Govt. Printing Off., 1947).

It is common knowledge, reflected almost daily in the Washington newspapers, that the Board of Education is striving to mitigate the many racial inequities in the school

system. But no matter how the Board shifts the racial use of school buildings or what other measures it invokes in its desperate efforts to keep abreast of population changes, it is unable to do more than mildly alleviate the almost scandalous inequalities inevitable under, and resulting solely from, the dual school system.

This inability results from the very nature of the dilemma facing the Board. The Constitution forbids racial inequality. Yet the complexity of administering an educational system for a large city with a dynamic and mobile population makes impossible the achievement of equality while keeping within the arbitrary lines of race. The Board's efforts to correct the inequalities simply create almost as many other inequalities, for both white and colored children. *E. g.*, as this Brief is being written, the Board's current budgetary makeshifts to relieve the teacher shortage in the schools for colored children are causing, in the schools for white children: firing of teachers, reassigning senior high school teachers to junior high schools and junior high teachers to elementary schools even though the Superintendent admits that such reassignment is both inefficient and "harmful to teacher morale," closing classes, turning senior high school counselors into instructors, teaching two grades in one room, disrupting educational schedules, cutting out special instruction for atypical children, etc. In the meantime, another tug-of-war is shaping up, between white and colored parents concerned about the welfare of their children, over the proposal to transfer either Bryan or Buchanan elementary school from white to colored use to relieve gross overcrowding of Negro pupils in that area. *Washington Post*, p. 1 (Nov. 20, 1952); *ibid.*, pp. 1, 12 (Nov. 21, 1952). Correction of these and other inequities is frustrated by the dual system itself. So long as compulsory separation of white and colored children exists in the public schools, there will always be some colored children whose educational opportunities will be less than if they had been white, and some white children whose educational opportunities will be less than if they had been colored.

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It is no answer to say that the educational opportunities for colored children averaged as a group are substantially equivalent to the educational opportunities for white children averaged as a group. Even if this were true (which it is not), it does not mitigate the discrimination imposed on the child who, but for his race, would have received better educational opportunities. "The essence" of the constitutional right to be free from governmentally imposed racial discrimination is that "it is a personal one . . . It is the individual . . . who is entitled" to it, "not merely a group of individuals". *Buchanan* v. *Warley*, 245 U. S. 60, 80 (1917); *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941); *Henderson* v. *United States*, 339 U. S. 816, 825 (1950). Nor is it relevant that some white children may sometimes get less than some colored children. The constitutional guarantee against racial discrimination "is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948); *Henderson* v. *United States*, 339 U. S. 816, 825-826 (1950).

The root of the discrimination is the rigid line of the racial bar to which all other considerations are subordinated. Every effort to cure the evil of racial discrimination by "equalization" of physical facilities within a segregated system is like trying to cure cancer with a mustard plaster. Only when the dual system is uprooted can the normal processes of eliminating inequities in the District's educational system become effective.

III. The People of Washington are ready for and will accept integration of their public schools.

Actual experience, both in Washington and throughout the country, including the South, proves how fallacious is the assumption that integration of the public schools will cause "racial trouble."

Not all the schools in Washington are racist. Negroes are now being admitted, in steadily increasing numbers, into the formerly all-white parochial schools and into more

and more of the formerly all-white private schools.[10] This integrated schooling brings, not trouble, but tolerance and better mutual understanding to all the students, and to the parents too. Throughout the country, public schools hitherto segregated are being peacefully integrated by cities, counties and States,[11] and by the Federal Government which operates elementary schools for the children of military and civilian personnel on federal areas, in the South as well as elsewhere.[12] "The success of the 1944 integration experiment in the service schools . . . was perhaps the major factor in increasing the demand for integration" in the military services.[13] Furthermore, over 1500 colored students have enrolled in formerly white graduate and professional schools throughout the South, following this Court's decisions of June 1950 in *Sweatt* and *McLaurin*.[14] At the under-graduate level, more and more of the previously all-white colleges and junior colleges in the South, including Berea College, the University of Kentucky, the University of Louisville, and others in Kentucky, Del Mar Junior College and others in Texas, and elsewhere, are opening their doors to colored students.[15]

The whole milieu of the District of Columbia is one of increasing change from Jim Crow to integration.[16] Segregation is gone or on the way out in many areas of public life in Washington; and the sequelae are uniformly peaceful.

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10 For the most recent announcement see *Washington Post*, p. 1 (Oct. 31, 1952) (Washington Cathedral's Beauvoir School).

11 E.g., see Joseph L. Bustard, "The New Jersey Story: The Development of Racially Integrated Public Schools," 21 J. of Negro Ed. 275-285 (Summer, 1952); *Time* Magazine, p. 84 (Oct. 8, 1951) (Tucson, Arizona); see also 21 J. of Negro Ed. 404 (1952) (St. Louis, Mo. parochial schools).

12 *Washington Post*, p. 3-B (Oct. 14, 1951); President Truman's Message to Congress of Nov. 2, 1951 on H. R. 5411, 82nd Congress (97 Cong. Rec. 13787-88).

13 Dennis Nelson, *The Integration of the Negro into the U. S. Navy*, 46, 45-48 (1951); Report of President's Committee on Equality of Treatment and Opportunity in the Armed Services, *Freedom to Serve*, (Govt. Printing Off., May 22, 1950).

14 21 Journ. of Negro Ed. 321 (Summer, 1952).

15 21 Journ. of Negro Ed. 354-358 (1952).

16 Phineas Indritz, "Racism in the Nation's Capital," 175 *The Nation* 355-357 (Oct. 18, 1952); *Washington Star*, "Segregation in the District," p. C-3 (Oct. 19, 1952).

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The park facilities operated by the Department of the Interior, including such "sensitive" facilities as swimming pools, tourist camp lodgings, golf courses, picnic grounds, and others, are wholly non-segregated. Negroes, both as individuals and in integrated groups, are now admitted into every public building (including the public school buildings in the evening), into every major private auditorium, in at least 100 privately-owned restaurants, in all government cafeterias, and in several theaters, both stage and movie.

All the major universities and colleges in Washington, with the notorious exception of George Washington University, now admit qualified students without regard to race. Negroes are now admitted in many formerly all-white professional groups and voluntary organizations, *e. g.,* District Medical Society, American Association of University Women, American Institute of Architects, etc. Many of the major Washington hotels now admit colored people. A considerable number of churches have mixed congregations, and practically none would refuse admission to a Negro worshipper. Segregation in streetcars and buses has been forbidden by law in the District since 1865.[17] And an 1873 statute, already held valid by the Municipal Court of Appeals, may soon end racial exclusion and segregation in all the public eating places of Washington.[18]

The largest employer in Washington, the Federal Government, has no segregation. And the District Government, which still sponsors segregation in some of its playgrounds, and in some of its departments (e.g., fire department, jail, etc.), is looking to eliminate it. The National Capital Housing Authority recently announced that its new housing projects would be nonsegregated. Significant, and peaceful, shifts in racial residential patterns have occurred

[17] See act of March 3, 1865 (13 Stat. 536, 537); *Railroad Company* v. *Brown*, 84 U. S. (17 Wall. 445 (1873).

[18] See *District of Columbia* v. *John R. Thompson Co., Inc.*, 81 Atl. (2d) 249, 79 Wash. L. Rep. 726 (1951), appeals argued and pending before U. S. Court of Appeals for the District of Columbia Circuit (Nos. 11039, 11044).

since this Court in 1948 prohibited the enforcement of restrictive housing covenants. *Hurd* v. *Hodge*, 334 U. S. 24 (1948). Segregation in Washington is no longer even a political issue. Both the Republicans and Democrats promised during the 1952 campaign to end racial segregation in the District.[19]

Only the public schools remain as the unyielding stronghold of segregation in Washington, imposing racist patterns on the growing generation, to the discomfiture not only of the Negroes but also of the ever increasing number of white people who do not want their children warped by the prejudice of racial discrimination and subjected to the inferior education inevitable under a dual school system.

It is only the alleged compulsion of law, not any peculjar aspect of public education, that keeps the public school system segregated. The attitude of educators with respect to the two sets of schools is evidenced by the recommendation by both Presidents of the Teachers' Colleges (Wilson, which trains white teachers, and Miner, which trains colored teachers) that they be merged.[20]

The time is ripe, and the people of Washington are ready, for the desegregation of the public schools and for equality of educational opportunity for all.

In any event, even if there were a real possibility of "racial trouble" in the public schools of the District (which there is not), such a problem should be solved by education and by enforcing, without racial discrimination, the law against violence and disorderly conduct, not by depriving well-behaved and respectable citizens of their legal rights. *Buchanan* v. *Warley*, 245 U. S. 60, 80-81 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948); *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941). The imposition of compulsory segregation simply to placate those who threaten disorder and violence is to subordinate law to lawlessness, tolerance to

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19 *Washington Post*, p. 2 (Oct. 18, 1952); *ibid.*, p. 11M (Oct. 26, 1952).

20 *Washington Post*, p. 9M (Sept. 3, 1950); *Washington Star*, p. 1 (Sept. 3, 1950).

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bigotry, Americanism to racism. The people of Metropolitan Washington are not really afraid of democracy. They have the capacity to meet and solve whatever intercultural problems may arise from the abolition of compulsory segregation in the public schools. They will show the Nation and the World that our Nation's Capital can be the living symbol of American faith in democracy.

Respectfully submitted,

AMERICAN VETERANS COMMITTEE, INC. (AVC),
Amicus Curiae,

By PHINEAS INDRITZ,
National Counsel
American Veterans Committee.

December 1, 1952
Washington, D. C.

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BRIEF FOR AMICI CURIAE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners*

v.

C. MELVIN SHARPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN COUNCIL ON HUMAN RIGHTS

AMERICANS FOR DEMOCRATIC ACTION
WASHINGTON CHAPTER

AMERICAN JEWISH COMMITTEE
WASHINGTON CHAPTER

AMERICAN JEWISH CONGRESS COMMISSION ON LAW & SOCIAL ACTION
WASHINGTON CHAPTER

CATHOLIC INTERRACIAL COUNCIL OF WASHINGTON

COMMISSION ON COMMUNITY LIFE OF THE WASHINGTON FEDERATION OF CHURCHES

DISTRICT OF COLUMBIA INDUSTRIAL UNION COUNCIL, C.I.O.

D. C. FEDERATION OF CIVIC ASSOCIATIONS, INC.

FRIENDS COMMITTEE ON NATIONAL LEGISLATION

JAPANESE AMERICAN CITIZENS LEAGUE
WASHINGTON CHAPTER

JEWISH COMMUNITY COUNCIL OF GREATER WASHINGTON

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
D. C. BRANCH

UNITARIAN FELLOWSHIP FOR SOCIAL JUSTICE
WASHINGTON CHAPTER

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IN THE

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No. 413

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v.

C. MELVIN SHARPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE

INTEREST OF AMICI CURIAE

This case deals with the question whether children in the public school system of the Nation's Capital may, consistently with the Constitution and laws of the United States, be separated by groups solely on the basis of skin color or the origin of their ancestors.

The undersigned submit this brief because our organizations represent groups of Americans in the Washington

community and throughout the nation of many creeds and many races who are deeply committed to the preservation and extension of the democratic way of life and who reject as inimical to the welfare and progress of our country artificial barriers to the free and natural association of peoples, based on racial or creedal differences. We believe this to be of especial importance in the Nation's Capital. We are united in the belief that every step taken to make such differences irrelevant in law, as they are in fact, will tend to cure one of our democracy's conspicuous failures to practice the ideals we proclaim to the world, and to bring us closer to that peace and harmony with other peoples throughout the world for which we all strive.

We submit this brief out of a sense of urgency which compels us to speak out for great segments of the community on behalf of a good and just cause. We are convinced that the great democratic principles of our Constitution are denied when racism permeates and shapes the institutions in which the children of the Capital of the Nation receive their schooling.

We submit this brief, finally, in the knowledge that the progress and welfare of a democratic community and the best contributions of all its people toward enriching the life, the intellect, and the spirit of the community can be achieved only from the untrammeled association of fellow-citizens without the interposition, especially by government, of barriers based on race.

STATEMENT OF THE CASE

This case is here on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, granted while the case was pending in that court on appeal from a judgment of the United States District Court for the District of Columbia granting a motion to dismiss the complaint. The petitioners are minors and their parents, citizens of the United States and residents of the District of Columbia, are suing on behalf of themselves and

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others similarly situated. The respondents here are members of the school board and officials of the public school system of the District of Columbia.

The complaint alleged that the minor petitioners applied for enrollment in the Sousa Junior High School of the District of Columbia and were denied enrollment solely because of their race or color and that they appropriately exhausted all administrative remedies for correction of that denial. It alleged *inter alia* that their exclusion from the school denied them due process of law, in violation of the Fifth Amendment to the United States Constitution and Title 8, Sections 41 and 43 of the United States Code; and constituted a bill of attainder prohibited by Article 1, Section 9, clause 3 of the Constitution. The complaint sought a declaratory judgment that the respondents had no right to exclude the minor petitioners from the Sousa School because of their race or color and an injunction restraining the respondents from such exclusion.

Respondents, without denying any of the allegations of the complaint, filed a motion to dismiss which was granted by the District Court without an opinion.

THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

The undersigned *amici curiae* believe that racial segregation in the District of Columbia public schools is unconstitutional. We refrain here from presenting such of our reasons as would parallel those presented in the brief of the petitioners already filed herein. We confine ourselves to the following two questions which we feel merit fuller discussion and on which we possess some special competence:

1. Does separation of school children by skin color or ancestry have any warrant in twentieth century community experience, proper legislative purpose, or scientific understanding?

2. Does the fact that Congress made provision for the establishment of schools for Negro children in the

District of Columbia before the adoption of the Fourteenth Amendment justify the conclusion that the Fourteenth Amendment was intended to permit racial segregation?

SUMMARY OF ARGUMENT

1. Racial classifications are not permissible in our democracy except only under the most dire of emergencies such as the "crisis of war". The conventional standards of "reasonableness" to test legislative action do not come into play when racial criteria are involved. Nor, even if it were relevant, is there any reasonable basis for separating school children by skin color. Examination of community experience in the District of Columbia and throughout the country discloses vast areas of activity in which the members of the public both voluntarily and by government action have departed from patterns of segregation and associate free of color restrictions. No rational basis exists to single out school children for racial separation.

The predictions of defiance of a decision invalidating racial segregation in schools or of difficulties resulting therefrom are neither novel nor warranted. They are not justified by community experience, history, morality, or law. To assert such factors implies that Constitutional rights must await the consent of those who withhold them.

Present day scientific knowledge discredits traditional concepts of "race." Continued enforcement of legislative action based on assumed distinctions formerly attributed to such concepts is not rational.

2. In *Carr* v. *Corning*, 182 F. 2d 14, it was held that Congress' establishment of public schools for Negroes before the ratification of the Fourteenth Amendment "conclusively supports" the determination that the Amendment permitted segregation in schools. This misconceives the chronology of the events of that day and gives a completely distorted significance to the school statutes.

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ARGUMENT

I.

SEPARATION OF SCHOOL CHILDREN BY SKIN COLOR OR ANCESTRY HAS NO WARRANT IN TWENTIETH CENTURY COMMUNITY EXPERIENCE, PROPER LEGISLATIVE PURPOSE, OR SCIENTIFIC UNDERSTANDING AND IS THEREFORE A MEANINGLESS CLASSIFICATION VIOLATIVE OF THE FIFTH AMENDMENT

This brief documents what twentieth-century America knows: racial segregation is not—and never was—intended to achieve any legitimate legislative goal but is a continuing attempt to maintain some vestiges of the slave system of the nineteenth century.

Classification by "race"[1] has been permitted by this Court to sustain governmental action only during the major crisis of the twentieth century and then only after "the most rigid scrutiny" had disclosed "circumstances of dire emergency and peril" stemming from "the crisis of war and threatened invasion."[2]

Though we do not suggest the propriety of even this limited impairment of the constitutional safeguards for the individual, we point out that these instances were occasioned only by extreme cases of national peril. It is only at such times that racial designations may become the basis for governmental action. No conventional problems and no ordinary standard of "reasonableness" may justify a transgression of the overriding principle that racial distinctions are odious.

---

[1] We use the term "race" only for simplicity of expression. We submit it has no meaning relevant to legal problems. See Section C, *infra*, p. 19. For purposes of brevity we have also referred generally to "skin color" as the basis adopted for segregation. Analyzed carefully, the real basis for segregation of Negroes stemming from the institution of slavery, lies in the birthland of the individual's forebears (i.e., Africa) rather than in skin color alone. For these reasons many statutes refer generally to "persons of African descent." *Cf.* Art. 1661.1, Sec. 2, Vernon's Statutes of Texas, Annotated (1947).

[2] *Hirabayashi* v. *United States*, 320 U. S. 81, 92 (1943), and *Korematsu* v. *United States*, 323 U. S. 214, 220 (1944). *Cf. Ex parte Endo*, 323 U. S. 283 (1944).

Moreover, governmental classification at any time must comport with what is fundamentally just. This is the essence of due process, a term of no fixed content. The "essentials of fundamental rights" are not "confined within a permanent catalogue," for it "is of the very nature of a free society to advance in its standards of what is deemed reasonable and right." *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). And the question whether a classification separating school children solely by race is constitutionally permissible today cannot be answered by looking backward to yesterday. Constitutional principles "may acquire meaning as public opinion becomes enlightened by a humane justice."[3] For this reason, the "boot-strap" arguments of the School Board in this case, as in all others which rely upon the authority of *Plessy* v. *Ferguson*, 163 U. S. 537, without reexamining its premises, cannot justify this Court's failing to do so. *Passenger Cases*, 7 How. 283, 470 (1849). We submit that the validity of continuing today to separate school children solely according to a skin-color

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[3] *Weems* v. *United States*, 217 U. S. 349 (1910):

pp. 373-374: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. * * * The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. * * * The construction of the Fourteenth Amendment is * * * an example for it is one of the limitations of the Constitution."

p. 378: "The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

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classification must be tested in the light of today's known community and social experience, declared legislative purposes and present scientific understanding. Tested accordingly, separation of children in public schools on the basis of skin-color alone is completely without rational basis in the United States in the twentieth century.

A. Community experience demonstrates the invalidity of racial segregation in the District of Columbia or anywhere in the United States.

1. Deterioration of patterns of segregation.

As this community's experience is examined, the lack of consistency and indeed of plain common sense involved in the erection of racial barriers between groups of school children is dramatically exposed. A brief glance at Table IV (Appendix, infra) shows the vast range of public activity in which this city engages free of color restrictions. Washingtonians mingle today without regard to skin color in many restaurants, movies, hotels, libraries, swimming pools, golf courses, tennis courts, and playgrounds, in all legitimate theatres, streetcars and busses, art galleries, and music halls, and in every public building, and every auditorium in the city. They attend inter-racial nursery schools, parochial schools, colleges, law schools and medical schools. (Table II, Appendix, *infra.*)

On what basis, then, may they rationally be precluded from doing so in public schools? If people, young and old, can live next door to each other in apartment houses, can walk or ride together as far as school doors, and can enter together in private schools, what proper reason may be adduced to prevent them from entering those doors to study together in public schools established in the interests of all the people, by a government dedicated to democracy?[4]

[4] The President-elect has pledged himself to remove "every vestige of segregation" in the Nation's Capital to the extent of the means at his command. But this is a goal which, as this case proves, cannot be achieved by executive action alone.

Moreover, segregation in schools has been abandoned in practice in so great a portion of this country, including the South, as to make its continuation anywhere impossible to justify in principle. Compiled in the Appendix, *infra,* is a list of those communities, in the South and border areas, where Negro students have been recently admitted to formerly all-white schools. (Table I). This list, which is representative but by no means exhaustive, marks the unanimously successful integration, in varying degrees, of colored and white students in educational institutions in over 85 communities in such areas. (There is of course no need to detail the vast areas of the North where legal segregation has never been practiced.)

These are developments of only the past several years, chiefly following this Court's action in *Sweatt* v. *Painter,* 339 U. S. 629 and *McLaurin* v. *Oklahoma,* 339 U. S. 637, in 1950. In that short time, one or more educational institutions in practically every Southern, Southwestern and Border state have opened their doors to Negroes, who had previously been excluded altogether. For example, tax-supported colleges and universities have opened their doors to Negro students in Texas, Oklahoma, Arkansas, Kansas, Missouri, Louisiana, Kentucky, Tennessee, Virginia, North Carolina, West Virginia, Maryland and Delaware. (Table III(A) (1) (b), Appendix, *infra*).

Despite the continued insistence of those who urge the continuance of segregation on the ground that the country is "not ready," these changes have not been limited to *public* colleges which alone would be compelled by the enforcement of the Fourteenth Amendment to open their doors. *Non-public* institutions have been far in the lead in the process of integration. Schools and colleges, both private and parochial, have removed racial barriers to admission in Alabama, Texas, Georgia, Missouri, Louisiana, Kentucky, Maryland, North Carolina, Virginia, West Virginia, and as mentioned, the District of Columbia. (Table III (A) (2), Appendix, *infra*). This merits special

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attention, for if segregation were as embedded in the "usages, customs and traditions" of the South as it is alleged to be, none of these institutions would have departed therefrom without compulsion. But freed of governmental compulsion to segregate (or exclude) by the aftermath of this Court's decisions in the *Sweatt* and *McLaurin* cases which substantially destroyed segregation in public colleges, these non-public schools have dropped the color bars in numbers and with a speed and fervor[5] which make it plain that it was only the barrier of the South's government-required segregation which had earlier stood in their way—and not the South's "usages, customs and traditions."

In addition to the colleges and universities in which segregation has been abandoned, *public elementary and high schools* have successfully ended segregation in recent years in one or more communities in California, Arizona, New Mexico, Kansas, Illinois, Ohio, Indiana, Maryland, Delaware, Pennsylvania and New Jersey. Public schools supported entirely by Federal funds have been integrated at Fort Bragg and Camp Lejeune, North Carolina, Quantico, Virginia, Fort Knox, Kentucky and other southern military reservations.

The District of Columbia has been no laggard in this pattern of change. Only where law is interpreted to forbid departure from segregation (as the D. C. Board of Education maintains is true here) has there been no corresponding progress. Private schools, at all levels of study, have dropped the color bar. This is true of pre-nursery, nursery, elementary and high schools, as well as colleges and graduate schools. (Table II, Appendix, *infra*).

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[5] The reactions of white students have been extremely favorable. They have welcomed the newly arrived Negroes with group demonstrations of approval, have called for change at colleges refusing admission to Negroes, have written articles for the press, and have called on the President of the United States for assistance to end racial restrictions. Table IV (B) Appendix, *infra*.

Moreover, neither in the District nor in other places which have known segregation are these changes occurring only in schools. We have compiled in Table IV a wide variety of instances (which is only a sampling of thousands of similar cases) in which places of public accommodation, voluntary associations, religious bodies, employers, and the athletic and entertainment world have followed where enlightened public thinking has beckoned.

These developments have significance for our problem because everywhere one looks—in colleges and universities, in factories, in state legislatures and city councils, in theaters, in stadia, in restaurants, in swimming pools, and throughout our Armed Forces—there has developed an increasing and cumulative mingling of people of different racial origins on a scale which makes ludicrous the continued separation of children in their formative years at school. Those who ride, play, and work, who fight and die together without strife may—nay, *do*—study together without strife.

This wide-ranging experience with integration, it should be added, is a judicial, not a legislative, consideration for it provides conclusive practical confirmation of the propositions that (1) separation based on race has no rational basis in our society and (2) integration presents nothing remotely like war-time "dire emergency and peril" which alone might justify separation (*Korematsu* v. *United States, supra*, p. 220), but in fact proceeds peacefully.

2. The prophesied community resistance to change.

Departures from segregation have been successful to a degree that surpasses even the most optimistic expectations of the proponents of such change. They continually refute the forecasts of those who on each and every such occasion predict violence, resistance, difficulties and, at very least, common dissatisfaction with the change.

If these predictions were made by those who previously had urged the removal of barriers toward equality they

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might be listened to with good grace. But though the words are different the voice is the same. These are the last-ditch arguments of those who would still preserve something of their ancestors' 19th Century class superiority, with its intolerable burdens on other human beings, while they also enjoy all the benefits of 20th Century society.

Furthermore, the mere assertion of such factors as worthy of consideration by this Court necessarily implies a belief that even if the Constitutional rights of an individual—or thousands of individuals—are being violated justice shall be rendered them only if those who withhold those rights will consent. Such a belief our democracy rejects.

And this aside, these assertions are unsound judged even by empirical standards rather than moral principle. In *Sweatt* v. *Painter, supra* (October Term, 1949, No. 44), the appellees warned that "forced mixed schools" would "cause large withdrawals from the public schools" (Appellees' Brief, p. 175). The brief *amicus* filed by the Attorneys General of eleven states was even more direful (at p. 9), citing reports of impending disturbance at East St. Louis and Alton, Illinois, two southern Illinois cities where the schools were being desegregated under force by law, and of apparent trouble at desegregated swimming pools in Washington, D. C., and St. Louis, Missouri[6]:

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[6] The swimming pool incidents referred to by the Attorneys General refute rather than support their argument. In Washington, the disturbance was an isolated incident which has been followed since 1950 by operation of pools under jurisdiction of the Interior Department without segregation and without the slightest difficulty. Comment, 18 Univ. Chi. L. Rev. 769, 773-775 (1951). And the attendance has shown a continuing increase. (Table IV, item (8) Appendix, *infra*.) The St. Louis experience was even more revealing. There the city officials reacted to an outbreak of violence by reversing their previously adopted decision to end segregation. A law suit was commenced to prevent segregation. Id. at 771-772. United States District Judge Hulen firmly rejected the argument that segregation should be retained to prevent disorder. Calling this "a new and novel theory", he ruled that "The law permits of no such delay in the protection of plaintiffs' constitutional rights".

> The Southern States trust that this Court will not strike down their power to keep peace, order, and support of the public schools by maintaining equal separate facilities. If the States are shorn of this police power and physical conflict takes place, as in the St. Louis and Washington swimming pools, the States are left with no alternative but to close their schools for that reason.

Of course, no "physical conflict" took place because of the decision which the Attorneys General feared. Instead, in less than two years the number of Negroes who have been peacefully integrated into Southern graduate and professional schools exceeds well over a thousand, and the tabulation is no longer a matter of much interest since the point is proved beyond debate.

In the *Henderson* case, *infra* (October Term, 1949, No. 25), the brief *amicus* filed by Rep. Sam Hobbs warned flatly that "that to adopt the contention of Appellant would be the kiss of death to render operation of the railroad impossible" (p. 5). In *Morgan* v. *Virginia*, 328 U. S. 373 (1946) (October Term, 1945, No. 704), the Commonwealth of Virginia, Appellee, warned that the statute which the Court subsequently invalidated was necessary to prevent violent altercations which would cause drivers to lose control of their busses (Appellee's brief, p. 14). The effects of a reversal of the decision below were painted in lurid terms (*Id.* at pp. 18-20).

Again, no such evils resulted. In fact, the Court of Appeals for the Fourth Circuit has had occasion to point out that no disorders occurred on the cars of a Virginia railroad which recently abandoned segregation to the extent it

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Draper v. *St. Louis*, 92 F. Supp. 546, 549 (E.D. Mo., 1950). The following year, 1951, the pools were opened on a fully integrated basis. "Civil Rights in the United States in 1951", page 90. As indicated in the Appendix, both East St. Louis and Alton are examples of successful integration, rather than disturbance of any sort.

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found convenient. *Chance* v. *Lambeth,* 186 F. 2d 879, 881, 882-883 (C.A. 4th, 1951).

We are not so naive as to discount the possibility of some forms of resistance to a decision that racial segregation in public grade schools is unconstitutional. But the prophecy of violence has so often been shown to be without substance [7] that it is now made with little conviction. Of course, this Court conclusively answered what has been called the "rhetoric of violence"[8] when it squarely held that the preservation of the public peace cannot be accomplished by laws which violate the Constitution. *Buchanan* v. *Warley,* 245 U. S. 60, 81 (1917).

It goes without saying that to deny a constitutional right because the lawless element of a community dislikes its enforcement is to suggest that the Federal compact is no match for the lynch-law mob.

Recognition of these facts by those who still seek to uphold segregation leads to their more sophisticated suggestion that the abolition of segregation at this time will (a) destroy public education in the South or (b) destroy the liberal or progressive movement in the South. The fact is that public education will no more be threatened by the Court's action against segregation in these cases than it was by its action in the cases of *Sweatt* v. *Painter, supra; McLaurin* v. *Oklahoma State Regents, supra,* and *Henderson* v. *United States,* 339 U. S. 816. At best such arguments in effect only urge delay in the disposition of the constitutional question. But delay is more likely to aggravate than to solve these alleged problems.[9] Moreover,

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[7] Note, 61 Yale L. J. 730, 738-743 (1952); Lewis, *The Crisis That Never Came Off,* The Reporter, 1:12 (Dec. 6, 1949).

[8] Comment, 18 Univ. Chi. L. Rev. 769, 781 (1951).

[9] In the meantime the denial of constitutional rights is itself productive of disorder. As a Georgia court noted long ago, "in the end, if those laws are unfair, unjust, unequal, they will breed discontent and disorder, and it is better for the peace and good order of society that all shall have equal rights." *White* v. *Clements,* 39 Ga. 232, 269 (1869).

these arguments were not first urged upon this Court when the *Sweatt* and *Henderson* cases were argued; they were put forth over 75 years ago (*Cf.* 2 Cong. Record 4153 (1874); 3 Cong. Record 981-982, 997, 1002 (1875)).

Nor are these alleged problems peculiar to the South. The quality of individual prejudice is not governed solely by the residence of the individual. Integration proposals have brought prophecies of violent resistance in northern waterfront towns like Camden, N. J., no less than in Clarendon County, S. C., and of destruction of public education in Alton, Illinois no less than in Atlanta, Georgia. But Camden saw no violence and is fully integrated, and Alton, rather than give up the State's monetary contribution to its public schools, gave up segregation. This was done grudgingly, but it was done—peacefully and completely.

We submit that if there is to be resistance, it will take the form not of destruction but of evasion. And the patterns of evasion are by this time familiar. Although the practice of excluding Negroes from the Democratic Party primary in the South was first condemned in 1927 (*Nixon* v. *Herndon*, 273 U. S. 536) this Court was called on several times thereafter to consider the validity of attempted evasions of that decision.[10] Even after the last decision there were further attempts—continuing to the present day[11]—which were dealt with by the lower courts.[12]

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[10] *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Grovy* v. *Townsend*, 295 U. S. 45 (1935); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1949).

[11] *Terry* v. *Adams*, 193 F. 2d 600 (C.A. 5th, 1952), cert. granted Nov. 12, 1952.

[12] *Chapman* v. *King*, 154 F. 2d 460 (C.A. 5th, 1946), cert. denied, 327 U. S. 800; *Mitchell* v. *Wright*, 154 F. 2d 924 (C.A. 5th, 1946), cert. denied, 329 U. S. 733; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4th, 1947), cert. denied, 333 U. S. 975; *Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4th, 1949); *Perry* v. *Cyphers*, 186 F. 2d 608 (C.A. 5th, 1951); *Adams* v. *Terry*, 193 F. 2d 600 (C.A. 5th, 1952); *Davis* v. *Schnell*, 81 F. Supp. 872 (D.C. S.D. Ala., 1949), aff'd without opinion, 336 U.S. 933 (1949); *Dean* v. *Thomas*, 93 F. Supp. 129 (D.C. E.D., L., 1950).

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Ultimately the fight will be completely abandoned. Negroes are now voting in constantly increasing numbers in the Democratic primary and general elections in the South, and candidates make special efforts to win their support.[13]

And so, while we may expect gerrymandering and possibly so-called "private" corporations operating the schools for one or a few of the States, we freely predict that in this day and age there will be neither real abandonment nor educational deterioration of the public school system in the areas involved. Furthermore, in the District of Columbia community acceptance and respect for legal authority is obviously such that there can be no fear whatever that this Court's order will be resisted here. As Judge Edgerton said in his dissent in *Carr* v. *Corning*, 182 F. 2d 14, 33: "When United States courts order integration of District of Columbia schools *they will be integrated*". (Emphasis supplied).*

We know, too, that despite the urging of the prophets of doom this Court will not permit basic Constitutional rights to be reduced by the lowest pessimistic denominator.

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[13] Race and Suffrage in the South since 1940, Jackson, Luther P., New South, Vol. 3, pp. 1-26 (1948); Civil Rights in the United States in 1951, op. cit. *supra*, p. 18; A Decade in Race Relations, Wilkins, Roy, America, June 16, 1951, pp. 287-289; Stakes Are Costly in Play for Texas, N. Y. Times, Sept. 23, 1952.

* Only last week the Superintendent of Schools said the school system would not be unprepared for a decision ending segregation, Washington Post, Nov. 29, 1952. By contrast, we regard as particularly unfortunate the Court's statement in the *Carr* case, *supra*, p. 16, that the problems with which it was dealing were "insoluble by force of any sort." The same amount of "force" is exercised by segregated as by unsegregated schools. The present practices in the District of Columbia school system are just as "forceful" to those who desire to associate with their fellows without artificial racial barriers as an unsegregated system would be to those who wish to keep aloof.

B. Declared legislative prohibitions against segregation in other areas of activity in the District of Columbia demonstrate the further irrationality of school segregation.

The classification of groups of children in the public schools by skin color alone must also be tested in the light of legislative action affecting other group relationships in the community.

As early as 1865,[14] the Congress expressly forbade any street railway company in the District of Columbia to exclude any person from any car, and since then there has been no "Jim-Crow" transportation in the District. In 1872 and 1873, the Legislative Assembly for the District enacted laws (referred to as the "Equal Service Laws") forbidding the refusal to serve any well-behaved person in any eating place, barber shop or hotel.[15] Thereafter, in 1875, the Congress enacted the famed Civil Rights Act,[16] forbidding racial discrimination or exclusion in places of public accommodation throughout the country, including the District of Columbia.

This series of legislative measures, then, carved out vast areas for the free association of peoples in the District. As opposed to the direct prohibitions *against* segregation in these instances where Congress has clearly expressed its intention on the subject, no instance has been found where the Congress *requires* segregation. (It should be noted that the statutes relied upon here as establishing a segregated school system are not mandatory in form—unlike school and other statutes in the South which explicitly re-

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[14] SECTION 5 of the Act of March 3, 1865, 13 Stat. 536.

[15] The law of 1873 was recently held valid, and in force, in *District of Columbia* v. *John R. Thompson Co.*, 81 A. (2d) 249 (D.C. Mun. App.). An appeal is now pending in the United States Court of Appeals for the District of Columbia Circuit.

[16] Act of March 1, 1875, 18 Stat. 335. This Act was declared invalid as applied to the States (*Civil Rights Cases*, 109 U. S. 3 (1883)) and, only because the provisions were considered nonseparable, to steamships in coastwise trade (*Butts* v. *Merchants and Miners Trans. Co.*, 230 U. S. 126 (1913).

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quire segregation. See compilation in the Appendix to the Petitioners' brief, herein.)

In this context, particularly in view of the other broad areas of present free community association mentioned in Section A, *supra*, it becomes impossible to accept as having rational foundation a legislative classification singling public school children alone out of the entire community for governmental separation based solely on race.

C. Present scientific understanding discredits traditional concepts of "race".

Governmental classifications must also be tested in the light of present-day scientific understanding.

It seems hardly necessary at this late date to offer proof that conduct governed by assumed distinctions attributed to race is wholly arbitrary. Moreover, the concept of "race", which has been thought to have a scientific explanation based on esoteric classifications used by physical anthropologists, have been demonstrated by mature students of anthropology to be largely lacking even such a foundation, and they have shown that no significance whatever can be attached to skin color alone. Boyd, *Genetics and the Races of Man* (Little, Brown & Co., 1950), pp. 10-27, 184-207.[17]

Certainly in the Western World *no* nation is anything but a mixture of many kinds of racial groups. The term

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[17] "The biological fact of race and the myth of 'race' should be distinguished. For all practical social purposes 'race' is not so much a biological phenomenon as a social myth. The myth of 'race' has created an enormous amount of human and social damage. * * * It still prevents the normal development of millions of human beings and deprives civilization of the effective co-operation of productive minds. The biological differences between ethnic groups should be disregarded from the standpoint of social acceptance and social action." *Statement by Experts on Race Problems*, United Nations Educational, Scientific and Cultural Organization, July 18, 1950. See also LaFarge, *The Race Question and the Negro;* Redfield, *What We Do Know About Race*, 57 Scientific Monthly 193 (Sept., 1943); Krogman, *An Anthropologist Looks at Race*, 7 Intercultural Education News 1 (Nov., 1945).

"white" is racially meaningless as applied to almost all American or European whites. There are fair-haired, tall, long-headed North Europeans and dark-haired, less tall, round-headed South Europeans. And there are all those who run the gamut. They are all *race mixtures.* Benedict & Weltfish, *Races of Mankind* (Public Affairs Committee, 1944). Even more certain is it that the American Negro is not a "race". Not only were the original African slaves members of different "racial" groups (from different parts of Africa) but their cross-fertilization with "white" Americans has been extensive. As early as 1920 at least 15.9 per cent of the "Negro" population was visibly mulatto. Klineberg, *Characteristics of the American Negro* (Harper, 1944), p. 268. And a recent study by John Hopkins and Pittsburgh University professors discloses that the Negro population in the United States is 30 per cent white in its ancestry. Glass and Li, *Report on the Dynamics of Racial Intermixture,* Annual Meeting of American Institute of Biological Sciences at Cornell University (N. Y. Times, Sept. 8, 1952, 33:8); Comas, *Racial Myths* (UNESCO, 1951) pp. 1-26.

II

THE FACT THAT CONGRESS MADE PROVISION FOR THE ESTABLISHMENT OF SCHOOLS FOR NEGRO CHILDREN IN THE DISTRICT OF COLUMBIA BEFORE THE ADOPTION OF THE FOURTEENTH AMENDMENT DOES NOT JUSTIFY THE CONCLUSION THAT THE FOURTEENTH AMENDMENT WAS INTENDED TO PERMIT RACIAL SEGREGATION.

Petitioners urge in this case that racial segregation in the schools operated by the District of Columbia government is discriminatory *per se* and consequently prohibited by the Fifth Amendment. The argument rests on the firmly based principle that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943).

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It is urged, however, by those seeking to uphold school separation based on race alone that neither the Fifth nor the Fourteenth Amendment to the Constitution, prohibits segregation.[17a] In this connection, reliance is placed on certain statutes enacted by the United States Congress for the education of Negro children in the District of Columbia at about the same time the Congress submitted the Fourteenth Amendment to the states for ratification. The theory suggested is that these statutes expressly provided for the establishment of segregated schools for Negro and white children and that, hence, the Congress of that period could not have viewed the constitutional principles embodied in the Fourteenth Amendment as prohibiting racial segregation.

This argument was given much weight by the majority opinion (Edgerton, J., dissenting) of the Court of Appeals for the District of Columbia Circuit in *Carr* v. *Corning*, 182 F. 2d 14 (1950).[18] Judge Prettyman's opinion there reviewed the statutes in question and concluded that they "conclusively support" the view that the Fourteenth Amendment does not prohibit segregation. *Ibid*, pp. 17-19.

We have already indicated our contention that the reason or unreason of a classification such as separate racial schools must be judged on the basis of contemporary conditions and current knowledge, and not governed by the dead hand of the past. *Weems* v. *United States*, 217 U .S. 349, 373-374, 378 (1910). But because we wish to meet squarely the argument from history, just outlined, we turn now to an analysis of the past as it is involved therein.

[17a] Brief for Respondents herein, pp. 36-37; Brief for Appellees in Briggs v. Elliott, No. 101 this term, p. 15; Brief for Appellees in Davis v. County School Board, No. 191 this term, pp. 12-13.

[18] The complaint in the *Carr* case, as in this one, challenged the constitutionality of segregation in the District of Columbia public schools. The Court of Appeals upheld segregation and no review of its decision was sought in this Court. In the instant case, the District Court in granting the motion to dismiss, stated in an oral opinion that it was bound by the *Carr* decision.

Such analysis shows that the conclusion on the part of the Court of Appeals in the *Carr* case was neither required nor justified in the light of the genesis of the local laws and of the Fourteenth Amendment. On the contrary, the conclusion that the Fourteenth Amendment was intended to prohibit segregation is fully documented in the penetrating study by Flack in his *The Adoption of the Fourteenth* Amendment (1908), by the petitioner's brief in *Sweatt* v. *Painter, supra* (pp. 54-62), by the *amicus* brief of the Committe of Law Teachers in that case (pp. 5-19), and by the latest and perhaps most exhaustive study of all, Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 153-62 (1940). We shall not repeat that presentation here.

This conclusion cannot be cavalierly swept aside simply by finding in isolated statutes, narrow and localized in scope and enacted years before the ratification of a constitutional amendment over which the entire nation seethed, a purpose completely at variance with the whole thrust of that amendment as it was generally understood.

In the *Carr* case, Judge Prettyman cited six statutes. Only five of these are actually relevant.[19] These five statutes were enacted between 1862 and 1866—and the dates are crucial, since the Court of Appeals inferred, from the fact that they were (1) contemporaneous with the passage by Congress of the proposed Fourteenth Amendment and (2) seemingly inconsistent with an anti-segregation in-

[19] The reference in the *Carr* decision (pp. 17-18) to Sections 281, 282, 294 and 304 of the revision of the D. C. Statutes (Act of June 22, 1874, 18 Stat. part 2) appears erroneously to assume that these provisions were first enacted in that year. In fact, these are sections taken from the Act of June 25, 1864, 13 Stat. 187, 191, from which Judge Prettyman had already drawn significance, and no additional significance can be found in their inclusion in the 1874 Revision, since that was merely part of a Congressional attempt to provide up-to-date compilations of existing law—one such compilation for the District of Columbia, and another (U. S. Revised Statutes, 1872 and 1878) of the general laws of the United States. Certainly there is no suggestion that any consideration was given by Congress in 1874 to the determination of racial policy which is inherent in the inference drawn by Judge Prettyman.

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terpretation of that Amendment, that the Amendment itself could not have been intended to abolish segregation.

But the inference is by no means either necessary or correct. It is based on a misconception of both the pertinency of the chronology and the purposes of the school statutes.

When the Fourteenth Amendment was proposed in June 1866, its framers obviously had no means of knowing how many years would elapse before its ratification by the states; in fact, it was not until July 1868, more than two years later, that it was declared ratified. The mere fact that the Amendment was proposed in 1866, at approximately the same time as the 1866 statutes, does not, as Judge Prettyman implies, necessarily impute to the Congress a purpose in that Amendment to perpetuate segregated schools.[20] It may equally suggest a desire to deal with the problem on a national basis rather than a local one, just as the Congress later did, in the Civil Rights Act of 1875, when it prohibited discrimination of any kind in places of public accommodation anywhere in the United States, including the District of Columbia.[21] We recognize that Congress, *prior to* the Fourteenth Amendment, was making provision for schools which, when they were finally established, were separate. But to conclude from this that Congress intended to *perpetuate* this situation, come what may, is to fail to distinguish between mere recognition of the historical *fact* of segregation and a *mandate* for segregation.

In fact, what the historical development of public education for colored children does amply demonstrate is that the Congress was concerned in the 1860's with *obtaining* education for those children, and further that Congress was never faced with the issue of granting or denying a request

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[20] Moreover, it should be recognized that there is significance in the fact that the path travelled through the Houses of Congress by the Bill dealing with District schools was obviously different from that taken by the Bill proposing the Fourteenth Amendment. The origin, committee consideration, and debates were totally different from the two matters.

[21] Act of March 1, 1875, 18 Stat. 335.

that there should be "integrated" education. At that time public education of any kind was still regarded in many quarters as invidious, and education for the Negro (who in many states was still forbidden to learn to read or write) had only a short while prior thereto been deemed wholly objectionable by some legislators.[22]

In 1862, only a few weeks after slaves were freed in the District of Columbia[23] (and almost a year before the Emancipation Proclamation of January 1, 1863) the Congressional action was an attempt for the first time to provide "free"[24] public education for colored children. The Congress was concerned with that problem *alone*.

Similarly, in 1864,[25] when Congress provided that the amount used to support schools for colored children should be appropriated from the general revenues of the cities of Washington and Georgetown in accordance with the ratio of colored children to the total number of children, Congress was faced only with the problem whether (in view of the exceedingly small sums allotted by the authorities to the colored schools)[26] they should continue to tax colored persons separately to support schools for colored children.[27]

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[22] *Cf.* 62 Cong. Globe, 37th Cong., 3d Sess. 1326-1327 (1863).

[23] Act of April 16, 1862, 12 Stat. 376.

[24] Act of May 20, 1862, 12 Stat. 394; Act of May 21, 1862, 12 Stat. 407. In part, the purpose was to remedy the unjust discrimination of the existing D. C. school system which, as a result of slavery days, denied admittance to colored children while collecting taxes from their parents, forcing the latter to maintain their own schools. Bryan, History of the National Capital, Vol. II. (1916), pp. 137-38, 389, 524-528.

[25] Act of June 25, 1864, 13 Stat. 187, 191.

[26] In 1862 nothing was paid over by Georgetown and only $8,256.25 by Washington. In 1863, Georgetown paid $69.72 and Washington $410.89. The need for additional funds was obvious. *Special Report of the Commissioner of Education on the Condition and Improvement of Public Schools in the District of Columbia*, p. 253, H. Rep. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871).

[27] The earlier Act of May 21, 1862, *supra*, n. 24, required the use of 10 percent of the taxes levied upon property of colored persons for the support of such schools.

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So, too, when in 1866 [28] Congress expressly ordered that the Act of 1864 be construed so as to require the cities of Washington and Georgetown to pay over the appropriated sums to the trustees of colored schools, Congress had not been requested to "integrate" but was acting only to overcome the continued reluctance of the municipal authorities to make any but the most completely inadequate provision for the education of colored children. And further, when the following week[29] the Congress authorized the conveyance of certain lands of the United States to the trustees of colored schools it was again seeking to *provide* education for colored children; it was not determining a question of racial policy. Since at that very time Congress was debating the question whether segregation would be outlawed by the proposed Amendment,[30] it may be supposed that Congress would have been astonished to be told that it was elsewhere determining that very question—and by means of a localized statute, not a Constitutional Amendment of nation-wide scope and interest.

In sum, the whole point is that the major portion of the period under analysis was *prior* to and not contemporaneous with the Fourteenth Amendment and (as the Corporation Counsel has argued in another context)[31] "the laws setting up schools for colored were enacted at a time when members of that race were afforded no schooling whatsoever. The purpose of the laws was to give rather than to take away, was to afford opportunity rather than deny opportunity * * *."

Additional evidence of historical misconstruction in the *Carr* opinion is found in the fact that, contemporaneously with the adoption of the Fourteenth Amendment by the Congress, there was also enacted the bitterly fought over

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[28] Act of July 23, 1866, 14 Stat. 216.

[29] Act of July 28, 1866, 14 Stat. 343.

[30] Flack, Adoption of the Fourteenth Amendment (1908), pp. 77-82.

[31] Brief for Appellees in *Cogdell* v. *Sharpe*, No. 11,019, in U. S. Court of Appeals for District of Columbia Circuit, October Term, 1951, p. 58.

Civil Rights Bill of 1866.[32] So significant was that Bill that the Amendment was "sidetracked to give full sway to that important measure."[33] This bill was generally understood to have the effect of opening white schools to Negroes.[34] But this very fact was believed to raise substantial doubts as to its validity on the ground that it was an exercise of the powers of the States. Accordingly, the first section of the Fourteenth Amendment was designed to meet this alleged Constitutional infirmity and to make secure the provisions of the Civil Rights Bill.[35]

Following the ratification of the Amendment, the Bill was re-enacted[36] and has been enforced by this Court as recently as 1948, in *Hurd* v. *Hodge*, 334 U. S. 24.[37]

Thus it is plain that the conclusion reached in the *Carr* case not only ignores the time sequence of the statutes and the ratification of the Amendment, but also gives a completely distorted significance to the school legislation.

CONCLUSION

The advances commenced by the Civil War were slowed and almost halted by judicial gloss on the Fourteenth Amendment. We trust that it is worth reminding the Court that segregation is not a Constitutional command. It was nothing more than a *de facto* social phenomenon until this Court itself gave it legal and Constitutional dignity by its majority decision in *Plessy* v. *Ferguson*. By

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[32] Act of April 9, 1866, 14 Stat. 27 (passed over veto). This is *not* the Act invalidated in the Civil Rights Cases.

[33] Flack, op. cit., *supra*, p. 20.

[34] *Ibid*, pp. 40-54; Frank and Munro, op. cit., *supra*, p. 160.

[35] *Ibid*, p. 55.

[36] Act of May 31, 1870, 16 Stat. 140.

[37] The respondents argue that the failure to include schools within the coverage of the Civil Rights Act of 1875 indicates Congressional intent to permit segregation. (Br. p. 37) The answer to this is two-fold: (1) It was not *that* Congress which proposed the Fourteenth Amendment; and (2) the omission of schools was a purely political and practical matter, not negating the understanding that the Amendment (though obviously not self-executing) did prohibit separate schools. Brief of the Committee of Law Teachers, op. cit., *supra*, pp. 14-16; Frank and Munro, op. cit., *supra*, pp. 156-162.

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now it has become clear that "separate" in practice is never "equal", and it now needs only this Court's determination to strip from segregation its spurious dignity, by holding with Mr. Justice Harlan that "Our Constitution is color-blind."

Respectfully submitted,

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APPENDIX

The information in the following tables is culled from the files and resources of the organizations sponsoring this brief. It is intended to be only representative, not exhaustive, and it is believed to be accurate.

TABLE I

List of Cities in Southern and Border States in Which Some Schools, Colleges and Universities Have Been Recently Integrated.

ALABAMA
- Talladega

ARIZONA
- Douglas
- Duncan
- Globe
- Miami
- Prescott
- Tolleson
- Tucson

ARKANSAS
- Fayetteville
- Little Rock
- Pine Bluff

CALIFORNIA
- Contra Costa County
- Imperial Valley
- Santa Ana County
- Mendota

DISTRICT OF COLUMBIA

DELAWARE
- Claymont
- Hockessin
- Newark

GEORGIA
- Decatur

ILLINOIS
- Alton
- Argo
- Cairo
- East St. Louis
- Edwardsville
- Harrisburg
- Madison
- Metropolis

ILLINOIS (continued)
- Sparta
- Tamms
- Ullin
- Waukegan

INDIANA
- Elkhart
- Gary
- Indianapolis
- New Albany
- South Bend

KANSAS
- Topeka
- Lawrence

KENTUCKY
- Berea
- Fort Knox
- Lexington
- Louisville
- Nazareth
- Paducah

LOUISIANA
- Baton Rouge
- New Orleans

MARYLAND
- Annapolis
- Baltimore
- College Park
- Westminster

MISSOURI
- Columbia
- Kansas City
- St. Louis

NEW MEXICO
- Alamogordo
- Albuquerque
- Carlsbad
- Santa Fe

NORTH CAROLINA
- Asheville
- Camp Lejeune
- Chapel Hill
- Fort Bragg

OHIO
- Allendale
- Cincinnati
- Glendale
- Wilmington

OKLAHOMA
- Norman
- Stillwater

SOUTH CAROLINA
- Greenville

TENNESSEE
- Knoxville
- Mont Eagle

TEXAS
- Amarillo
- Austin
- Big Spring
- Corpus Christi
- Dallas
- Fort Worth
- Houston
- Plainview
- Wichita Falls

VIRGINIA
- Alexandria
- Charlottesville
- Fort Quantico
- Richmond
- Williamsburg

WEST VIRGINIA
- Buckhannon
- Morgantown

TABLE II

Schools, Colleges and Universities in the District of Columbia and Environs Which Will Accept Both White and Negro Students.

A. Nursery, Elementary and High Schools:

All Catholic parochial schools
Arlington Unitarian Church Summer School
Baker's Dozen Youth Center
Beauvoir Elementary School (1953)
Bethesda-Chevy Chase Nursery School
Burgundy Farms Country Day School
Community Nursery School
Georgetown Day School
Green Acres Day School
Hisacres New Thought Center Nursery School
Kenilworth School (Mother's Club, Nursery)
Lincoln Congregational Church Nursery School
Raymond School (Mother's Club, Nursery)
Rosedale School (Mother's Club, Nursery)
Silver Spring Nursery School

B. Colleges and Universities:

American University
Catholic University
Dunbarton College of Holy Cross
Georgetown University (all but Foreign Service School)
Howard University
National Law School
Trinity College

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TABLE III

"The School Doors Open Wide"

Examples of Recent Admission of Negroes to Educational Institutions in the South and Border Areas

A. In the South

1. PUBLIC EDUCATION

a. ELEMENTARY AND HIGH SCHOOL LEVEL

Delaware

Claymont—Negroes attend Claymont public school previously restricted to whites, for first time, under court order.[1]

Hockessin—Negroes admitted to Hockessin white public school, as ordered by state court.[2]

Kentucky

Fort Knox—Base public school, supported entirely by Federal funds, admits both Negro and white students on equal basis.

Maryland

Baltimore—Negro boys admitted to Baltimore's Polytechnic Institute (High School) although municipal ordinance bars admission.[3]

North Carolina

Camp Lejeune—Public school at Camp Lejeune, supported entirely by Federal funds, has successfully integrated its white and Negro students.

Fort Bragg—Integrated public school at Fort Bragg, operated entirely with Federal funds, operated without fanfare or incident since September, 1951. Only one parental complaint, about Negro students and teacher, soon ended.[4]

Virginia

Fort Quantico—Public school at Fort Quantico operates without segregation.

b. COLLEGE AND GRADUATE LEVEL

Arkansas

Fayetteville—Several hundred Negro students have received a friendly acceptance for nearly 4 years in graduate and professional schools of University of Arkansas.[5]

Little Rock—Negroes accepted without incident in law, education, and medical graduate schools of University of Arkansas, despite one local objection.[6]

Delaware

Newark—University of Delaware at Newark admits qualified Negroes to any course which is not provided at Delaware State College for Negroes.[7]

Kentucky

Louisville—Louisville Municipal University and Negro College completely and successfully integrated at graduate and undergraduate levels, in classes, dormitories, cafeteria, and all student activities. "A magnificent success," says Pres. Davidson.[8]

Lexington—University of Kentucky has successfully opened up graduate and professional schools to several hundred Negro students, who face no segregation in such places as the cafeteria.[9]

Paducah—Under court order, a Negro applicant has been accepted at Paducah Junior College.[10]

Louisiana

Baton Rouge—Negro student accepted without incident at Louisiana State University.[11]

New Orleans—Louisiana State University graduate college is open to Negro students.

Maryland

Annapolis—Negro graduates from U. S. Naval Academy at Annapolis.[12]

College Park—University of Maryland admits qualified Negroes to graduate and undergraduate schools. (Negroes have been admitted to the law school since 1935.) Integration (including admission to dormitory life) has been wholly successful.[13]

Missouri

Columbia—Negroes are being admitted to the University of Missouri after favorable action by students, administrators, and others, and without incident.[14]

St. Louis—Harris Teachers College, a municipal institution, admitted its first Negro under court order.[15]

North Carolina

Chapel Hill—Several Negroes attend University of North Carolina law school, as 2 graduates pass state bar examination. Other graduate schools also opened without incident.[16]

Oklahoma

Norman—Negro students have attended, and graduated from, various divisions of the University of Oklahoma since 1948, with no trouble of any kind.[17]

Stillwater—Negroes admitted to Oklahoma A. & M., join white students in athletic and other similar activities, without difficulty.[18]

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Tennessee

Knoxville—Negroes have been admitted to some of the graduate and professional schools of the University of Kentucky, without difficulty.[19]

Texas

Amarillo—Amarillo Junior College now admits Negro students.

Austin—Negroes enrolled successfully, despite widespread protest, in September 1950, at University of Texas.[21]

Texas University admits first two Negroes to Dental School.[21a]

Corpus Christi—Del Mar Municipal Junior College has opened its doors to qualified Negro residents of Corpus Christi.[22]

Big Spring—Howard Junior College, previously all white, has opened its doors to Negro students.[23]

Wichita Falls—Midwestern University ordered by Federal Court to admit colored students.[24]

Virginia

Charlottesville—Negroes admitted without incident to University of Virginia for first time in 1950.[25]

West Virginia

Morgantown—Negro students have been accepted into the University of West Virginia graduate, and more recently undergraduate, colleges successfully.[26]

2. PRIVATE EDUCATIONAL INSTITUTIONS

Alabama

Talladega—Talladega College becomes Alabama's first mixed educational institution by enrollment of a white student (other than a child of a white faculty member).[27]

District of Columbia

Washington—All catholic and most of the other parochial schools, and most private schools, have begun to operate in past several years on an interracial basis; so has the pre-nursery school program operated in cooperation with the District Recreation Department, youth centers, day-care centers, and other private institutions of an educational nature (See: Table II)

Negroes have been accepted in Georgetown University, Catholic University, National Law School, Washington College of Law, Dumbarton College of Holy Cross, Trinity College, and American University.

Georgia

Decatur—Columbia Theological School now admits Negroes.[28]

Kentucky

Berea—Berea College, subject of a 1908 court case upholding segregation, has successfully integrated Negroes at all levels since 1950.[29]

Louisville—Negroes successfully admitted to undergraduate schools of Ursiline College, Louisville Theological Seminary, Nazareth College, the Nursing School of St. Joseph's Infirmary, and Bellarmine College.[30]

Louisiana

New Orleans—Loyola University of this city and Southern Baptist Theological Seminary now admit Negro students.[31]

Maryland

Annapolis—Negro graduates, as another enrolls, at St. John's College in Annapolis.[32]

Baltimore—Johns Hopkins University in Baltimore has admitted Negroes each year since World War II.[33]

Westminster—Westminster Theological Seminary has opened its doors to Negroes.[34]

Missouri

St. Louis—Large numbers of Negro students have attended St. Louis University, where Negroes also serve on the faculty, since 1944. Washington University of St. Louis has admitted Negro students and has had Negro visiting professor, for some time. The St. Louis College of Pharmacy and Allied Sciences began admitting Negroes this year.[35]

St. Louis Catholic parochial schools have been integrated by order of the Catholic hierarchy, and have operated wholly without incident despite some parental protests.[36]

North Carolina

Asheville—Black Mountain College announces that its doors are opened to all persons regardless of color.[37]

Texas

Austin—The Austin Theological Seminary now admits Negro students.[38]

Dallas—Southern Methodist University has admitted 3 Negro students to its graduate school of theology.[39]

Forth Worth—Southwestern Baptist Seminary now accepts Negro students.[40]

Plainview—The local theological school, Wayland College, accepts Negroes.[41]

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Virginia

Alexandria—Burgundy Farm Country Day School is a most successful example of interracial operation on both the student and faculty level.[42]

Richmond—The Union Theological Seminary, and the Richmond Professional Institute, both admit Negroes now, though formerly open only to white students.[43]

Williamsburg—First Negro student is admitted to William and Mary College.[44]

West Virginia

Buckhannon—West Virginia Wesleyan has abolished segregation in its school entirely, after admitting Negroes to specific courses for some time.[45]

B. In Southwestern, Border and Other Areas.

1. PUBLIC EDUCATION

a. Elementary and High School Level

Arizona

Douglas—Public schools have been integrated.

Duncan—Public School segregation of white and Negro students ends as litigation is settled out of court.[46]

Globe—Globe public schools are integrated without incident.[47]

Miami—Segregation in the public schools ends here without difficulty of any sort.[48]

Prescott—Segregated schools end successfully in Prescott.[49]

Talleson—Segregation of pupils of latin descent is ended by Federal Court order.[50]

Tuscon—Segregated public schools ended in Tuscon with full integration of students, teachers and administrators in 1951. In spite of many advance protests, Superintendent Morrow says system works well.[51]

(All the foregoing occurred following 1950 state referendum authorizing integration by School Boards)[52]

California

Imperial Valley—Kindergarten and elementary pupils and teachers have been integrated.

Contra Costa County—Segregation is ended in county schools by Federal Court order.[53]

Mendota—Integration of separate schools for Mexican and white children is highly successful.[54]

Santa Ana—Segregation of Mexican school children in the Westminster School District is ended by court order.[55]

Illinois

Alton—Long-standing segregation in public schools of Alton successfully ended, despite rumors of trouble and initial protests.

Argo—Segregation in public schools successfully ended.

Cairo—Despite violent objections, schools successfully maintain new policy of opening schools to all, and strife ceases.[56]

Edwardsville—Segregation in public schools successfully ended.

East St. Louis—85 year policy of segregation ended without difficulty in 1950, despite rumors of trouble and student strikes which did not occur.[57]

Harrisburg—Segregation in public schools ended without incident.

Tamms—Public schools successfully end segregation in 1951.[58]

Ullin—Schools here were integrated in 1951 without any difficulty.[59]

Waukegan—Public schools successfully integrated in 1951.[60]

Indiana

Gary—Protests and disorder successfully overcome as large Negro and white student bodies became completely integrated.[61]

Indianapolis—Despite agitation by the K.K.K., separate Negro and white schools at Indianapolis are integrated without serious disruption.[62]

New Albany—Segregated school systems completely and successfully integrated with respect to both teachers and students.

New Jersey

General—Nearly four dozen communities in New Jersey have seen their Negro and white schools integrated successfully in the past several years. The few protests and withdrawals which arose were quietly ended by the finality of the decision. Segregation in a peaceful and successful manner was particularly significant in towns which evidenced strong prejudice, including populations of lower than average educational background, as well as those of intellectual and cultural pride, where both teachers and students were successfully integrated.

Communities in New Jersey where public schools have been integrated include: Freehold, Camden, Haddonfield, Burlington, Bordentown, Cape May, Egg Harbor, Fair Haven, Florence, Greenwich, Long Branch, Lower Penns Neck, Palmgra, Penns Grove, Pleasantville, Princeton, Princeton Township, Quin-

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ton, Riverside, Salem, Shrewsbury, Woodstown, Trenton, Asbury Park, Mount Holly and Atlantic City.[63]

Princeton—In intellectually elite Princeton, installation of a Negro teacher in the newly-integrated school attended by children of both races caused a withdrawal of seven children to the exclusive private schools nearby; yet all but one returned before semester's end.[64]

Salem—In Southern-like Salem, N. J., where over one-third of the students were colored, the white and Negro schools were completely integrated with a Negro principal remaining in charge of white teachers. There was no difficulty.[65]

New Mexico

Alamogordo—Segregation in public schools is abolished and Negro faculty member appointed.[66]

Albuquerque—Segregation of public school systems is ended in this large city of Southern traditions.

Carlsbad—Schools integrated for first time in 1951, after welcoming vote by students and faculty.[67]

Santa Fe—Racial segregation in public school system is ended.

Ohio

Glendale—Segregation in Glendale public schools ends on advice of County Attorney.[68]

Wilmington—Further desegregation of grade levels in elementary schools undertaken, high schools already being non-segregated.[69]

Pennsylvania

Carlisle—Segregation of Negro children eliminated from school system.[70]

b. College and Graduate Level

Note: Successful integration in these institutions outside of the South has been too widespread and universally accepted for recent developments to be regarded as significant.

For some examples and surveys see: National Scholarship Service and Fund for Negro Students, "Opportunities in Interracial Colleges," 1951 (over 200 interracial colleges listed); Roche, "Catholic Colleges and the Negro Student," 1948 (overwhelming majority of Catholic colleges admit Negroes); Texas Legislature Council, "Staff Monograph on Higher Education for Negroes in Texas," 1951 (Negroes at University of Texas and other Southern institutions, following *Sweatt* and other cases); Na-

tional Assn. of Intergroup Relations Officials, "Toward Equality in Education," 1952 (white students enrolled at Southern Negro colleges, and more white colleges than listed here would welcome Negro students if enabled to do so); "The American Negro in College, 1949-1950," Crisis, Vol. 57, No. 8, p. 488; "The American Negro in College, 1950-1951," Crisis, Vol. 58, No. 7, p. 445. Sorensen, "The School Doors Swing Open," New Republic, 127:13, Dec. 15, 1952.

2. PRIVATE EDUCATIONAL INSTITUTIONS

Note: Successful integration in these institutions outside of the South has been too widespread and universally accepted for recent developments to be regarded as significant.

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Sources for information in Table III are listed below. The abbreviations refer to the following publications:

B.S.—"Civil Rights in the United States—A Balance Sheet of Group Relations," published jointly each year by the American Jewish Congress and the National Association for the Advancement of Colored People.
J.N.E.—Journal of Negro Education.
N.Y.T.—New York Times.
W.A.A.—Washington Afro-American.
W.D.N.—Washington Daily News.
W.E.S.—Washington Evening Star.
W.P.—Washington Post.

1 W.A.A., 4-5-52.
2 W.A.A., 4-5-52; N.Y.T., 8-29-52.
3 W.D.N., 9-4-52.
4 W.P., 10-14-51.
5 N.Y.T., 10-23-50.
6 N.Y.T., 10-23-50; W.A.A., 11-27-51.
7 1948 B.S., p. 24.
8 New Republic, 7-21-52.
9 N.Y.T., 10-23-50.
10 1950 B.S., p. 44.
11 1950 B.S., p. 44; W.E.S., 3-28-52.
12 W.E.S., 6-7-52.
13 1948 B.S., p. 24.
14 1950 B.S., p. 44.
15 1949 B.S., p. 32.
16 The Voice (A.N.P.), 9-18-52; W.A.A., 5-1-51.
17 1950 B.S., p. 44.
18 1950 B.S., p. 45.
19 W.E.S., 1-12-52; N.Y.T., 10-23-52.
20 Amsterdam News, 8-9-52.
21 N.Y.T., 10-23-50.
21a N.Y.T., 9-11-52, 38:8.
22 Amsterdam News, 8-9-52.
23 Amsterdam News, 8-9-52.
24 W.A.A., 1-52.
25 N.Y.T., 10-23-50.
26 N.Y.T., 10-23-52.
27 W.A.A., 1-52; N.Y.T., 2-4-52.
28 1951 B.S., p. 66.
29 N.Y.T., 10-23-50.
30 N.Y.T., 10-23-50; W.A.A., 1952; Colored Harvest, 11-52; Crisis, No. 5, 1952, p. 594.
31 W.A.A., —, 1952.
32 W.E.S., 7-10-52; N.Y.T., 1-2-49.
33 1951 B.S., p. 66.
34 W.A.A., —, 1952.
35 St. Louis Argus, 6-20-52; N.Y.T., 10-23-50; 1951, B.S., p. 66.
36 Rose (ed.), Race Prejudice and Discrimination (1951), p. 548.
37 W.A.A., 1952.
38 1951 B.S., p. 66.
39 1951 B.S., p. 66.
40 1951 B.S., p. 66.
41 1951 B.S., p. 66.
42 W.P., 7-19-52.
43 1951 B.S., pp. 66-67.
44 W.A.A., 5-18-51.
45 1949 B.S., p. 32.
46 1949 B.S., p. 33.
47 Nation, 4-28-51.
48 Nation, 4-28-51.
49 Nation, 4-28-51.
50 1951 B.S., p. 65.
51 Time, 10-8-51.
52 1951 B.S., p. 58.
53 W.A.A., 11-20-51.
54 Survey, 1951.
55 Westminster.
56 Time, 2-18-52; Nation, 2-9-52; N.Y.T., 9-7-52, 14:1.
57 N.Y.T., 12-22-49, 1-30-50.
58 W.A.A., 9-31-52.
59 W.A.A., 9-30-52.
60 W.A.A., 9-30-52.
61 N.Y.T., 6-7-47, 9-13-47.
62 The Reporter, 12-6-49.
63 N.Y.T., 6-5-48; J.N.E., Summer, 1952.
64 J.N.E., Summer 1952.
65 J.N.E., Summer 1952.
66 The Voice (A.N.P.), 9-4-52.
67 Nation, 9-22-51.
68 W.A.A., 10-21-52.
69 1950 B.S., p. 49.
70 1948 B.S., p. 24.

TABLE IV

"The Old Order Changeth"
(Representative Departures From Segregation Throughout the Nation)

A. In Public Accommodations

Alabama

1. United Nations Week observed by inter-racial, inter-faith celebration in Birmingham (1951).

Arkansas

2. Little Rock Public Library ends entry ban against Negroes (1951).
3. McRae Memorial Sanatorium opens near Little Rock with inter-racial surgical staff (1951).

Delaware

4. Six movie houses in Wilmington admit Negroes for the first time (1952).

District of Columbia

5. Refusal to carry Negroes on Potomac River's Wilson Line excursion boat is ended by Interstate Commerce Commission order (1951).
6. Eating places in District of Columbia serving without discrimination following efforts of "Coordinating Committee for the Enforcement of D. C. Anti-Discrimination Laws of 1872-1873" are listed as follows:

1950
April—Greyhound Post House.
July—Kann's Department Store.
July—Trailways Depot.
Sept.—G. C. Murphy & Co. (Park Road),
Woolworth & Co. (all stores),
F & W Grand (all stores),
McCrory (all stores),
Goldenberg Department Store.
1951
Jan.—S. S. Kresge Co. (all stores).
April—McBride's.
July—Neisner's.
1952
Jan.—Hecht Co.
March—Lansburgh & Bro. Dept. Store.
Sept.—G. C. Murphy & Co. (F St. store).

Also listed by the Committee are 27 other eating places as well as many hotel dining rooms (1952).

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7. Recreation Board's annual report reveals increase in attendance at playgrounds, including integrated areas. Recreation Dept. head reports integrated units operated much more fully than those on segregated basis (1951).
8. Attendance at inter-racial pools increased in 1951 by 24% over 1950; no disturbances of any kind since 1949 (1951). D. C. Recreation Board continues policy of gradual abandonment of segregation. Four more playgrounds declared "open" after widespread community discussion and much opposition. No "incidents" reported following change of designation of the playgrounds (1952).
9. Summer theatre for mixed audience opens at Meridian Hill Park; hailed as complete success (1949).
10. U. S. O. canteen in District's Lafayette Square opens as integrated center (1951).
11. Negro Wave is crowned carnival queen of U. S. O.'s integrated Lafayette Square canteen, winning over eight white contestants (1952).
12. Eleven Howard University and two Meharry interns (Negro) join staff of District's Gallinger Hospital, continuing a process commenced in May 1949 with "no incidents" (1951).
13. Inaugural Committee chairman announces policy of non-segregation at Inaugural ceremonies, including ball, during January, 1953; asks for relaxation of segregation by restaurants and hotels (1952).

Florida

14. Unsegregated audience of 7,000 sees "Jazz at the Philharmonic" concert in Miami (1951).
15. Miami opens new library to all persons, regardless of color (1952).
16. Negro Doctor is appointed to staff of white hospital in Miami Beach; first such appointment in the South (1952).

Kentucky

17. Louisville's five public golf courses opened to Negroes by Mayor following Federal Court action (1952).
18. Negroes admitted for first time to all departments of main branch of Louisville Public Library (1948).
19. State Legislature passes hospital bill containing anti-discrimination clause (1952).

Louisiana

20. New Orleans ends some segregation at Union Station (1951).

Maryland

21. Baltimore Marine Hospital now completely without segregation in any of its facilities (1951).
22. State Legislature repeals law segregating Negroes on intrastate steamboats and railways (1951).
23. Baltimore Park Board ends segregation at 4 city golf courses, 20 tennis courts, baseball fields, playgrounds, and other facilities (1951).
24. Campers and counsellors are integrated at Senior High Conference and Junior High Camps at Colona, Md., operated by the Board of Christian Education of the Presbyteries of Baltimore, Washington and New York (1952).
25. Baltimore's Friendship International Airport agrees to serve all persons regardless of color in dining room and cocktail lounge (1952).
26. Gov. McKeldin calls racial bias in theatres "offensive and illogical" (1952).
27. Ford Theatre in Baltimore drops segregation policy in effect since 1871 (1952).
28. Christ Child Home for Convalescent Children opens in Rockville for children of all races (1952).

Missouri

29. St. Louis municipal pools continue to operate on non-segregated basis in 1951; attendance closer to average of past years than in 1950, first year of non-segregation.
30. Kansas City Council ends segregation at public events in Municipal Auditorium, Municipal Air Terminal, and Municipal Starlight Theatre (1951).
31. St. Louis County recreation park concessionaires comply with order to serve Negroes (1951).
32. Publishers attending St. Louis convention astonished when, for first time all downtown hotels accept colored guests, thus expanding breaches in segregation pattern previously made in parks, swimming pools, municipal opera, airport facilities, and colleges (1952).
33. U. S. District Court bans segregation in publicly-owned swimming pools in Kansas City (1951).

New Jersey

34. Atlantic City Hospital accepts Negro doctors and nurses on staff for the first time (1950).

New Mexico

35. Albuquerque City Commission enacts strong anti-discrimination ordinance for all places of public accommodation (1952).
36. La Fonda Hotel in Santa Fe accepts Negro guest for first time in its history (1952).

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North Carolina

37. First unsegregated radio audience in history of Charlotte meets for Town Meeting of Air program (1948).

Ohio

38. East Liverpool ends segregation in public swimming pools without difficulty (1951).
39. Eleven of fifteen public swimming pools in Cincinnati are operated on non-segregated basis (1951).
40. Airport restaurant agrees to ban discrimination against Negroes at Cincinnati airport (1951).

Oklahoma

41. Segregation in all forms for both interstate and intrastate riders is eliminated from Rock Island Railway by company order (1951).

Pennsylvania

42. Pennsylvania Railroad ends discrimination in reserving coach seats on travel destined for the South (1949).

Texas

43. Austin's city council opens main branch of its public library to all citizens (1952).
44. Unsegregated audiences attend concert of "Jazz at the Philharmonic" troupe at El Paso and San Antonio (1952).
45. Winnie Street YWCA opens all-white dining room to colored persons (1951).
46. Dallas' Baker Hotel serves Negro luncheon guest for first time as one of winners of contest sponsored by Serra Club (1952).

Virginia

47. First non-segregated audience in history of Norfolk Museum of Arts and Sciences attends exhibition and lecture (1949).
48. White and Negro seamen mingle unrestrictedly in Norfolk's new National Maritime Union Building (1949).
49. Manager of Charles Department Store in Richmond affirms non-segregation policy in lunch room and continued lack of friction (1951).
50. Restaurant ordered by court to end racial segregation at Washington National Airport (1948).
51. Gov. Battle and Gov. Scott of North Carolina speak to unsegregated audience at the Mosque in Richmond (1951).
52. Historic Williamsburg Inn entertains first Negro guests (1952).

West Virginia

53. Airport restaurant in Charleston halts discrimination against Negroes after court order (1951).

B. In the Field of Education

South

54. Roper survey shows that 42 percent of persons in the South think that "eventually children of all races and colors will go to the same public schools together everywhere, including the South" (1950).
55. 200 teachers from 116 Southern and border state colleges and universities, meeting at Atlanta University, on a non-segregated basis, call for removal of all laws requiring segregation in education (1950).
56. About 100 college presidents, deans, and other educators unanimously adopt recommendation to all institutions of higher learning to eliminate all forms of racial segregation and discrimination in admission (1949).
57. Southern Conference Educational Fund announces poll of 15,000 Southern college teachers shows 70% of those replying (3,375) favor admission of Negroes to professional and graduate schools (1949).

Alabama

58. Auburn Institute student newspaper calls for admission of Negroes to white colleges (1950). See items 67, 79 below.
57. Talladega College (Birmingham) names first Negro president (1952).

Arkansas

60. Negro law student at University of Arkansas is elected president of dormitory, most of whose residents are white (1952).

California

61. Woman teacher is first Negro appointed to Los Angeles Board of Education (1952).

District of Columbia

62. Student newspaper at George Washington University urges university officials to permit admission of Negro students (1949).
63. Howard and Fisk Universities are first two Negro institutions admitted to Phi Beta Kappa (1952).
64. Superintendent of Schools announces abandonment of rule that Negroes and whites cannot appear together during school hours at any school building (1952).

Florida

65. The state-wide Florida Student Government Association adopts resolution opposing segregation (1951).

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Georgia

66. Georgia University Regents reject $10,000 gift from J. W. Pew to distribute book favoring segregation and white supremacy (1951).
67. Three Negroes win high awards at Atlanta University's annual art exhibition (1951).
68. Negro elected to Augusta's Board of Education, first time since Reconstruction days any Negro has held public office in Richmond County (1952).
67. Emory University student publication calls for admission of Negroes to white graduate schools and colleges (1950).
70. Students at Candler School of Theology in Atlanta vote, 234 to 13, in favor of admitting Negroes (1950).
71. Students and faculty at Piedmont College attack the institution's acceptance of gift from anti-Negro propagandist (1951).

Indiana

72. All opposition to Negroes has broken down in clubs, dormitory life and classes at Notre Dame and St. Mary's College for Women (1949).

Kentucky

73. Catholic Committee of the South recommends all institutions of higher learning admit Negroes without discrimination (1949).

Louisiana

74. Non-segregated audience of elementary and high school teachers meets in New Orleans school building for first time to discuss joint educational problems (1952).

Maryland

75. Baltimore witnesses first inter-racial summer vacation school for children, sponsored by Baltimore's Catholic Inter-racial Council (1952).
76. Governor McKeldin appoints Negroes to state and county boards of education (1951).
77. Co-ordinating Council of School P. T. A.'s of Baltimore, having small number of Negroes, chooses Negro man for vice-president over white woman opponent (1952).

Mississippi

78. Jefferson Military College (Natchez) refuses 50 million dollar endowment from Armstrong Texas Education Association conditioned on school limiting enrollment to "white Christians" and proselytizing for "white supremacy" (1949).
79. Student publication of University of Mississippi calls for "admission of Negroes to white graduate schools," concluding that "the pigment of a man's skin should not make any difference." Student senate refuses to order editor's discharge. Millsaps College publication echoes same view (1950).

Missouri

80. Students at Missouri University vote, 4,156 to 1,847, in favor of admitting Negroes. Curators of the university recommended legislation to admit Negroes to facilities not found at Lincoln University (1949).

New Jersey

81. First Negro is appointed to Jersey City Board of Education (1950).

North Carolina

82. Negro doctor is first of his race to become member of North Carolina Board of Education (1949).
83. University of North Carolina's "tacit understanding" to enforce segregation at all public meetings is denounced by the president of the student body and other campus leaders and in lead editorial of student newspaper (1950).
84. Order of University of North Carolina officials banning newly-admitted Negro students from cheering section at football games reversed after sharp criticism of, and protest against, order by 14 student organizations (1951).
85. First Negro is appointed to Durham's Board of Education (1951).

Oklahoma

86. One thousand white students at Oklahoma State University burn copy of Fourteenth Amendment and mail ashes to President Truman to protest school's segregation policy (1948).

South Carolina

87. Student at College of Charleston polls 152 fellow-students, 126 of whom stated it would make no difference to them if Negroes were admitted to their classes and 91 said Negroes had a "moral and ethical" right to attend (1951).

Tennessee

88. Eight of nine faculty members resign in protest over decision of trustees of University of the South (Sewanee) not to admit Negroes to the theological school (1952).
89. Members of the faculty of the third annual Cumberland Forest Music Festival cancel teaching and concert as protest against refusal of Sewanee to admit Negroes (1952).
90. First Negro educator named as supervisor of instruction for Nashville elementary and secondary schools (1952).
91. Dr. H. D. West is first Negro to head Meharry Medical College (1952).

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Texas

92. University of Texas school newspaper commends Supreme Court's *Sweatt* decision and declares: "All over the South the new change is being accepted with good grace. Nowhere has there been a suggestion that race relations have been injured, rather to the contrary" (1950).

Virginia

93. Ralph Bunche addresses mixed audience, largest in history of University of Virginia, despite segregation law (1951).

C. In Voluntary Associations

1. DOCTORS

Alabama

94. 500 Negro and white doctors attend annual meeting at John A. Andrew Clinical Society (1951).

District of Columbia

95. D. C. Optometric Association, by unanimous vote, admits first Negro (1952).
96. D. C. Medical Society admits five Negro physicians for first time after overwhelming approval by membership (1952).

Florida

97. Florida Medical Association admits Negroes for the first time (1950).

Georgia

98. Georgia Medical Association admits Negroes to scientific sessions (1952).
99. Fulton County Medical Association in Atlanta, by vote of 176 to 33, removes bar to membership of qualified Negro physicians (1952).

Kentucky

100. Kentucky Medical Association abandons race as a qualification to membership (1951).

Missouri

101. Missouri Medical Association votes, 60 to 16, to change constitution and admit Negro doctors (1949).
102. St. Louis Dental Society votes almost 2 to 1 to unite Negroes to membership (1951).

Oklahoma

103. Oklahoma Medical Association votes to invite Negro physicians to attend scientific sessions (1950).

Tennessee

104. Newly-elected president of Tennessee State Medical Association calls for removal of race bar.

Virginia

105. Delegates from Northern Virginia branch of Medical Society of Virginia to vote to change society's color bar (1951).

2. NURSES

106. National Association of Colored Graduate Nurses disbands, having achieved its purpose of integrating Negro nurses into nursing profession.
107. American Nurses Association approves full Negro role in all activities (1950).

Alabama

108. Alabama Nurses Association votes to admit Negroes to membership (1949).

Arkansas

109. Arkansas State Nurses Association votes unanimously to admit Negroes to full membership (1949).

District of Columbia

110. D. C. Graduate Nurses Association removes bar to Negro membership; 25 admitted by end of first year.

North Carolina

111. North Carolina Association of Registered Nurses votes unanimously to dissolve, following by nine months the vote of North Carolina State Nurses Association to give full membership to Negro nurses.

Ohio

112. Admit first Negro nurse to Ohio State Nurses Association (1952).

3. LAWYERS

113. Twenty-five State Bar Associations are fully integrated (1950).

Alabama

114. Alabama Bar Association, which admitted first Negro years ago, now has 7 Negro members (1950).

District of Columbia

115. Inter-racial Lawyers Committee starts Community Chest drive among lawyers.

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Ohio

116. Cincinnati admits two Negro lawyers to Bar Association for the first time (1951).

Texas

117. Galveston County Bar Association amends constitution to remove barrier to Negro membership (1951).

4. EDUCATORS AND SCIENTISTS

Arkansas

118. Arkansas Education Association admits Negroes (1950).

District of Columbia

119. Prof. E. Franklin Frazier, elected President of American Sociological Society, is first Negro to be President of an American professional society not composed only of Negroes (1948).

120. Washington Metropolitan Chapter of American Institute of Architects votes unanimously to admit members without regard to color (1946).

Georgia

121. Georgia Teachers and Education Association becomes first Negro state group to affiliate with National Education Association after N. E. A. announces eligibility of Negro delegations (1951).

Louisiana

122. Segregation abandoned at New Orleans convention of National Education Association.

Maryland

123. Maryland State Teachers Association votes 5 to 1 to eliminate "white only" membership requirement and invites all teachers to participate in activities (1951).

North Carolina

124. North Carolina Science Academy votes with only one dissenter to admit Negroes to full membership (1951).

Ohio

125. Negro admitted to National Engineering Society (Tau Beta Pi) 22 years after election when admission barriers are removed.

Texas

126. Texas Social Welfare Association, in which Negroes are fully integrated, adopts resolution to meet only where Negroes will not be "Jim-Crowed" (*Circa*, 1947).

Washington

127. Convention of American Association of University Women at Seattle votes, 2,168 to 68, to admit Negroes to membership (1949).

South

128. State Library Associations in Oklahoma, Virginia, Arkansas, Texas, and Kentucky are open to full Negro participation, and have been for many years (1950).

5. SERVICE ORGANIZATIONS

129. Report on inter-racial advance shows all branches of YMCA are open to colored and white members alike in Detroit, New York, Cleveland, Chicago, Philadelphia, San Francisco, Emporia, Kansas; Fort Wayne, Indiana; Kansas City, Missouri (cafeteria only); Providence, Rhode Island; Paterson, New Jersey, Joliet, Illinois; Altoona, Pennsylvania; Canton, Ohio, and Colorado Springs, Colorado (1951).

District of Columbia

130. National Symphony Orchestra Association removes racial barriers to membership (1952).

Illinois

131. Illinois State American Legion convention unanimously approves resolution to admit Negro, Filipino, and Japanese veterans to all divisions (1952).

Kentucky

132. First Negro appointed director of Louisville Community Chest.

North Carolina

133. Colored Girl Scout represents entire State at National encampment (1949).

Tennessee

134. American Red Cross removes racial designations in blood collecting program. Memphis Chapter balks. Citizens of Memphis in turn rebel at refusal to accept the National ruling (1952).

Virginia

135. Thirty young white persons holding N.C.C.J. seminar in Norfolk decide to invite colored representatives to meeting next year (1952).

New York

136. International Geneva Association, a society of chefs, headwaiters, and hotel and restaurant managers, revokes 75-year-old ban on Negro membership (1952).

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D. In Religious Bodies

South

137. Southern branch of Presbyterian Church in the United States after 91 years votes to dissolve its one Negro synod and to absorb it into the general organization (1951).

General

138. National Council of Churches of Christ in the U. S. A. renounces all patterns of segregation based on color (1952).

California

139. Methodists at quadrennial general conference vote to permit changes in segregation practices by member churches (1952).
140. Two San Francisco Presbyterian congregations, one entirely Negro, the other entirely white, merge as a single church under a Negro pastor (1951).

District of Columbia

141. Secretary for Social Action of Board of Social Missions of United Lutheran Church urges end of color bar to membership.
142. First Washington Negro pastor appointed to head mixed parish in Northwest section.

Louisiana

143. Archbishop Rummel issues pastoral letter in New Orleans calling on all Catholics to break down segregation in "education, industry, and opportunity" as well as in "social and civic relationships" and "in the seating accommodations, at the confessional, at the communion rail, and in the general reception of sacraments and sacramentals of the Church" (1951).

Missouri

144. Lutheran Church, Western District of Missouri Synod, to admit Negro congregations for first time (1949).
145. Report discloses 30 Catholic parishes in St. Louis have integrated congregations (1951).

New York

146. St. Paul Evangelical Lutheran Church in Brooklyn becomes first integrated Lutheran church in America (1951).
147. First Negro is elected chairman of Executive Committee of Congregational Christian Churches (1950).

North Carolina

148. Presbyterians end segregation at church resort at Montreat, North Carolina (1951).

Ohio

149. World Baptist Congress in resolution adopted at convention calls on all associated organizations to abandon segregation and discrimination (1950).

South Carolina

150. Negro Baptist churches in Columbia agree to drop color bar and admit whites (1951).

Virginia

151. Norfolk Ministers' Association abolishes segregation at United Preaching Mission.
152. White Norfolk pastor challenges his congregation to admit Negroes to membership.
153. Augusta County Ministerial Association in Staunton, Va., and Ministerial Association of Clifton Forge, Va., both inter-racial, are now headed by Negro presidents. The pattern had long ago been developed by the Ministers' Inter-racial Group of Lynchburg, Va. (1952).

E. In Employment

South

154. Southern Regional Council reports 16 major Southern cities employ about 6,500 Negro municipal workers in more than 110 different kinds of jobs, including professional and managerial. Report asserts Negro city workers accepted by the entire community "as a matter-of-course," and that only reason hiring of Negroes is not stepped up seems to be "fear of criticism for going too fast." Sixteen cities surveyed were: Atlanta, Birmingham, Dallas, Fort Worth, Houston, Jacksonville, Knoxville, Little Rock, Louisville, Miami, Nashville, New Orleans, Norfolk, Oklahoma City, Richmond, and San Antonio (1951).

District of Columbia

155. Peoples Drug Stores, largest chain pharmacy in District, hires three Negro pharmacists.

Florida

156. H. H. Arrington is first Negro member of the Florida bar.

Illinois

157. Chicago Association of Commerce reports development of wide utilization of Negroes among its members, some of whom had formerly resisted even legal action to compel employment (1952).

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Maryland

158. Baltimore taxi company hires 14 Negro drivers as experiment at beginning of 1951; ends up year with 161 drivers, and no "incidents."
159. Baltimore Transit Company employs 5 Negro bus drivers, first in company's history.

Missouri

160. St. Louis Post-Dispatch announces hiring of Negro reporter, first in 40 years (1949).

New York

161. National Urban League reports 550 "first" jobs were found for colored workers in 1951 and that significant improvements in racial situations were found in eleven cities, including Memphis, Tennessee, Phoenix, Arizona, and Baltimore, Maryland.

North Carolina

162. The Rocky Mount Sanitarium admits two Negro doctors to its staff with full privileges. They are the first to be thus accepted in a Southern hospital (1949).

Pennsylvania

163. Negroes promoted for first time to skilled jobs at Philco Philadelphia plant, thus ending a long-established departmental segregation (1951).

Tennessee

164. Gov. Browning breaks precedent and appoints two Negro women to work in state employment service office (1952).

Virginia

165. First Negro fireman in history is employed by city of Richmond.

F. In Entertainment and Athletics

Arizona

166. Long Island University assured by University of Arizona of non-discrimination against Negro basketball players (1951).
167. University of Arizona will no longer play with teams which bar Negroes on opponents' teams. Its teams are open to all, along with the following Border Conference teams: Texas Western (El Paso), West Texas (Canyon, Texas), Hardin-Simmons (Abilene), Arizona State (Temple), Arizona State (Flagstaff), New Mexico A. & M. (Las Cruces) (1951).

California

168. Precedent set when Professional Golfers' Association changes rules and permits Negroes to compete in tournament at San Diego (1952).

District of Columbia

169. Washington Caps introduce mixed team in National Basketball Association without incident.
Washington Lions purchase first Negro hockey player from Canadian team.
D. C. Golden Gloves tournament drops bar to Negro entrants.
170. Negro teams participate for first time in softball league sponsored by District Recreation Board (1952).
171. Dorothy Maynor is first Negro to perform commercially in D. A. R.'s Constitution Hall (1952).
172. Hamilton Bank sponsors high school musical talent contest open to all Washington pupils. Finals held at Constitution Hall (1951).
173. Colored students accepted as matter of course on American and Catholic University teams (1951).

Florida

174. Miami holds mixed boxing matches with no difficulties, though the sports editor of Miami Daily News had warned "It's a backward step, loaded with dynamite" (1952).
175. Tampa Smokers baseball team breaks precedent in Florida league with first Negro player (1952).
176. First colored jockey in Florida rides at Hialeah Park (1952).
177. University of Miami breaks tradition; plays football against University of Pittsburgh and University of Iowa, both having Negroes on team (1952).
178. Marian Anderson sings before unsegregated audience in Miami (1952).

Georgia

179. Despite warning by Dr. Green, K. K. K. head, that 10,000 will boycott Atlanta baseball games if Negroes play, exhibition game is held between Brooklyn Dodgers and Atlanta baseball club (1949).
180. Southern Association Baseball League officials state their view that colored players are acceptable to them and to the public; only remaining obstacle is Birmingham, Alabama, ordinance barring mixed play (1952).

Louisiana

181. State Legislature defeats bill designed to prevent white and Negro athletes from playing opposite each other (1952).

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New Jersey

182. Precedent set when swank Maplewood Country Club accepts two colored entrants to play in Eastern Veterans Championship tennis matches (1952).

New York

183. First Negro woman is accepted as entrant in National Amateur Tennis Championship (1950).
184. Negro team breaks precedent when allowed to compete in American Bridge Association national tournament (1951).
185. Amateur Fencers League of America votes to accept all members, regardless of color (1949).
186. Metropolitan Opera breaks precedent by having Negro ballet dancer Janet Collins and Negro singers in chorus (1951).

North Carolina

187. First Negro plays football in North Carolina against a Southern Conference team (1950).

Oklahoma

188. Negroes play for first time on Oklahoma College football field in game against University of Tulsa (1948).

Tennessee

189. Negro singer Mary Robbs is first Negro ever to appear as soloist with Chattanooga Orchestra; mixed audience mingles freely (1951).

Texas

190. Dallas baseball team to use Negro players, first in Texas League. Ty Cobb, native Georgian, voices strong approval (1952).

Virginia

191. Ralph Thomas, Negro baritone, sings with all-white group in play at Salem, Va. (1952).

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DEC 6 1952

IN THE

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OCTOBER TERM, A. D. 1952.

No. ~~413~~ 8 4

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Appellants,

vs.

C. MELVIN SHARPE, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned as counsel for and on behalf of American Federation of Teachers, respectfully moves this Honorable Court for leave to file the accompanying brief as Amicus Curiae. Consent has been given by counsel for appellants and appellees. The letters giving such consent accompany this brief.

The American Federation of Teachers is an organization of more than 350 locals of 60,000 teachers throughout the country, committed to a policy of "Democracy in Education—Education for Democracy". Its membership con-

sists chiefly of classroom teachers who do the actual work of teaching the children in the nation's schools.

In its own affairs it is committed to a practice of complete equality and non-segregation between teachers of every race. Its Constitution provides:

> "Section 11 (of Article III). No discrimination shall ever be shown toward individual members, or applicants for membership because of race * * *."

It has worked unceasingly throughout its history, and with greater intensity in recent years, for the abolition of all forms of discrimination and segregation in education based on racial differences.

Its members, as shown by the proceedings of its national conventions, have repeatedly asserted a fixed opinion that segregated school systems are a basic violation of the rights guaranteed by the Constitution of the United States.

JOHN LIGTENBERG,

Counsel for the American Federation of Teachers.

SELMA M. BORCHARDT,

Of Counsel.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF THE AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE.

The American Federation of Teachers submits this brief as amicus curiae in view of the great importance to democracy and the cause of education of the constitutional issues involved in this case.

Through the daily experience of its members the American Federation of Teachers is cognizant of the harm done to education by the practice of segregated schools.

Opinions Below.

Statutes Involved.

The opinions below and the statutes involved are set out in the brief of the appellants.

Question Presented.

The question presented here is whether or not the Board of Education of the District of Columbia deprives the Negro school children, including the appellants, of rights secured by the Constitution and laws of the United States, including the Fifth Amendment of the Constitution of the United States and the Federal Civil Rights Act.

Statement.

This is a class action in which the plaintiffs seek an injunction restraining the Board of Education of the District of Columbia, its members and employees, from operating a system of schools in the District of Columbia in which separate schools are operated for white and colored children and mandating them to admit the minor appellants and other Negro children similarly situated to the public schools of the District of Columbia without discrimination based on race or color. A motion to dismiss was filed by the defendants and the case was dismissed by the District Court on the ground that the complaint failed to state a cause of action upon which relief could be granted. The United States Court of Appeals for the District of Columbia upheld this decision and the case is before the United States Supreme Court for review.

The substantial issue is whether segregation of children in the grade and high schools of the District of Columbia

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is *per se* a denial of "due process" and the equal protection of the laws and of the rights of the plaintiffs and others similarly situated under the Federal Civil Rights Statute.

Summary of Argument.

In this brief amicus curiae the American Federation of Teachers will argue that segregation in the schools violates the basic principles of the educational process; that Negro children forced by the authorities of the District of Columbia to attend segregated schools are, by virtue of such segregation denied the protection of the Fifth Amendment of the Constitution and of Federal statutes enacted pursuant thereto.

ARGUMENT.

I.

A segregated school system is harmful to all the races involved. Its inconsistency is detrimental to the educational process as a whole and materially affects the opportunities of the minority group.

The American Federation of Teachers, on behalf of its 60,000 members, submits that segregation in public schools inevitably results in inferior education for all.

This organization, composed almost entirely of classroom teachers, is cognizant of the loss of human values and the waste of the resources of the spirit that results from such a system.

In a broad sense the consequence is a denial of the highest ends of education, both to the dominant and minority groups. In an atmosphere of inequality, it is no more feasible to teach the principles of our American way to the white children than to the Negroes. The apparent insincerity of such teaching is as destructive to the moral sense of the majority as to the sense of justice of the minority. The fundamental morality of each is undermined.

To the conscientious teacher the incongruity of such a system presents a barrier to the teaching of basic values of truth, beauty and justice. For if justice is relative and depends on race or color how can we teach that ours is a government of laws and not of men? And if justice is relative and considers race and color then a different flag waves over a colored school and the pledge to the flag must

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mean different things. The one nation is really not one nation but at least two, it is found to be divisible, and liberty, like justice, has two meanings.

These are the deep rooted evils that teachers see in a segregated school system. The system results in inferior educational facilities for the Negro and deprives him of an important element of the educational process. The damage to him is material both as to quantity and quality.

The damage to the white child is more subtle. In a moral and spiritual sense he is corrupted, while the other is corroded. The material advantage is purchased at the cost of an uneasy spirit.

And in the last analysis, the teacher is caught in a maze of contradiction from which there is no escape save by a destruction of the system. The classroom teacher sees this case as the means of cleansing the fountainhead of our national ideals.

We in America rightly put our hope of future greatness in our schools. We see in constantly improving education our hope for civil and political righteousness. In our quest it is well that we look again and again

> "unto the rock whence we are hewn, and to the hole of the pit whence we are dug."

II.

Segregation in public schools inevitably results in inferior educational opportunities for Negroes.

If we restrict our attention to the standards of educational opportunity that can be expressed in dollars expended and facilities that can be measured and counted, we find a vast disparity between white and colored schools.

Commenting on the study of Dr. John Norton and Dr. Eugene Lawler—Public School Expenditures (1944) W. Harden Hughes states:

> "The contrasts in support of white and Negro schools are appalling . . . the median expenditure per standard classroom unit in schools for white children is $1,160 as compared with $476 for Negro children. Only 2.56% of class rooms in the white schools fall below the $500 cost level while 52.59% of the class rooms for Negro children are below this level."[1]

> "The state supported institutions of higher learning for Negroes are far inferior" states Charles S. Mangrum, Jr., "to their sister institutions for whites. Most of the inequalities which have been noted herein with respect to the public schools for whites and Negroes are also present in the Negro normal and technical schools. . . . There is hardly one among them that could compare with any good white college in the same area."[2]

Several recent studies,[3] as well as many previous ones, all indicate the great disparity between the educational opportunities afforded white youth and those offered to the Negro youth in the states where a segregated and discriminatory system of education prevails.

So obvious are the inequalities that in Volume 1 of the National Survey of the Higher Education of Negroes we find this statement: "No one with a knowledge of the facts believes that Negroes enjoy all the privileges which American democracy expressly provides for the citizens of the

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[1] Negro Year Book, Tuskegee Institute 1947. "The Negro and Education." W. Harden Hughes, p. 56.

[2] The Legal Status of the Negro (p. 134), Charles S. Mangrum, Jr., Chapel Hill University of N. C. Press, 1940.
See Public School Expenditures, Dr. John Norton and Dr. Eugene S. Lawler, American Council on Education, 1944.

[3] The Black & White of Rejections for Military Service, American Teachers Assn. Studies, ATA Montgomery, Ala., 1944; Public School Expenditures in the U. S., Dr. John K. Norton and Dr. Eugene S. Lawler; American Council on Education, Wash., D. C., 1944; Journal of Negro Education, Summer 1947.

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United States and even for those aliens of the white race who reside among us. The question goes much deeper than the Negro citizens' *legal right to equal educational opportunity.* The question is whether American democracy and what we like to call the American way of life, can stand the strain of perpetuating an undemocratic situation; and whether the nation can bear the *social cost of utilizing only a fraction of the potential contribution of so large a portion of the American population.*[4]

The Constitution is a living instrument, and a "separate but equal" doctrine based upon antiquated considerations, should not, at this time, and in this advanced era, be permitted to perpetuate a situation which denies full equality to Negroes in the pursuit of education.

III.

Segregation in public schools deprives the Negro student of an important element of the education process. Where this occurs under the color of law, he is thereby deprived of life, liberty, or property without due process of law in violation of the Fifth Amendment.

The practice of segregation in the field of education is a denial of education itself. Education means more than the physical school room and the books it contains, and the teacher who instructs. It includes the learning that comes from free and full association with other students in the school. To restrict that association is to deny full and equal opportunities in the learning process. To restrict that association is to deny the constitutional guarantees.

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[4] Socio-Economic Approach to Educational Problems, Misc. No. 6, Vol. 1, p. 1, Federal Security Agency, U. S. Office of Education, Wash., 1942.

Psychologists show us that learning is an emotional as well as an intellectual process; that it is social as well as individual, and is best secured in an environment which encourages and stimulates the best effort of the individual and holds out the hope that this best effort will be accepted and used by society.

In every situation there is the inter-relation of the individual to his group—which is one that increases with his maturity. First it is the family, then the local community, then the state, the nation, and finally the entire world. At no stage of development should any barriers be erected to prevent the individual from moving from a narrower group to a larger one, particularly barriers on race. As Lewin states:

> "The group to which an individual belongs is the ground on which he stands, which gives or denies him social status, gives or denies him security and help. The firmness or weakness of this ground might not be consciously perceived, just as the firmness of the physical ground on which we tread is not always thought of. Dynamically, however, the firmness and clearness of this ground determine what the *individual wishes to do, what he can do, and how he will do it.* This is equally true of the social ground as of the physical."[5]

If education can be made available to all so that each may develop to the fullest and give his contribution to society, we will find a peaceful way—rather than one of human destruction and tragedy—to bring freedom and justice to peoples.

The American Federation of Teachers believes that segregated and discriminatory education is undemocratic and contrary both to sound educational development as

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[5] Kurt Lewin, "Resolving Social Conflict," p. 174, Harper & Bros., 1948.

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well as to the basic law of the land—the United States Constitution. We subscribe to the principle that democratic education provides a total environment which will enable the individual to develop to his capacity, physically, emotionally, intellectually and spiritually.

For such training to be fully effective, it is essential that each individual participate, without barriers of race, creed, or national origin, as a full fledged member in the home, the community, the state and the nation.

Accordingly, any restriction, particularly in the form of segregated and discriminatory schooling, which prevents the interplay of ideas, personalities, information and attitudes, impedes a democratic education and ultimately prevents a working democracy.

IV.

The segregated school system operated by the Board of Education of the District of Columbia violates the due process clause of the Fifth Amendment.

The Fourteenth Amendment made Negroes citizens of the United States and was intended to protect them fully in the exercise of their rights and privileges. To make sure that this intent was fully known, Congress refused to readmit Southern States or seat their representatives until the states accepted the Fourteenth Amendment.

In construing the Fourteenth Amendment the Supreme Court has established a rule of law that discrimination based on race or color violates the constitutional guarantee.

The court has applied this rule in the field of higher education in two recent cases. *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637.

The court has applied this rule with equal firmness in other fields, and has made no distinction between cases arising under the Fifth and Fourteenth Amendments. The national policy has been applied to racial discrimination by both State and Federal agencies. (Cases cited in Appellants' Brief, pp. 6-8.)

The opportunity, the duty, and the stern necessity of a consistent application of the rules are dramatically present in this case. Here the Court may become the schoolmaster and teach the lesson that others have failed to teach. The most important place to teach the lesson is in the nation's schools, and if the lesson is learned there it will be learned everywhere.

In *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 70 S. Ct. Rep. 851 the court held that the requirements of state law that the instruction of a Negro graduate student in the University of Oklahoma "upon a segregated basis" deprived the appellant in that case of his personal and present right to the equal protection of the laws.

There is no reason in experience for applying a different logic to children in grade and high schools. As the court there said, Our society grows increasingly complex and our need for trained leaders increases correspondingly.

We cannot give separate training to two segments of society and then expect that some magic will merge the individual from these segments into equal citizens having equal opportunities.

It is a mockery to say that those who aspire to teach and lead must have equal opportunity regardless of race, and still condemn those they are to teach and lead to inequality.

Ninety years of segregated schools demand the historical judgment that separate facilities are inevitably unequal and are not the way to equal opportunity.

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In the segregated school system the growing citizen never has the chance to show his equal ability; he never has the

> "opportunity to secure acceptance by his fellow students on his own merits." *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 641.

He must wait until he has finished what schooling he gets before he enters the competition. For him "the personal and present right to the equal protection of the laws" is of as great practical importance as for the graduate student.

The constitutional guarantee is not for law students and post-graduates alone. It is meaningless if it does not apply to all.

Conclusion.

Segregation of Negroes in public schools in any of our States or Territories inevitably results in depriving Negroes of educational opportunities provided by those States or Territories for white citizens. Negroes in such States are thereby denied the equal protection of the laws and are deprived of valuable rights without due process of law. This Court should end these violations of the constitutional mandate by reversing the judgment in this case and granting the appellants the relief they pray for.

Respectfully submitted,

JOHN LIGTENBERG,
134 N. La Salle Street,
Chicago 2, Illinois,
Counsel for American Federation of Teachers, Amicus Curiae.

SELMA M. BORCHARDT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned counsel for and on behalf of the Federation of Citizens Associations of the District of Columbia (hereinafter referred to as the Federation), respectfully move this Honorable Court for permission to file the accompanying brief as amicus curiae.

The Federation is a corporate organization; one of its purposes, as stated in its Charter, is to obtain the expression of the general public sentiment upon matters of special interest to all citizens of the District of Columbia

and to secure and make effective their united actions. The Federation consists of duly elected delegates from fifty-seven neighborhood citizens associations, the territorial jurisdictions of which cover almost all of the District of Columbia. The membership of the individual associations is composed of white persons who are, to a large extent, parents of school children affected by the Court's decision of May 17, 1954 and by the plan of the Board of Education. In the aggregate the members and their children number many thousands. The matters embraced in Questions 4 and 5 propounded by the Court have been discussed and considered extensively at meetings of the fifty-seven associations and the Federation.

The reasons for the Federation's desire to submit the brief as amicus curiae, which is tendered herewith, are as follows:

1. For many years the Federation has concurred with the Board of Education and has supported it in the maintenance of a dual public school system in accordance with the pertinent Acts of Congress. The Court's decision of May 17, 1954 declared in effect that such dual system is unconstitutional. So far as the Federation has been able to learn, the Board of Education has accepted the Court's decision and has determined to eliminate segregation, without awaiting the further decision and decree of the Court and without obtaining legislation from Congress to replace the Acts of Congress under which the Board theretofore acted, which the Court has held unconstitutional. The Federation does not oppose desegregation but holds that the plan which the Board of Education has adopted involves unnecessary speed of action and many hardships upon the school children, in violation of their rights as citizens, which rights the Court apparently has fully recognized in its opinion in this case and the opinion in the four related cases. Several provisions and requirements of the plan are in reality legislation which, it is believed, the Board has no authority to promulgate. In

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doing this, the Board of Education is making a calculated attempt to circumvent the exclusive right, power and duty of Congress to deal with this problem by legislation.

2. Because of local conditions in the District of Columbia, the Federation desires to suggest and urge that the terms of the decree to be entered by the Court should adequately protect the rights of *all* children of school age, and assure that no child of either color will be compelled, under penalty, to attend any specified school where the students of his own color constitute a disproportionate small minority. Also, the parents should be protected from the fines and/or imprisonments provided by the District of Columbia Code in that connection.

3. From all available information, the Federation understands that the petitioners, as well as the respondents, expect to take the general position in their final briefs, that integration of the District public schools is substantially an accomplished fact, and that the pending questions propounded by the Court are moot, or practically so. True, a plan of integrating the public schools was put into effect within a short time after May 17, 1954, and the plan has progressed to the point where the major part of it is in effect. In its brief, the Federation desires to call the Court's attention to some of the mandatory and compulsory requirements which constitute a part of that plan. Those compulsory provisions, it is believed, are most unreasonable and, in the light of the Court's opinion, they appear to be of doubtful validity to say the least. The Court has recognized and has emphasized the damaging effect upon colored school children which is produced by compulsory segregation of them. That proposition, like most others in life, has two sides. It is the desire of the Federation to deal briefly with the other side and to demonstrate why the terms of the decree should adequately protect children of *all* races against unnecessary damag-

ing effects which will certainly arise as the result of compulsory integration if it be applied without any flexibility. As indicated previously, the Federation believes that coverage of this matter in the briefs of the petitioners and respondents is not contemplated. The importance of the matter would indicate a desirability for the Court to receive suggestions such as the Federation's brief will attempt to present.

The Federation respectfully and emphatically desires to point out to this Honorable Court that the case of the District of Columbia schools, as it stands, is defective through absence of a proper, not to say indispensable, party. One group of citizens is learnedly and expertly represented by counsel. The group of which the Federation is representative is thus far without a voice of its own. The Board of Education and its worthy counsel, of necessity, cannot speak the views of this group, as they necessarily differ in some vital respects from those common to all. Without the Federation this Court will not hear the voice of this great body of citizens of the District of Columbia.

Respectfully submitted,

E. F. Colladay,

D. C. Colladay,

J. Richard Earle,

Counsel for Federation of Citizens Associations of the District of Columbia.

1331 G Street, N. W.,
Washington 5, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 839

THE UNITED STATES, PETITIONER

vs.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the United States Court of Claims

No. 19–52

OLYMPIC RADIO AND TELEVISION, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed January 14, 1952

To the Honorable, The Chief Judge and Judges of the United States Court of Claims:

The plaintiff, Olympic Radio and Television, Inc., respectfully represents and alleges:

1. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its office and principal place of business at 34–01 Thirty Eighth Avenue, Long Island City, New York. During the taxable year involved plaintiff was engaged in the manufacturing of television and radio receiving sets.

2. In this suit plaintiff seeks to recover from the United States the sum of $148,841.72, being income and excess profits taxes which were erroneously and illegally assessed and collected from
2 the plaintiff by the Collector of Internal Revenue for the Second Collection District of New York for the year 1944, and which was erroneously paid by the plaintiff to the said Collector. In addition, the plaintiff seeks to recover from the United States interest on such amount from the date of such payment and collection.

3. Plaintiff's claim to recover such amount and interest is founded upon the laws of the United States and particularly upon Section 122 of the Internal Revenue Code, and upon Title 28, United States Code, Section 2516. Jurisdiction of this action is vested in the Court of Claims by Title 28, United States Code, Section 1491.

4. Plaintiff kept its books and accounts on the accrual basis and filed its Federal corporation income and declared value excess profits tax returns and excess profits tax return on the same basis using a calendar year. Said returns for the year 1944 were filed on or about March 15, 1945, with the Collector of Internal Revenue for the Second Collection District of New York.

5. Plaintiff paid its excess profits tax liability for the year 1944 to the Collector of Internal Revenue for the Second Collection District of New York on the following dates and in the following amounts:

Date of payment	*Amount of payment*
Mar. 13, 1945	$173,181.81
June 5, 1945	173,181.81
Sept. 7, 1945	138,545.45
Dec. 15, 1945	138,545.45
Total	623,454.52

3 6. Plaintiff filed its Federal corporation income tax return for the calendar year 1946 with the Collector of Internal Revenue for the Second Collection District of New York on or about March 15, 1947. Said return as filed by the plaintiff for the year 1946 disclosed no income tax liability, and reflected a net operating loss for the year 1946 of $324,844.23.

7. Upon the audit of the plaintiff's income tax return for the year 1946, the Bureau of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60 to which the plaintiff agreed.

8. During the calendar year 1946 plaintiff paid a total of $263,272.80 in excess profits taxes as follows:

Date of payment	*Amount of payment for calendar year 1945*
Mar. 14, 1946	$86,660.81
June 15, 1946	86,660.81
Sept. 12, 1946	86,660.81
Dec. 12, 1946	3,290.37
Total	263,272.80

9. On or about June 11, 1948, plaintiff filed a claim for refund on Form 843 with the Bureau of Internal Revenue, being a claim for refund of income and excess profits taxes for the year 1944 erroneously and illegally assessed and collected by the Collector of Internal Revenue for the Second Collection District of New York in the amount of $191,004.04.

10. More than six months has elapsed since the filing on or
4 about June 11, 1948, of said refund claim, above referred to, during which time the Commissioner took no action with respect to the said claim for refund.

11. The refund claim, above referred to, was based upon the application of Section 122 (d) (6) of the Internal Revenue Code. The refund claim on said Form 843 was computed by adding to the agreed net operating loss for the year 1946 the sum of excess profits taxes actually paid by the plaintiff during 1946.

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12. Up until the time of the filing of this complaint, plaintiff has not received any portion of the amount claimed in said refund claim, nor has the plaintiff been credited in any manner for tax purposes or otherwise with any portion of the amount claimed in said refund claim.

13. The assessment and collection of excess profits tax for the year 1944 in the total amount of $148,841.72 was erroneous and illegal.

14. Plaintiff is the sole owner of the claim here asserted and has not made an assignment or transfer of said claim or any part thereof or interest therein.

Wherefore, the plaintiff prays, judgment for the total amount of at least $148,841.72 with interest thereon from the date of payment and such other and further relief to which it may appear the plaintiff is entitled.

EUGENE MEACHAM,
824 Connecticut Avenue NW.,
Washington 6, D. C.

5 In the United States Court of Claims

Answer

Filed May 13, 1952

The United States of America, defendant herein, by its Acting Assistant Attorney General, hereby makes answer to plaintiff's petition as follows:

1. Admits the allegations of paragraph 1.

2. Denies that the income taxes sought to be recovered in this suit were erroneously and illegally assessed and collected from the plaintiff or were erroneously paid by the plaintiff to the Collector of Internal Revenue, and admits the remaining allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. Admits the allegations of paragraph 4.

6 5. Admits that plaintiff paid its excess profits tax liability for the year 1944 in the amounts set forth in paragraph 5 and that such amounts were paid on approximately the dates set forth therein.

6. Admits the allegations of paragraph 6.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8.

9. Admits that on or about June 11, 1948, plaintiff filed a claim for refund of income and excess profits taxes for the year 1944,

but denies that such taxes were erroneously and illegally assessed and collected or that plaintiff is entitled to recover on any of the grounds set forth in said claim.

10. Admits the allegations of paragraph 10.

11. Admits that the refund claim was based upon the application of Section 122 (d) (6) of the Internal Revenue Code, but alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 11.

12. Admits the allegations of paragraph 12.

13. Denies the allegations of paragraph 13.

14. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 13.

7 Wherefore, defendant prays that plaintiff take nothing from it in this suit and that the same be dismissed.

ELLIS N. SLACK,
Acting Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

9 In the United States Court of Claims

Plaintiff's motion for summary judgment together with supporting affidavit, and exhibit thereto

Filed July 16, 1952

Comes now the plaintiff, Olympic Radio and Television, Inc., and respectfully moves this Honorable Court to enter a summary judgment herein and as grounds thereof refers to the pleadings heretofore filed herein and the accompanying affidavit, all of which are made a part hereof by this reference, which disclose that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law, pursuant to Rule 51 (a) of the Rules of the United States Court of Claims (revised May 15, 1951).

(S) Eugene Meacham,
EUGENE MEACHAM,
Attorney of Record,
824 Connecticut Avenue NW.,
Washington 6, D. C.

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10 *Affidavit in support of motion*

STATE OF NEW YORK,
County of Queens, ss:

Morris Sobin, being duly sworn, deposes and says: that he is Vice President and Treasurer of the Plaintiff above-named in this proceeding; that he was the Treasurer of the Plaintiff during the calendar year 1944 and up to the present time; that on or about June 11, 1948, Plaintiff filed a claim for refund of income and excess profits taxes for the year 1944; that said refund claim was based upon the carry-back of a net operating loss of the Plaintiff from the year 1946 to the year 1944, as computed under the provisions of Section 122 (d) (6) of the Internal Revenue Code; that said refund claim referred to adjustments under Section 122 (d) (6) for amounts representing excess profits taxes paid or accrued during 1946; that in this proceeding the Plaintiff has abandoned its contention with respect to excess profits taxes accrued in the year 1946 in the sum of $86,333.74 and relies solely upon the payment of excess profits taxes during the year 1946 in the sum
11 of $262,272.80; that a copy of said refund claim above-referred to, together with the schedules and computations attached thereto, is attached to this Affidavit; that for the purposes of this proceeding the amount of refund claimed was computed as follows: the supplemental Revenue Agent's Report covering the Plaintiff's operations for the year 1944, dated March 31, 1948, reflected an adjusted net income for 1944 of $308,407.41, after allowance of net operating loss carry-back from 1946 of $310,872.60; the latter figure does not include any additions for excess profits taxes paid during 1946: the Plaintiff actually paid $263,272.80 in excess profits taxes during 1946; if the latter figure is added to the agreed net operating loss for 1946 of $310,872.60 and the aggregate of these two carried back to 1944, net income for 1944 is reduced to $45,134.61 and the adjusted excess profit net income becomes $61,172.43; because of the excess profits credit and unused excess profits credit carry-overs there would result an excess profits tax liability for 1944 of zero; that the remaining excess profits tax assessments (and payments) for the year 1944 not yet recovered by the Plaintiff by way of refund, all of which have been paid to the Collector of Internal Revenue, aggregate $148,841.72, which is the amount claimed as a refund in this proceeding, plus interest.

(S) Morris Sobin.
MORRIS SOBIN.

Subscribed and sworn to before me this 3rd day of July, 1952.

[SEAL] (S) Abraham Cooper,
Notary Public.
ABRAHAM COOPER,
Notary Public, State of New York.

No. 03-0752550. Qualified in Bronx County.
Cert. filed with Bronx & Queens Co. Clk. & Reg.
Term expires March 30, 1953.

12 *Exhibit to affidavit*

Form 843
Treasury Department
Internal Revenue Service

(Revised January 1946)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's stamp: (Date received) June 15, 1948.

☒ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

STATE OF NEW YORK,
County of Queens, ss:

Type or print

Name of taxpayer or purchaser of stamps: Olympic Radio & Television, Inc., Successors to Hamilton Radio Corporation.
Business address: 34-01 38th Avenue (Street), Long Island City 1, New York (City).
Residence ----------

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete.

1. District in which return (if any) was filed 2nd New York.

2. Period (if for income tax, make separate form for each taxable year) from 1-1, 1944, to 12-31, 1944.

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3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount net assessment, $191,004.04; dates of payment, various.

5. Date stamps were purchased from the Government _____.

6. Amount to be refunded, exclusive of interest, $191,004.04.

7. Amount to be abated (not applicable to income, gift, or estate taxes) _____.

8. The time within which this claim may be legally filed expires, under section 322 of I. R. C. (Revenue Act or Internal Revenue Code), on March 15, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

The net operating loss for 1946 was not adjusted, as required under Section 122 (d) (6), for excess profits taxes paid or accrued during 1946. Taxpayer finally agreed to a deficiency in excess profits taxes (hence these taxes accrued in 1946) of $86,333.74. Moreover, taxpayer actually paid, in 1946, $306,072.41 in excess profits taxes.

OLYMPIC RADIO & TELEVISION, INC.,
(S) (Name illegible), *President.*
M. SOBIN, *Treasurer.*

Sworn to and subscribed before me this 11th day of June 1948.

Abraham Cooper,
ABRAHAM COOPER,
Notary Public, State of New York.

Residing in Bronx County.
Bronx Co. Clk.'s No. 177, Reg. No. 382–C–9.
Certificate filed in Queens Co. Clk.'s No. 3044, Reg. No. 422–C–9.
Commission expires March 30, 1949.

RE: OLYMPIC RADIO TELEVISION, INC.

RECOMPUTATION OF TAXES FOR 1944

Income tax

Net income per RAR		$619,280.01
Loss per RAR, 3/31/48	$310,872.60	
EPT def. agreed in 1946	86,333.74	
		397,206.34
		222,073.67
A. E. P. N. I.		142,008.24
Line X		80,065.43
Tax @ 40%		32,026.17

Excess profits tax

A. N. I. from above		222,073.67
Interest on borrowed capital, '44	$14,876.71	
Interest on borrowed capital, '46	1,161.11	
		16,037.82
		206,035.85
Adj. for 711 (a) (1) (J)		86,333.74
		292,369.59
Spec. Exp.	$10,000.00	
E. P. Cr. (RAR–10–18–46)	55,451.34	
Unused E. P. C. (RAR–3–31–48)	84,910.01	
		150,361.35
A. E. P. N. I.		142,008.24
95%		134,907.83
80% of line X, above		64,051.34
Income tax		32,026.17
EPT		32,035.17
10% credit		3,202.52
Net EPT		28,822.65
Inc. tax		32,026.17
Final total tax		60,848.82
Total tax per orig. 1139		191,004.04
Refund due		130,155.22

15 *Defendant's response to plaintiff's motion for summary judgment and defendant's cross motion for summary judgment*

Filed August 12, 1952

Comes now the defendant by its Acting Assistant Attorney General and moves the Court to overrule the plaintiff's motion for summary judgment and to enter summary judgment against the plaintiff and in favor of the defendant in the above-entitled action because the pleadings and the evidence appended to the motions for summary judgment of the respective parties consisting of affidavits and exhibits show that there is no triable issue

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as to any material fact and that the defendant is entitled to judgment as a matter of law.

In support of the within motion and in response to the
16 plaintiff's motion for summary judgment, the defendant will rely upon the pleadings and the evidence attached to the motions of the respective parties as well as the brief submitted herewith.

Respectfully submitted.

ELLIS N. SLACK,
Acting Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

CITY OF WASHINGTON,
District of Columbia, ss:

Elizabeth B. Davis, being duly sworn, says:

1. I am an attorney in the Tax Division of the Department of Justice, assigned to duty at Washington, D. C., and that in my official capacity I am counsel of record for the United States, the defendant in a cause of action now pending in the United States Court of Claims, styled and numbered as follows: Olympic Radio and Television, Inc. v. United States, No. 19–52.

2. In my official capacity as counsel of record for the defendant I am at the present time the custodian of the administrative files of the Bureau of Internal Revenue, Treasury Department containing the information, papers and documents in the
17 possession of the defendant relating to the issues involved in the aforesaid proceeding.

3. I have examined the administrative files in my custody and as the result thereof state the following facts which I believe to be true:

(a) That the express profits tax return of the Hamilton Radio Corporation (now the Olympic Radio and Television, Inc.) for the calendar year 1945 showed an excess profits tax liability of $346,643.22.

(b) That of the amount of $346,643.22, payments in a total amount of $261,939.28 were made in 1946 and the remaining amount of $84,703.94 satisfied by credit.

(c) A deficiency of $42,799.61 in excess profits tax and $4,164.46 in interest was assessed on the November, 1947, list, of which $42,799.61 was abated on Schedule IT–CB–8061 (this is the schedule showing allowance of tentative carry-back adjustments), and the balance of $4,164.46 was credited on the same schedule. Additional interest of $38.16 and $789.38 was assessed on June 17, 1947, and April 19, 1948, lists, respectively, and was paid by credit.

(d) That there were carry-back allowances made from 1947 to 1945, resulting in overassessments of 1945 excess profits tax being allowed of $189,642.35 and $199,800.48, or a total overassessment allowed of $389,442.83. The amounts of these overassessments were either refunded or credited during the years 1947 and 1948.

18 (e) The following is a summary of the foregoing assessments and adjustments of 1945 excess profits taxes:

	Excess profits tax	
Originally assessed per return		$346,643.22
Deficiency assessed 11/47 (without interest)		42,799.61
Total assessments		389,442.83
Carry-back from 1947	$189,642.35	
Carry-back from 1947	199,800.48	
		389,442.83
Net assessment		None

ELIZABETH B. DAVIS.

Subscribed and sworn to before me this 8th day of August, 1952.

[SEAL] NELLIE G. PLUMLEY,
Notary Public.

19 *Argument and submission of case*

On October 7th and 8th, 1952, the case was argued and submitted on plaintiff's and defendant's motions for summary judgment by Mr. Frederick R. Tansill for plaintiff and by Mrs. Elizabeth B. Davis for defendant.

21 *Opinion of the court on plaintiff's and defendant's motions for summary judgment by Whitaker, J.; dissenting opinion by Madden, J., with which Jones, Ch. J. agrees*

Decided November 4, 1952

Mr. Frederick R. Tansill for the plaintiff. Mr. Eugene Meacham was on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Acting Assistant Attorney General Ellis N. Slack, for the defendant. Mr. Andrew D. Sharpe was on the brief.

OPINION ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Decided November 4, 1952

WHITAKER, Judge, delivered the opinion of the court:

The plaintiff sues for the recovery of $148,841.72 with interest asserting that the excess profits tax collected from it for the year 1944 was larger, by that amount, than it should have had to pay.

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The plaintiff, a manufacturer of radio and television sets, paid in 1945 an excess profits tax on its 1944 profits in the total amount of $623,454.52. In 1946 it paid an excess profits tax of $263,272.80 on its 1945 profits. The plaintiff's return for 1946 showed no income tax liability, but instead a net operating loss of $324,844.23 reduced by the Bureau of Internal Revenue upon audit to $310,872.60. This operating loss for 1946, under the law, could be "carried back" to the year 1944. When this was done, it reduced the plaintiff's excess profits taxes for 1944 from the $623,454.52, which it had paid, to a considerably lesser sum. The amount of that reduction has been received by the plaintiff, by payment or credit. The plaintiff says, however, that to its net operating loss of $310,872.60 for 1946 there should have been added the $263,272.80 which it paid in 1946 on its 1945 excess profits, and that the sum of these two figures, instead of the first figure only, should have been carried back to reduce the 1944 excess profits net income. If that had been done, it would have reduced the 1944 excess profits tax by the amount claimed in this suit.

22

Section 122 of the Internal Revenue Code, which is entitled "Net Operating Loss Deduction" provides:

"(a) DEFINITION OF NET OPERATING LOSS.—As used in this section, the term net operating loss means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

* * * * *

"(d) EXCEPTIONS, ADDITIONS AND LIMITATIONS.—The exceptions, additions and limitations referred to in subsections (a) (b) and (c) shall be as follows:

* * * * *

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year."

Subchapter E of Chapter 2 is the part of the Code providing for excess profits taxes. Subsection (b) of Section 122 provides that if the taxpayer has a net operating loss for any taxable year, that net operating loss may be carried back to the two preceding taxable years, to reduce the income for those years.

The plaintiff, relying on the statutes referred to above, says that by Section 122 (d) (6) its excess profits tax paid in 1946 was includible in its "net operating loss" and therefore could be carried back to 1944, the second preceding taxable year, to reduce its income for that year. The Government says that these statutory provisions do not permit the plaintiff to do so, because the plain-

tiff was on the accrual basis for the computation of its income for tax purposes, and the tax which it desires to carry back, 23 though paid in 1946 when the plaintiff had a net operating loss, accrued in 1945 when it did not have a net operating loss, and would not have had such a loss even if this tax had been deducted from its 1945 income. The Government points to Section 43 of the Code which says:

"The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed * * *."

Then it points to Section 23 which says:

DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(s) * * * the net operating loss deduction computed under section 122."

Both Sections 43 and 23 are in Chapter 1 of the Code. Section 48 (c) also contains a definition similar to that of Section 43.

The statutory texts quoted above put a heavy burden on the plaintiff to show that it, being on the accrual basis for tax purposes, could take, in 1946, a deduction of excess profits taxes which accrued in 1945, though they were paid in 1946. The plaintiff's contention is that if the statutory definition of "paid or accrued" is applied to the excess profits tax situation, the deduction which the statute seems to tender to taxpayers is largely illusory, so far as taxpayers on the accrual basis of tax accounting are concerned. This would seem to be true, since it would be only rarely that a taxpayer would accrue a liability for an excess profits tax in a year in which it had a net operating loss.

According to the letter of the statutes, plaintiff is not entitled to deduct in the year 1946 taxes which accrued for the year 1945 but which were paid in 1946. When the statute referred to deductions "paid or accrued" in the taxable year, it referred to deductions paid in the taxable year if the taxpayer was on a cash basis, and to deductions accrued within the taxable year if the taxpayer was on the accrual basis. It is also true that in 24 computing one's income, either one basis or the other must be used, and that one cannot be used for certain deductions and the other for others.

Notwithstanding all this, we think that in order to give effect to the intention of Congress we must permit this taxpayer to deduct excess profits taxes paid in the calendar year 1946, although they accrued for the year 1945. We think so, for this reason: It was the clear intention of Congress that a taxpayer should be permitted to carry back to a former year his loss in a subsequent year,

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and that to this loss there should be added excess profits taxes "paid or accrued" in the calendar year.

Now, if we follow the letter of the statute, a taxpayer on an accrual basis would be denied the deduction of excess profits taxes, in practically all cases, if he is limited to the excess profits taxes accrued within the taxable year. There is rarely a case when a taxpayer would be liable for any excess profits tax in a year in which it had sustained a net operating loss; and, yet, Congress certainly intended that it should get the benefit of the deduction of excess profits taxes for some year. In order for it to get this deduction it would seem that it should be entitled to deduct the excess profits taxes which it paid in the taxable year, although they had accrued in the prior year.

It seems to us, therefore, that we must make an exception in this case to the general rule prohibiting the shifting from the "paid" to the "accrued" basis, or vice versa, in the case of specific deductions. Otherwise, we cannot give effect to the plain intention of Congress. We realize this does violence to the letter of the Act, but we are so thoroughly convinced of the intention of Congress that we feel justified in disregarding the letter in order to give effect to that intent. After all, it is the intention of Congress which we must enforce, however that intention may be divined.

No cases exactly in point have been cited to us nor have we found any; however, several of the Courts of Appeal have held that in applying the tax levied on undistributed net income, the expression "paid or accrued" need not be given its customary meaning.

In Birmingham, et al., v. The Loetscher Company, 188 F. 2d 78 (C. A. 8) the court held that a cash basis taxpayer could, under Section 505 (a) (1) of the Internal Revenue Code, deduct both taxes for a prior year paid within the taxable year and taxes accrued but not paid within the taxable year, in determining its undistributed net income for the purposes of the penalty tax on such net income. The court there relied on a holding in Commissioner v. Clarion Oil Company, 148 F. 2d 671, 80 U. S. App. D. C. 41, which, while it permitted a cash basis taxpayer to deduct taxes accrued but not paid within the tax year, refused to permit it to deduct taxes paid within the year but accrued in a prior year. In Aramo-Stiftung v. Commissioner, 172 F. 2d 896 (C. A. 2) the court permitted a cash basis taxpayer to deduct income taxes accrued but not paid within the taxable year, in determining its Section 505 (a) (1) taxable income. See also Wm. J. Lemp Brewing Company, 18 T. C. —, No. 70.

These cases support plaintiff's contention that the definitions of the term "paid or accrued" in sections 43 and 48 (c) should not be applied in all circumstances and regardless of consequences.

The Tax Court in Lewyt Corporation v. Commissioner, 18 T. C. ——, No. 151, has decided the question here involved adversely to plaintiff's contention. We regret that we are unable to agree.

Defendant's motion is denied, and plaintiff's motion for summary judgment is granted. Judgment will be entered in plaintiff's favor against the defendant in the amount of one hundred forty-eight thousand eight hundred forty-one dollars and seventy-two cents ($148,841.72), with interest as provided by law.

It is so ordered.

HOWELL, Judge; and LITTLETON, Judge, concur.

Madden, Judge, dissenting

I think the plaintiff is not entitled to recover. The Birmingham, Clarion Oil Company and Aramo-Stiftung cases, cited in the court's opinion, involved the penalty tax on undistributed profits. To penalize a corporation for not distributing as dividends money which it either does not have, because it pays it out in back taxes during the year, or which prudence would require it to keep, because it will be needed to pay taxes accrued during the year
26 though not payable until the following year, would seem to amount to penalizing sound management. The instant situation presents no comparable pressure of equity against the text of the statutes. The carry-back provision of the statutes does not permit the taxpayer to average its profit and loss experience for a five-year period. It only permits net operating losses, as determined by statutory provisions, to be carried back. To get the advantage of the statute, its requirements should be met. The Tax Court, in Lewyt Corporation v. Commissioner, 18 T. C. ——, No. 151, has decided the same question which is involved in our case, adversely to the plaintiff's contentions. I agree with its decision.

Chief Judge Jones agrees with this dissenting opinion.

27 *Motion for the United States for rehearing*

Filed Dec. 3, 1952

The United States, defendant herein, moves the Court for a rehearing in the above-entitled case for the following reasons:

1. This Court erred in ignoring the plain provisions of Sections 48 (c) and 122 (d) (6) of the Internal Revenue Code in allowing the plaintiff on the accrual basis to increase its net operating loss for 1946 by excess profits taxes which were paid in that year, but were not a proper accrual in that year.

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2. The Court erred in making an exception to the general rule, prohibiting the shifting from the "paid" to the "accrual"
28 basis, in order to give effect to what is considered the plain intention of Congress.

3. The Court erred in concluding that it was the intention of Congress to allow a taxpayer on the accrual basis to increase its net operating loss under Section 122 (d) (6) of the Internal Revenue Code by amounts which were not proper accruals in the year of the net operating loss.

4. The Court erred in granting plaintiff's motion for summary judgment and entering judgment for the plaintiff.

Wherefore, the defendant prays that this motion be set for oral argument; that defendant's motion be granted for the reasons set forth above and also in a brief attached hereto; and that judgment be entered in favor of the defendant.

Respectfully submitted.

CHARLES S. LYON,
Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

28A *Motion for the plaintiff in opposition to the motion for the United States for rehearing*

Comes now the plaintiff, through its counsel of record, and respectfully moves this Court to grant this Motion and to deny the defendant's Motion for Rehearing for the following reasons:

1. The Opinion of this Court in the subject proceeding was correct as a matter of law.

2. This Court did not err as alleged in the defendant's Motion.

3. The single issue presented in this proceeding involves a question of law and all facts were either admitted in the pleadings or covered by unopposed affidavits.

4. The defendant had, prior to the filing of defendant's Motion for Rehearing, an opportunity for arguing the issue of law
28B here involved in open Couht and filed a brief in support thereof. The defendant's Brief in Support of this Motion fails to advance any significantly new and different arguments from those already presented to this Court, hence no good purpose would be served by setting this proceeding for reargument.

Wherefore, the plaintiff respectfully prays that this Motion be granted for the reasons set forth in the plaintiff's briefs as heretofore filed, for the reasons set forth in this Court's Opinion as well as for the reasons set forth in the Brief attached hereto; that the defendant's Motion for Rehearing and for oral argument be de-

nied and that this Court's Judgment in this proceeding remain as entered.

Respectfully submitted.

(S) Eugene Meacham,
EUGENE MEACHAM,
Counsel of Record,
824 Connecticut Avenue NW.,
Washington 6, D. C.

29 *Argument and submission of case*

On motion for rehearing

February 3, 1953

On February 3, 1953, the case was argued and submitted on Defendant's motion for rehearing by Mrs. Elizabeth B. Davis for Defendant, and by Mr. Frederick R. Tansill for plaintiff.

31 *Opinion of the Court on defendant's motion for rehearing by Whitaker, J.; Madden, J., and Jones, Ch. J. adhere to the views expressed in their former dissenting opinion*

Decided March 3, 1953

Mr. Frederick R. Tansill for the plaintiff. Mr. Eugene Meacham was on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Acting Assistant Attorney General Ellis N. Slack, for the defendant. Mr. Andrew D. Sharpe was on the briefs.

WHITAKER, Judge, delivered the opinion of the court:

In our opinion on plaintiff's and defendant's motions for summary judgment filed November 4, 1952, we held that the words "paid or accrued" in section 122 (d) (6) of the Internal Revenue Code must be construed as permitting a deduction for excess profits taxes paid in the taxable year in which a loss had been sustained, although the taxpayer filed its returns on an accrual basis; and we accordingly granted plaintiff's motion for a summary judgment.

Defendant has now filed a motion for a rehearing in which it presents a persuasive argument that our decision is wrong, but after careful consideration of defendant's motion and the authorities cited, we adhere to our former opinion.

However, defendant in its motion for a rehearing calls our attention to the provisions of sections 711 (a) (1) and 711 (a) (2) of the Revenue Act of 1940 (54 Stat. 976), to which subsections (J) and (L) were added by sections 210 (a) and 210 (b)

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of the Revenue Act of 1942 (56 Stat. 907 and 908), which read in part as follows:

32 EXCESS PROFITS NET INCOME

"(a) TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1939.—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

"(1) EXCESS PROFITS CREDIT COMPUTED UNDER INCOME CREDIT.—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

"(J) NET OPERATING LOSS DEDUCTION ADJUSTMENT.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *.

"(2) EXCESS PROFITS CREDIT COMPUTED UNDER INVESTED CAPITAL CREDIT.—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

"(L) NET OPERATING LOSS DEDUCTION ADJUSTMENT.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *."

In computing the credit which the Act allows to be taken against excess profits net income, subsections (J) and (L) plainly forbid the deduction of the excess profits taxes in question in this case, whether or not they were paid or accrued within the taxable year.

Section 122 (d) (6) of the Internal Revenue Code permits a deduction of excess profits taxes paid or accrued within the taxable year in computing the net operating loss deduction, but when a taxpayer comes to compute his excess profits credit against excess profits net income, he is denied this deduction. The result is that the deduction allowed by section 122 (d) (6) can be used only in the computation of the ordinary corporate income
33 tax and the corporation surtax net income, but it cannot be used in the computation of the excess profits tax.

Plaintiff seems to admit that this is correct where the excess profits tax is computed under section 710 (a) (1) (A) of the Revenue Act of 1942, but it says that it is not correct when the

excess profits tax is computed under section 710 (a) (1) (B) of the Revenue Act of 1942.

Section 710 (a) (1) provides that the excess profits tax shall be the lesser sum computed under subsection (A) and subsection (B). Subsection (A) provides for a tax of 90 per centum of the adjusted excess profits net income, increased to 95 per centum by the Revenue Act of 1943. Subsection (B) provides for a tax which shall be "an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, * * *."

Plaintiff says that when it computed its tax under subsection (B), it arrived at a figure which was less than that computed under subsection (A), and, therefore, that the tax to be demanded of it as a tax computed under subsection (B); and then it says that in computing the excess profits tax under subsection (B) it is not prohibited from deducting the excess profits taxes paid or accrued in another year in which it had sustained a loss.

We think this position is sound.

Section 711 (a) provides that the excess profits net income, upon which the excess profits tax is levied, shall be the normal tax net income with the following adjustments:

"If the excess profits credit is computed under section 713, the adjustments shall be as follows: * * * [subsection (1)]."

Subsection (J) (i) provides for the "net operating loss deduction adjustment." It says, "The net operating loss deduction shall be adjusted as follows:"

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *."

34 The same restriction is made if the excess profits credit is computed under section 714.

Therefore, when a taxpayer goes to compute his excess profits tax under section 710 (a) (1) (A) he cannot take credit for "any excess profits tax imposed by this subchapter"; and he must pay 95 per centum of his excess profits net income, less the adjustments allowed, which exclude an adjustment for excess profits taxes paid in another year.

However, section 710 (a) (1) provides that if the amount of the excess profits tax computed under subsection (A) is greater than the amount computed under subsection (B), then the taxpayer is required to pay only the amount computed under subsection (B).

So, the taxpayer proceeds to compute its excess profits tax under subsection (B). This subsection provides that the tax is "an

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amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or supplement G, as the case may be, but without regard to the credit provided in section 26 (e) (relating to income subject to the tax imposed by this subchapter)."

It will be seen that in computing the tax under subsection (B), the taxpayer is not concerned with its adjusted excess profits net income. What it is concerned with is the tax imposed under Chapter 1, which is the normal corporation tax and the corporation surtax net income. This subsection says that the excess profits tax, as computed under it, is the difference between 80 per centum of the corporation surtax net income and the normal corporation income tax.

When computing the tax under subsection (B), no regard is to be had to the excess profits net income, but only to the ordinary net income and the corporation surtax net income. No one denies that in computing the ordinary net income that the taxpayer is permitted to carry back or forward the net operating loss in another year, which net operating loss includes a deduction for the excess profits tax paid or accrued within the taxable year in which there was a loss. This is also true in the computation of the surtax net income.

Section 711 (a) relates alone to the computation of the ex-
35 cess profits net income; it does not relate to the computation of the ordinary corporate net income nor to the surtax net income; hence, the prohibition therein contained against the deduction of excess profits taxes in a year in which a loss was sustained does not apply when a corporation is computing its ordinary net income or its surtax net income.

Therefore, inasmuch as this taxpayer's tax was computed under section 710 (a) (1) (B) of the Revenue Act of 1942, and since the tax imposed by this section is not based on excess profits net income, the limitation imposed by subdivision (J) (i) of section 711 (a) (1) and subdivision (L) (i) of section 711 (a) (2) is not applicable.

It results that the judgment heretofore entered in the sum of $148,841.72 will stand.

HOWELL, Judge, and LITTLETON, Judge, concur.

MADDEN, Judge, and JONES, Chief Judge, adhere to the views expressed in their former dissenting opinion.

37 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1953

21 Supreme Court of the United States

No. 10, October Term, 1954

THE UNITED STATES, PETITIONER

vs.

OLYMPIC RADIO AND TELEVISION, INC.

Order allowing certiorari

Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~839~~ 100

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case on November 4, 1952, rehearing denied, March 3, 1953.

OPINIONS BELOW

The original opinion of the Court of Claims (R. 10–14) and the dissenting opinion, entered November 4, 1952, are reported in 108 F. Supp. 109. The opinion on rehearing (R. 16–19), entered March 3, 1953, is reported in 110 F. Supp. 600.

JURISDICTION

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, the Government filed a motion

for rehearing. On March 3, 1953, the court denied the motion. (R. 19.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether, under Section 122 (d) (6) of the Internal Revenue Code, a taxpayer on the accrual basis can, in computing its net operating loss for one year, deduct the amount of excess profits taxes paid in that year but which accrued in an earlier year.

STATUTE INVOLVED

The applicable portions of the pertinent statute are set forth in the Appendix, *infra*, pp. 12–18.

STATEMENT

This case was submitted to the court below on motions for summary judgments filed by both parties, together with supporting affidavits. The facts, which are not in dispute, are briefly as follows:

Taxpayer, a corporation, keeps its books and accounts and files its income tax returns on the accrual basis. (R. 1.) Its income tax return for the year 1946 disclosed no income tax liability and reflected a net operating loss of $324,844.23. (R. 2.) Upon the audit of the taxpayer's income tax return for the year 1946, the Commissioner of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60. (R. 2.) Taxpayer, in its excess profits return for the year 1945, reported an excess profits tax liability of $346,643.22. Of this amount $263,272.80 was paid in 1946. (R. 2.)

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Taxpayer duly filed a claim for refund of income and excess profits taxes for the year 1944 in the amount of $191,004.04. This claim was based on the ground that the excess profits taxes for 1945 paid during 1946 should be added to the agreed net operating loss for 1946 under Section 122 (d) (6) of the Internal Revenue Code. The amount of $263,272.80, the excess profits tax for 1945, paid in 1946, was later refunded or credited to the taxpayer, as a result of the allowance of carry-backs for 1947. (R. 10.)

The Court of Claims (Madden, J., with whom Jones, C. J., concurred, dissenting) held that, in computing its net operating loss for 1946, the taxpayer was entitled to deduct the amount of the excess profits taxes shown on its 1945 return and paid in 1946. The court entered judgment in favor of the taxpayer in the amount of $148,841.72, with interest. (R. 14.)

REASONS FOR GRANTING THE WRIT

1. As the Court of Claims expressly recognized (R. 14), its decision, allowing an accrual basis taxpayer to increase its net operating loss by the amount of an earlier-accrued excess profits tax actually paid in the taxable year, is in direct conflict with that of the full Tax Court, rendered without dissent, in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245. See, also, *W. L. Maxson Corp.* v. *Commissioner*, decided January 26, 1953 (1953 P–H T. C. Memorandum Decisions, par. 53,021). And see *Estate of Byrne* v. *Commissioner*, 16 T. C. 1234, deciding the same issue

in favor of the Government without extended discussion.

In the *Lewyt* case, the Tax Court held (18 T. C. at 1249–1253), in square conflict with the decision below, that an accrual basis taxpayer cannot, under Code Section 122 (d) (6) [1] (Appendix, *infra*, p. 14), increase its net operating loss for a particular year for carryback purposes by the excess profits tax which was paid in that year but which accrued in a prior year. The basis for the decision of the Tax Court was that, while Section 122 (d) (6) allows as a deduction the excess profits tax "paid or accrued within the taxable year," the alternative verbs "paid or accrued" were used to comprehend, and distinguish between, taxpayers on a cash or accrual basis (*i. e.*, "paid," if on

[1] Section 122 (a) of the Code defines the "net operating loss", which may be carried back to and be deducted in two previous years under Code Sections 23 (s) and 122 (b) (1) and (c) (Appendix, *infra*, pp. 12, 13–14), as the excess of the deductions "allowed by this chapter", *i. e.*, the chapter imposing the income tax, over the gross income, with the exceptions, additions, and limitations provided in subsection (d). Section 122 (d) (6) provides that there shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2, *i. e.*, the excess profits tax, "paid or accrued within the taxable year." Section 48 (c) (Appendix *infra*, p. 13) provides that when used in this chapter, *i. e.*, the chapter imposing the income tax and the chapter containing Section 122 (d) (6), the term "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, and Section 43 (Appendix, *infra*, pp. 12–13) provides that the deductions provided for in this chapter, *i. e.*, the income tax chapter containing Section 122 (d) (6), shall be taken for the taxable year in which "paid or accrued", dependent upon the method of accounting on the basis of which net income is computed.

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cash basis, and "accrued," if on accrual basis), and were not designed to give an accrual basis taxpayer the right to deduct its excess profits tax in the year paid, if the tax accrued in another year.[2] See Code Sections 43 and 48 (c) (Appendix, *infra*, pp. 12–13), and see footnote 1, *supra*. This conflict between the Court of Claims and the Tax Court on a question of such recurrent importance in the administration of the tax laws would seem to require resolution by this Court at this time.[3] We are informed by the Department of the Treasury that the same issue is presented in at least 35 (and probably more) other cases now pending before the Court of Claims, the district courts, the Tax Court, and the Treasury, involving a total of at least $27,000,000 in taxes, plus interest. Other taxpayers will doubtless raise the same question in other cases.[4]

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[2] The holding that the term "paid or accrued" in Section 122 (d) (6) refers to the accounting method employed in computing income was reaffirmed in *Robert Reis & Co.* v. *Commissioner*, 20 T. C. No. 36. The *Reis* case involved a situation where the liability for the excess profits tax was contested. It was held that the tax did not "accrue" in the year for which it was incurred, but that it accrued when the contest was settled and the tax was paid, under *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516.

[3] The Court's decision in the *Lewyt* case was entered April 9, 1953, and final decision has not yet been entered in the *Maxson* case. Thus, the time within which to file appeals to the Court of Appeals for the Second Circuit, the reviewing court for those cases, has not yet expired, and we understand the taxpayers will appeal.

[4] Even though the excess profits tax was repealed for years ending after December 31, 1945 (Sec. 122 (a), Revenue Act of 1945, c. 453, 59 Stat. 556), the statutory period for filing

2. The decision of the Court of Claims departs from the principle, established in numerous decisions of this Court, that a taxpayer on the accrual basis must take deductions in the year in which they accrue, regardless of when paid. *United States* v. *Anderson*, 269 U. S. 422; *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357; *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92; *Security Mills Co.* v. *Commissioner*, 321 U. S. 281. Cf. *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516. Furthermore, the court below recognized that the clear language of the statute (Secs. 43, 48 (c) and 122 (d) (6) (see fn. 2, *supra*)), forbids an accrual basis taxpayer to deduct in one year excess profits taxes paid in that year but which accrued in an earlier year (R. 12). Nevertheless the court thought that it should read an exception into the statute and permit the claimed deduction in order to give effect to what it believed

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claims for net operating loss deductions does not expire until 39 months after the end of the taxable year of the net operating loss (Sec. 322 (b) (6), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 322)). It is probable also that in a number of instances waivers have been filed which will extend the statutory period. (Sec. 322 (b) (3), Internal Revenue Code.) Moreover, since Section 122 (d) (6) applies in connection with determination of net operating losses up to and including the year ended June 30, 1950 (Sec. 304, Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137), the same issue can arise for all years prior to that date where the liability for excess profits taxes for years prior to 1946 was being contested and the taxes were accordingly not paid or accrued until a later year when the contest was settled. In *Robert Reis & Co.* v. *Commissioner*, *supra*, n. 2, the loss year was 1949.

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was the intention of Congress (R. 13).[5] It reasoned that Congress must have intended that an accrual basis taxpayer should be allowed to deduct excess profits taxes paid but not accrued in the tax year in determining its net operating loss for that year because, otherwise, an accrual basis taxpayer would be denied the benefit of deducting excess profits taxes "in practically all cases", the court assuming that only rarely would excess profits taxes accrue in a year when an operating loss was sustained. (R. 13.) Even if the court were correct in its assumption, that could not justify disregard of the plain language of the statute.[6] As this Court recently

[5] *Birmingham* v. *Loetscher Co.*, 188 F. 2d 78 (C. A. 8); *Aramo-Stiftung* v. *Commissioner*, 172 F. 2d 896 (C. A. 2); and *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671 (C. A. D. C.), certiorari denied, 325 U. S. 881, construing the words "paid or accrued" as used in Section 505 (a) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 505), dealing with the penalty surtax on the undistributed profits of personal holding companies, furnish no support for the decision of the majority of the court below. See dissenting opinion of Judge Madden (R. 14) and the opinion of the Tax Court in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245, 1252.

[6] If the principle of *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516, is applicable to federal income and excess profits taxes, an accrual basis taxpayer would get the benefits of this section where taxes for prior years were contested and not settled until the loss year. Although the Commissioner of Internal Revenue has recently taken the position before the Tax Court that the *Dixie Pine Co.* case is not governing with respect to federal income or excess profits taxes and that such tax "accrues" in the accounting period for which levied, this position was rejected in the recent case of *Robert Reis & Co.* v. *Commissioner*, 20 T. C. No. 36. The court also pointed out in that case that its holding therein, allowing an accrual

reiterated, provisions of tax law cannot be bent in particular cases in order to avoid "hardship" to the taxpayer or the Government. *Healy* v. *Commissioner*, 345 U. S. 278, 284–285. And see *Riley Co.* v. *Commissioner*, 311 U. S. 55, 59; *United States* v. *Hill*, 248 U. S. 420; *Commissioner* v. *Hecht Co.*, 163 F. 2d 194 (C. A. 4); and *Sabine Transp. Co.* v. *Commissioner* 128 F. 2d 945, 947 (C. A. 5); cf. *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 321.

As the Court stated in *Crooks* v. *Harrelson*, 282 U. S. 55, 60, to justify a court's departure from the terms of the statute "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." The Court of Claims here did not, and indeed could not, rely upon any legislative history to support its assumptions as to the "intent" of Congress. (See the Tax Court's discussion of the legislative history in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245, 1251–1252). As Judge Madden stated in his dissenting opinion, to get the advantage of a net operating loss granted by the statute, the statute's "requirements should be met."[7]

basis taxpayer to deduct, in computing its net operating loss for 1949, excess profits taxes for 1943 and 1944 which were in dispute and not settled until 1949, refutes a contention made by the taxpayer in the *Lewyt* case, *supra*, that to construe "paid or accrued" as used in Section 122 (d) (6) as referring to the taxpayer's method of accounting would deny accrual basis taxpayers any benefit under the section.

[7] In its motion for rehearing the Government again pointed out to the court below that its decision was inconsistent with Section 711 (a) (1) (J) and (a) (2) (L) of the Internal Revenue Code, which provides, for purposes of adjusting the excess profits net income, that in computing the net operating loss for

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(R. 14.) Cf. *Reo Motors* v. *Commissioner*, 338 U. S. 442; *Standard Paving Co.* v. *Commissioner*, 190 F. 2d 330 (C. A. 10).

Furthermore, the court erred in rejecting the Government's contention that, since the excess profits taxes for 1945, which were claimed as a deduction in 1946 in computing the net operating loss, were later refunded or credited in full as a result of a net operating loss carry-back from 1947, the taxpayer did not suffer any real economic loss and was therefore not entitled to increase its operating loss deduction by a tax liability which was eliminated. The purpose of Section 122 (d) was to prevent "net losses from being used as a deduction by the taxpayer where he is not suffering any economic loss."

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any taxable year under Section 122 (a) and 122 (d) (6) (Appendix, *infra*, pp. 13, 14–15), "no deduction shall be allowed for any excess profits tax imposed by this chapter." The court below rejected that contention in its opinion on rehearing (R.19). The effect is to allow all excess profits, taxes, both paid and accrued, to be deducted in arriving at the net operating loss to be carried back for income tax purposes, but not to allow any excess profit taxes to be deducted in arriving at the net operating loss to be carried back for excess profits tax purposes—a result which would seem inconsistent with any probable Congressional intention. Further, the court below erred in holding that Section 711 (a) (1) (J) and (a) (2) (L) do not apply even if taxpayer's excess profits tax liability for 1944 is to be determined under Section 710 (a) (1) (B). This result requires that the net operating loss for purpose of the two alternative computations of the excess profits tax be calculated in two different ways, again a highly improbable result. Compare *Sokol Bros. Furniture Co.* v. *Commissioner*, 185 F. 2d 222 (C. A. 5), certiorari denied, 340 U. S. 952, with *Basalt Rock Co.* v. *Commissioner*, 180 F. 2d 281 (C. A. 9), certiorari denied, 339 U. S. 966.

H. Rep. No. 855, 76th Cong., 1st Sess., p. 17 (1939–2 Cum. Bull. 504, 517). The taxpayer clearly should not be allowed to use the amount of excess profits taxes for 1945, which were paid but later refunded, to increase in a fictitious amount a net operating loss to be carried back to an earlier year.[8]

3. The decision below, if allowed to stand, may lead to completely anomalous consequences. Under it all taxpayers, whether on the cash or accrual basis of accounting, would appear to be able to deduct *all* excess profits taxes, both paid and accrued within any taxable year, for purposes of determining their net operating losses.[9] The decision could also result in allowing the excess profits taxes paid for a particular year to be used as a carry-back to wipe out or reduce the excess profits tax liability for that year. For example, if the net operating loss for 1946 here, resulting from the allowance of a deduction of the 1945 excess profits taxes, exceeded the 1944 net

[8] Cf. *Arrowsmith* v. *Commissioner*, 344 U. S. 6, where this Court, in determining the *nature* of a transaction which took place in 1944, considered events occurring in later years.

[9] In *Ohio Boxboard Co.* v. *Carey*, Civil No. 28356, now pending in the District Court for the Northern District of Ohio, a taxpayer with a net income for 1944 of $1,740,718.29 as determined by the Commissioner of Internal Revenue, is claiming the right to deduct 1943 excess profits taxes paid in 1944 of approximately $1,000,000 and also to deduct 1944 excess profits taxes accrued in that year of approximately $1,000,000, thus resulting in a claimed net loss of over $400,000.

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income after necessary adjustments under Section 122 (d), the excess would be a carry-over to 1945 under Section 122 (b) (1) (Appendix, *infra*, pp. 13–14) and would be claimed as a deduction against the excess profits tax liability for 1945.[10] Thus, the 1945 excess profits taxes would be a factor in wiping out or reducing the very liability which they were paid to satisfy. Certainly, such incongruous results could not have been intended by Congress.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY, 1953.

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[10] Such a claim was made in the *Lewyt* case before the Tax Court, but in view of that court's holding that the excess profits taxes were not deductible in computing the net operating loss deduction, the basis for the claim was eliminated.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [as added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 43 [as amended by Sec. 134 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall

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not be allowed in computing net income for the period in which falls the date of the taxpayer's death.

(26 U. S. C. 1946 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * *

(c) *"Paid or Incurred," "Paid or accrued."*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U. S. C. 1946 ed., Sec. 48.)

SEC. 122 [as added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) [as amended by Sec. 105 (e) (3) (A) of the Revenue Act of 1942, *supra*] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 153 (a) of the Revenue Act of 1942, *supra*] *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions,

additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(c) [as amended by Secs. 105 (e) (3) (B) and 153 (b) of the Revenue Act of 1942, *supra*] *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e));

(d) [as amended by Sec. 105 (e) (3) (C) of the Revenue Act of 1942, *supra*] *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * * *

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

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(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

SEC. 710 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974].

IMPOSITION OF TAX.

(a) [as amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Imposition.*—

(1) [as amended by Sec. 202 of the Revenue Act of 1942, *supra*] *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) [as amended by Sec. 202 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] 95 per centum of the adjusted excess profits net income, or

(B) [as amended by Sec. 202 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided

in section 26 (e) (relating to income subject to the tax imposed by this subchapter), and without regard to 80 per centum of the credit provided in section 26 (h) (relating to credit for dividends paid on certain preferred stock).

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [as amended by Sec. 204 of the Revenue Act of 1943, *supra*] *Specific exemption.*—A specific exemption of $10,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 2 (a) of the Excess-Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204 (a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

* * * * *

(26 U. S. C. 1946 ed., Sec. 710.)

SEC. 711 [as added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

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(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [as added by Sec. 210 (a) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; * * *

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(L) [as added by Sec. 210 (b) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year

under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under subparagraph (B) of this paragraph for such taxable year; * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 711.)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 100

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief in opposition contends that the petition for a writ of certiorari was not filed within the statutory period. The principal basis for this contention is this Court's decision in *Federal Trade Commission* v. *Minneapolis Honeywell Regulator Co.*, 344 U. S. 206. That case, however, is wholly inapposite.

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, within 30 days of the entry of the original judgment, the Government filed a motion for rehearing. This motion was timely filed. Rule 53 (c) of the Court of Claims. On

March 3, 1953, the court denied the motion with an opinion. (R. 19.) The petition for a writ of certiorari was filed May 29, 1953.

Respondent contends that, inasmuch as the Court of Claims did not vary the terms of the November 4 judgment when it denied the motion for rehearing, the time within which the petition for writ of certiorari could be filed began to run on November 4 and expired February 2, 1953. It is urged, therefore, that under *Minneapolis Honeywell* the petition is out of time.

But *Minneapolis Honeywell* did not deal with a timely motion for rehearing in the court below (cf. *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 19–20, n. 1, p. 21), and did not purport to change the long established rule that timely motions for rehearing toll the time for filing a petition for certiorari until 90 days after the disposition of the rehearing motion. *Department of Banking* v. *Pink,* 317 U. S. 264, 266; *Pfister* v. *Northern Illinois Finance Corp.,* 317 U. S. 144, 149–150; *Morse* v. *United States,* 270 U. S. 151; cf. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131, 137. Here, where the motion for rehearing was timely filed in the Court of Claims, the 90 day period did not commence until the decision of that court on March 3, 1953, and did not expire until June 1, 1953. As the petition for certiorari was filed May 29, it was timely.

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The petitioner, Federal Trade Commission, in the *Minneapolis Honeywell* case attempted to sustain the timeliness of the petition for a writ of certiorari on two well settled rules: (1) that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely petition, and (2) that when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed. This Court's decision did not question the correctness of these two general propositions but held them to be inapplicable to the facts of that case. Reliance upon the first proposition was held by this Court to be misplaced because the untimely memorandum filed by the Federal Trade Commission in the Court of Appeals neither sought a rehearing nor an amendment of the previous judgment in respect to the one matter controverted in the Court of Appeals and decided by the Court of Appeals in the first judgment. The second proposition was held inapplicable because the later judgment entered by the Court of Appeals reiterated, without change, everything which had been decided in the earlier judgment on the one controverted matter. Here, on the other hand, the motion for rehearing was timely filed; it was directed specifically to the matter now in contro-

versy in this Court; it was argued orally before the court; it was fully considered by the court on its merits and disposed of by a supplemental opinion; and the petition for writ of certiorari is directed toward precisely the same judgment as to which the motion for rehearing was denied.

The petition for a writ of certiorari was timely filed.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

JULY 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In its petition for certiorari the United States noted (Pet. 3-5) that the decision of the Court of Claims in this case is in direct conflict with that of the Tax Court in *Lewyt Corp.* v. *Commissioner,* 18 T. C. 1245, and that the Court of Claims expressly recognized the conflict (R. 14). On July 14, 1954, the Court of Appeals for the Second Circuit affirmed the decision of the Tax Court in the *Lewyt* case. The Second Circuit took notice of the contrary decision of the Court of Claims in the instant case, but declined to follow it. Its opinion,

which is set out in full in the Appendix, *infra*, states (p. 21):

> Finally, on this point the taxpayer gives us the decision of the Court of Claims in *Olympic Radio and Television, Inc.* v. *United States*, 108 F. Supp. 109 (1952), *re-hearing denied* 110 F. Supp. 600 (1953), which squarely upholds the position of the taxpayer as to the meaning of "paid or accrued" in § 122(d)(6). We have given careful and respectful consideration to the two opinions of the majority in that case, which were based largely on the same considerations urged upon us by the taxpayer here, and find ourselves unable to agree with the Court of Claims.

On August 24, 1954, the Court of Appeals for the Second Circuit denied *per curiam*, without opinion, a petition for rehearing in the *Lewyt* case.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER, 1954.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 184—October Term, 1953.

Argued April 15, 1954 Decided July 14, 1954
Docket No. 22871

LEWYT CORPORATION (Now known as Lewyt Manufacturing Corporation), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before: CLARK, HINCKS and HARLAN, CIRCUIT JUDGES

Petition to review a decision of the Tax Court determining a deficiency in petitioner's income taxes for the taxable year ended September 30, 1944, and a deficiency in excess profits taxes for the taxable year ended September 30, 1945. Tietjens, *Judge.* Affirmed.

FREIDIN & LITTAUER, New York City (Eugene Meacham, Fred R. Tansill and Seymour Sheriff, of Counsel) *for the petitioner.*

H. Brian Holland, Assistant Attorney General (Ellis N. Slack, Lee A. Jackson, and I. Henry Kutz, Special Assistants to the Attorney General, of Counsel) *for the respondent.*

HARLAN, *Circuit Judge:*

We are asked to review a decision of the Tax Court determining a deficiency of $7,129.21 in peti-

tioner's income tax for the taxable year ended September 30, 1944, and a deficiency of $446,557.19 in excess profits tax for the taxable year ended September 30, 1945. The taxpayer is a New York corporation engaged in the manufacture of vacuum cleaners and electronic devices. For tax purposes it used a fiscal year ending each September 30 and reported on an accrual basis. Each fiscal year referred to in this opinion will be designated simply by the calendar year in which it ended.

In the two years in question § 23(s) of the Internal Revenue Code [26 U. S. C. A. § 23(s)] provided that in computing net income there should be allowed as a deduction (from gross income) the "net operating loss deduction" provided in § 122 (26 U. S. C. A. §122). Section 122(a) defines "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)." We are not concerned here with any of the provisions of subsection (d) except that contained in (d) (6) which permits the deduction of taxes "imposed by Subchapter E of Chapter 2 [excess profits taxes] paid or accrued within the taxable year," subject to certain rules not presently relevant. If a taxpayer has a net operating loss for a given taxable year, § 122(b)(1) and (2) and § 122(c) [1] provide that it may be ap-

[1] "§ 122. Net operating loss deduction

* * *

(b) Amount of carry-back and carry-over.

(1) Net operating loss carry-back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating

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plied, in accordance with prescribed specifications, as a deduction in computing net income for the two preceding taxable years (called a "carry-back") and for the two succeeding taxable years (called a "carry-over"), the starting point being with the second preceding taxable year, and any excess

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loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) Net operating loss carry-over. If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess,, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) Amount of net operating loss deduction. The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and

being carried successively, until exhausted, into the subsequent years ending with the taxable year secondly succeeding the year in which the net operating loss occurred.

The taxpayer had net operating losses in each of the years 1946 and 1947, and the dispute we have before us relates primarily to (a) the proper computation of such losses for each of those years, and (b) the application of such losses to the years 1944 and 1945, in each of which the taxpayer had substantial taxable net income.

We come first to the questions relating to the year 1945 in respect of which the Tax Court sustained the determination of the Commissioner that there was a deficiency in excess profits taxes of more than $460,000.

The Commissioner determined that in 1947 the taxpayer had a net operating loss of $786,383.25, which he allowed as a "carry-back" deduction to 1945. The taxpayer claimed additional "carry-backs" to 1945 aggregating $1,381,402.33 by reason of (a) the remittance to the Collector in 1947 of $300,008.87 in respect of excess profits taxes for the years 1943, 1944, and 1945 which, it is asserted, should have been added to the net operating loss for 1947; (b) the remittance to the Collector in 1947 of $55,949.04 interest on the foregoing amount

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(4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e)) * * *"

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and on some $12,000 of additional income taxes for 1943, which, it is claimed, should also have been added to the 1947 net operating loss; and (c) the failure to allow any portion of the net operating loss for 1946, claimed to be $1,025,444.42, as a "carry-back" to 1945. Each of these claims was denied by the Commissioner, who was sustained by the Tax Court. The taxpayer also contends that the Tax Court erred in failing to credit on the asserted excess profits tax deficiency for 1945 the sum of $108,437.36, which the taxpayer remitted to the Commissioner in 1947 in respect of 1945 excess profits taxes (this amount being part of the $300,008.87 referred to above).

1. *1947 Principal Remittances*

These remittances aggregating $300,008.87 were made under the following circumstances:

Prior to 1947, a dispute arose between the taxpayer and the Collector as to the taxpayer's 1943 tax liability. On August 30, 1946, the Collector issued a statutory notice asserting income and excess profits tax deficiencies for 1943 in the amount of $7,757.49 and $194,992.51, respectively. The taxpayer objected to these deficiencies and took the matter to the Tax Court. Meanwhile, settlement negotiations were opened. On September 29, 1947, the taxpayer's auditor, believing that a formula for settlement had been reached, recomputed the tax liability for 1943 and sent the Collector a check for $190,002.16, of which $154,473.30 represented additional taxes for 1943 computed in accordance

with the supposed settlement formula, and $35,528.86 the interest on such sum from December 15, 1943. The Collector deposited this check on September 29, 1947 in his "Suspense Account."

Notwithstanding this transaction, settlement conferences continued down to October 30, 1947, when they were broken off, the Head of the Technical Staff of the New York Division advising the Division Counsel on November 6, 1947 that a satisfactory settlement had not been reached and that defense of the case should proceed. However, negotiations were evidently resumed, for on February 24, 1948 a settlement stipulation was filed settling, among other things, the asserted 1943 excess profits tax deficiency for the sum of $140,147.87 which was $1,470.26 less than the amount attributable to excess profit taxes ($141,618.13) in the taxpayer's remittance of September 29, 1947.

On September 29, 1947, the taxpayer also forwarded to the Collector a check for $178,810.92, stated in the letter of transmittal to represent additional taxes of $49,953.38 for 1944, with interest in the amount of $8,492.07, and of $108,437.36 for 1945, with interest in the amount of $11,928.11. This remittance was predicated on a Revenue Agent's examination of the taxpayer's books for 1944 and 1945 (as well as 1946 and 1947), and a computation by the taxpayer's auditor applying in respect of excess profits taxes the same supposed settlement formula as underlay the taxpayer's remittance relating to 1943 excess profits taxes. Although no deficiency notice had been issued, and no settlement

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negotiations had been begun as to 1944 and 1945 taxes, the factors giving rise to the alleged excess profits tax deficiency for 1943 were deemed equally applicable to 1944 and 1945. The Collector also deposited this second remittance in his "Suspense Account."

The taxpayer charged on its books to earned surplus the principal amounts of these two remittances as tax payments, *viz:* $154,473.30 for 1943, $49,-953.38 for 1944, and $108,437.36 for 1945. Of the first item, $12,855.17 represented income taxes (with which we are not concerned here) and the balance, aggregating $30,008.87, represented excess profits taxes. The interest payments on these three items were charged to 1947 expense on the taxpayer's books, *viz:* $35,528.86 (1943), $8,492.07 (1944) and $11,928.11 (1945), or a total of $55,-949.04.

The taxpayer's position that the $300,008.87 of remittances in respect of excess profits taxes should have been allowed as a deduction in computing the net operating loss for 1947 (thereby increasing the "carry-back" to 1945) rests upon § 122(d)(6). As heretofore noted, this section gives a deduction for "the amount" of excess profits taxes "imposed" which were "paid or accrued within the taxable year."

Preliminarily it should be said that while there is an issue relating to the computation of the 1946 net operating loss (which we discuss later) as to the correctness of the Tax Court's holding that in the case of an accrual taxpayer, as this taxpayer was,

this section permits only the deduction of excess profits taxes which *accrued* within the taxable year, for the point now under discussion the taxpayer accepts the decision of the Tax Court in this respect as being correct. It can afford to do so since it is clear that none of these excess profits taxes had accrued prior to 1947 because they were in dispute—see *Dixie Pine Products Co.* v. *Comm'r,* 320 U. S. 516 (1944)—and whether they accrued in 1947 depends upon whether they can be considered as "paid" in that year despite the fact that the dispute over them was not settled until at least 1948. See *Chestnut Securities Co.* v. *United States,* 62 F. Supp. 574 (Ct. Cls. 1945), and *Lehigh Valley Railroad* v. *Comm'r,* 12 T. C. 977 (1949). So the sole question with which we are now concerned is whether these 1947 remittances constituted taxes "paid" within the taxable year, that is 1947, within the meaning of § 122(d)(6). We think they did not.

A remittance made in respect of an asserted or putative tax liability in no proper sense constitutes a tax "payment" except to the extent that it is effective to discharge such liability in whole or in part. That in turn depends upon the agreement of the taxpayer and the Commissioner or his representatives, acting within their powers, or upon whether the taxing authorities have a duty under the particular circumstances involved to accept the remittance as a payment of the tax in full or *pro tanto.*

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Here there was admittedly no agreement in this respect between the taxpayer and the taxing authorities in 1947, and the only question is whether the Collector was, in the setting of these remittances, under a duty to accept them as "payments" *pro tanto* of the asserted or putative tax liabilities against Lewyt. We think he had no such duty. The taxpayer's 1943 tax liability was still in dispute on September 29, 1947, when these remittances were made. Settlement negotiations continued into 1948, and no settlement was reached until February 1948. Meanwhile the taxpayer's proceedings in the Tax Court remained alive. With respect to 1944 and 1945 taxes, the Revenue Agent had commenced his examination of the taxpayer's 1944 and 1945 returns, and it was clear that the same issues giving rise to the Commissioner's deficiency notice of August 30, 1946 as regards 1943 taxes were also involved for 1944 and 1945. So far as the record discloses, deficiency notices for 1944 and 1945 were not issued until February 16, 1950; and, in any event, it is clear that the controversy as to those issues present in the 1943 dispute, which were also applicable to 1944 and 1945, was active until at least 1948.

In these circumstances, we think that the action of the Collector in placing these 1947 remittances in his "Suspense Account" to abide the event of the disposition of these disputes was quite proper. The taxpayer was not entitled to have these remittances treated as a satisfaction of its tax liabilities in whole or in part, and at the same time

continue to contest such liabilities, or at best leave the Collector with an ambiguous situation on his hands.

Rosenman v. *United States,* 323 U. S. 658 (1945), while not reaching the precise point we have here, does support our view of the matter. In that case the Supreme Court held that the period of limitation on refund claims provided in § 910, I. R. C., requiring such claims to be presented within three years "after the payment of such tax," commenced to run from the time the Commissioner assessed the tax rather than from an earlier time when the taxpayer had made a general payment on account of estimated estate taxes. Stating that "payment" of a tax as contemplated by § 910, I. R. C., "plainly presupposes challenged action by the taxing officials" in response to which a remittance is made, the Court under the facts of that case held that no "tax payment" occurred until there had been an assessment followed by its satisfaction in part out of moneys already deposited with the Collector and in part by additional amounts paid by the taxpayer in response to such assessment, since it was only at that point that interest began to run against the Government on any amount in excess of that ultimately found due as the tax. While we do not read *Rosenman* to foreclose treating as a tax payment any remittance made prior to assessment, we do think that it supports the view that a remittance which does not *satisfy* an asserted tax liability should not be treated as the "payment" of a tax. Satisfaction may, as in *Rosenman,* follow from

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payment of a tax assessed, for such a payment extinguishes the asserted liability, even though the taxpayer is left with an independent claim for refund which survives the discharge of the assessment. Or it may follow from the payment of an asserted liability in advance of assessment, as appears to be contemplated by § 56(d), I. R. C., and 26 C. F. R. 601.13(b)(2),[2] *if*, as is expressly provided in the latter and by necessary implication in the former, the payment is accompanied by the taxpayer's acquiescence in the proposed deficiency. The same holds true as to § 271(a)(1)(B), requiring that amounts "collected without assessment" be excluded from the computation of a deficiency, for here again acquiescence by the taxpayer in such collections as constituting satisfaction of part of his tax liability is a condition necessarily to be implied. In short, there can be no payment without satisfaction whether pursuant to or apart from an assessment. Here the taxpayer was tendering its check with one hand, and contesting its liability to pay with the other. Its Tax Court proceedings as to the 1943 deficiency still stood, and that avenue was still open to it as to 1944 and 1945 taxes.

The taxpayer is quite mistaken, we believe, in reading *Rosenman* as standing for the proposition that the 1947 remittances should be treated as tax payments *ab initio* to the extent of the taxes ultimately found owing because they were effective

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[2] See also informal ruling of Internal Revenue Bureau contained in Prentice-Hall Federal Tax Service, 1950, par. 76,331.

to stop the running of interest against the taxpayer. The initial *Rosenman* payment was found not to be a tax payment despite the fact that the Court recognized that it stopped penalties and, as the Government conceded, interest *against the taxpayer.* It was found not to be a tax payment because it gave rise to no interest claim *against the Government.* The situation here is no different. Nor do we find such decisions as *Hanley* v. *United States,* 63 F. Supp. 73 (Ct. Cls. 1945), inconsistent with our conclusion, for there the taxpayer did not negative "payment" by simultaneous contest. Cf. *Murphy* v. *United States,* 78 F. Supp. 236 (S. D. Calif. 1948).

We hold that the 1947 remittances did not constitute "payment" of the taxpayer's 1943, 1944 and 1945 tax liabilities. They were no more than deposits "made in the nature of a cash bond for the payment of taxes thereafter found to be due." *Rosenman,* at p. 662.

The taxpayer also argues that the Tax Court's order entered on the 1948 stipulation settling the 1943 excess profits tax liability binds the Government by way of collateral estoppel from now asserting that the 1947 remittance in respect of the 1943 tax was not a payment of the tax. We need not dwell on this contention. It seems clear (although the pleadings are not before us) that the settlement was concerned only with the *fact* of payment and not with its *date.* The item in the stipulation "Tax paid: September 29, 1947 (3rd NY)" does not persuade us that the question we now have before us was really at issue in the Tax Court.

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2. *1947 Interest Payments*

For the same reasons the taxpayer's contention as to the deductibility of the 1947 interest payments in respect of 1943, 1944 and 1945 taxes must also fail.

3. *1946 Net Operating Loss*

The taxpayer challenges the determination of the Commissioner and the Tax Court as to the amount of the 1946 net operating loss.

As determined below, the net operating loss for 1946 was $164,326.38. The taxpayer argues that it should have been increased by $861,118.04, being the amount of the excess profits taxes which it paid in that year in respect of 1945.

This requires us to interpret the phrase "paid or accrued" in § 122(d)(6) permitting the deduction of excess profits taxes "paid or accrued within the taxable year" in the computation of the net operating loss under § 122(a). As already noted, it was unnecessary to reach this problem with respect to the 1947 net operating loss. The Tax Court held that "paid or accrued" meant that a *cash* taxpayer was entitled to deduct only excess profits taxes "paid," and an *accrual* taxpayer only those "accrued," within the taxable year, and that since Lewyt was an accrual taxpayer this sum of $861,118.04 could only be reckoned in Lewyt's tax computations for 1945. We think the Tax Court was right.

We start with the statute itself. Section 48(*e*), I. R. C., 26 U. S. C. A. §48, provides that "when

used in this chapter" (that is Chapter 1 entitled "Income Tax") "the terms * * * 'paid or accrued' shall be construed *according to the method of accounting upon the basis of which the net income is computed under this Part* [IV "Accounting Periods and Methods of Accounting"].[3] See also T. R. 29.43-1. Section 43, I. R. C., 26 U. S. C. A. §43, captioned "Period for which deductions and credits taken," states: "The deductions and credits * * * provided for in this chapter [1] shall be taken for the taxable year in which 'paid or accrued' * * * dependent upon the method of accounting upon the basis of which net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period."

The taxpayer makes a number of arguments to avoid what we think to be the plain effect of these provisions. We consider first its argument based on legislative history. Section 202(a) of the Revenue Act of 1941 amended § 23(c) of the Internal Revenue Code to permit deduction of Chapter 2E excess profits taxes "paid or accrued within the taxable year" in computing net income, subject to certain rules provided in §23(c)(2), one of which, "A," stated: "The deduction shall be limited to the tax *imposed* for the taxable year, but any portion of such tax paid *after* the taxable year shall be considered as having been paid *within* the taxable year * * *" The taxpayer here points out, and

[3] All italics in this opinion have been supplied.

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we think correctly, that this last quoted provision in effect placed cash and accrual taxpayers substantially on an *accrual* basis so far as the excess profits tax deduction was concerned. Then came the Revenue Act of 1942 which by §105(c) eliminated Chapter 2E excess profits taxes as a deduction in computing net income, but added, by §105 (e)(3)(C), a new Section, §122(d)(6), permitting the deduction of such excess profits taxes from gross income in computing the net operating loss, and net operating loss "carry-backs" and "carry-overs," subject to rules which were the same as those presently contained in §122(d)(6).

Pointing out that these rules are substantially the same as those formerly contained in §23(c) (2) as amended by the Revenue Act of 1941, except that rule "A" of that section, quoted above, was omitted, the taxpayer argues that one of two inferences should be drawn—either that the Congressional intent was that the basis of deductibility of excess profits taxes should follow the taxpayer's method of accounting, *i.e.*, cash or accrual, or that in this respect the Act gave a taxpayer, whether cash or accrual, an election to deduct such taxes if either paid or accrued. It is urged that the latter inference is the more compelling, it being argued, as we shall see in a moment, that to draw the first inference would attribute to Congress an intention to "discriminate" between cash and accrual taxpayers, in that an accrual taxpayer, absent such election, would rarely be able to take an excess profits deduction in a "loss" year.

We think that without more the arguments for and against these opposing inferences would at best present a stand-off. But we need not pause to examine them further, for here we have the explicit direction of §43 that this deduction "shall be taken for the taxable year in which 'paid or accrued' * * * *dependent upon the method of accounting upon the basis of which net income is computed,* unless in order to reflect the income the deductions * * * should be taken as of a different period." Certainly the exception would have no application in this instance, and it appears not to be contended to the contrary.

Next, we are referred to *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671 (D. C. Cir.), *cert. denied* 325 U. S. 881 (1945), and a line of cases following it, *Birmingham* v. *Loetscher Co.,* 188 F. 2d 78 (8th Cir. 1951); *Aramo-Stiftung* v. *Comm'r,* 172 F. 2d 896 (2d Cir. 1949); and *Wm. J. Lemp Brewing Co.* v. *Comm'r,* 18 T. C. 586 (1952), holding that the provisions of former §356, I. R. C., now §505(a)(1), I. R. C., 26 U. S. C. A. §505, permitting the deduction of excess profits taxes "paid or accrued during the taxable year" in computing the surtax upon the undistributed net income of personal holding companies under §500, I. R. C., 26 U.S.C.A. §500, gives a taxpayer, whether cash or accrual, the option of taking this deduction on either basis. The ground of these decisions, as exemplified by *Clarion,* is that the provisions of §48(c) in Chapter 1 of the Internal Revenue Code defining "paid or accrued" in terms of a taxpayer's method of re-

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porting for the purpose of computing *net income* under that Chapter, have no application to the meaning of §505(a)(1) permitting deduction of excess profits taxes for the purpose of computing the *undistributed income* tax on personal holding companies under Chapter 2. "But, obviously, this definition [48(c)] was intended to apply to the method of computing *net income*, and has no reference or relevancy to the subject matter of what, for the purposes of the newly added provision in relation to personal holding companies is taxable as *undistributed* income." *Clarion*, at p. 675. Stated otherwise, Chapter 2 contains no provisions comparable to §48(c) and §43 of Chapter 1 defining the phrase "paid or accrued."

The *Clarion* and the other cases cited are inapplicable to the one before us. Here the meaning of "paid or accrued" in § 122(d)(6) is directly involved in the computation of *net income*, for §23(s) allows as a deduction in "computing net income" under §23 "the net operating loss deduction computed under Section 122." In addition, to the extent that the meaning of "paid or accrued" is involved in the computation of the net operating loss itself by application of the §122(d)(6) deduction, §43 specifically gives it the same meaning as §48(c) requires in connection with the computation of net income.

The third contention which the taxpayer presses upon us is that to construe §122(d)(6) as we do discriminates against the accrual taxpayer. The argument is that in the nature of things it is usually

impossible for a taxpayer to incur in the same year both an excess profits tax liability and a net operating loss. Therefore, it is said, an *accrual* taxpayer in most cases will be unable to get the benefit of the §122(d)(6) adjustment in calculating his net income, while a *cash* taxpayer normally will. Take this hypothetical situation as illustrative of the taxpayer's point. A corporation had high profit years in 1942 and 1943 and incurred a $1,000,000 excess profits tax liability in the latter year, which it paid in 1944. In 1944 it had a net operating loss of $500,000, without regard to any §122(d)(6) adjustment. If an *accrual* taxpayer, the corporation would not be able to add its excess profits taxes for 1943 to its net operating loss for 1944; if a *cash* taxpayer, it would; and this in turn would mean that the cash taxpayer's net operating loss "carry-back" to 1942 and 1943 under § 122(b)(1) would be increased by $1,000,000, whereas the accrual taxpayer's "carry-back" would remain at $500,000.

We may conceive of situations where the accrual taxpayer is not put at this disadvantage with the cash taxpayer. One such is a situation where, as in the case of this taxpayer's 1943 excess profits taxes, accrual of the excess profits tax liability has been postponed because of a dispute concerning it, and the time of payment and accrual therefore coincide. See *Robert Reis & Co.* v. *Comm'r,* 20 T. C. 294 (1953). Nevertheless, we would not be candid if we failed to recognize the force of what the taxpayer argues here. But however sympathetic one may be to this predicament of an accrual taxpayer—

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a phenomenon by no means unique under the tax laws—we would not be justified in ignoring the plain mandate of the statute.

Finally, on this point the taxpayer gives us the decision of the Court of Claims in *Olympic Radio and Television, Inc.* v. *United States,* 108 F. Supp. 109 (1952), *re-hearing denied* 110 F. Supp. 600 (1953), which squarely upholds the position of the taxpayer as to the meaning of "paid or accrued" in §122(d)(6). We have given careful and respectful consideration to the two opinions of the majority in that case, which were based largely on the same considerations urged upon us by the taxpayer here, and find ourselves unable to agree with the Court of Claims.

4. *1946 Net Operating Loss "Carry-Back"*

Now we come to the issue involving the "carry-back" of the 1946 net operating loss to 1944 and 1945. As previously noted, §122(b)(1) requires that such loss be applied first to the year 1944 and the excess, if any, to 1945. That excess is the amount by which the 1946 operating loss exceeds the income for 1944 "computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6) [of §122] *and* (B) by determining the net operating loss *deduction* for such second preceding taxable year [1944] without regard to such [1946] net operating loss." §122(b)(1) and §122(c).

In terms of the present case, the situation is this: The taxpayer's 1944 income, as to which there is

no dispute, was $584,866.81, *without regard* to any §122(d)(6) adjustment or the 1946 net operating loss deduction under §23(s). There was no net operating loss for 1944. The net operating loss for 1946, as determined by the Commissioner, was $164,326.38, and we have already disposed of the contention that it should have been increased by $861,118.04, the amount of the excess profits taxes paid by the taxpayer in 1946 in respect of 1945.

The taxpayer contends that in computing the amount of the 1946 net operating loss ($164,326.38) which is to be carried back to 1945, there should first be offset against 1944 net income ($584,866.81) either (a) the sum of $759,916.50, being the amount of the 1943 excess profits taxes reflected in the taxpayer's return for that year and *paid* by it in 1944, or (b) the sum of $625,561.59, being the amount of the 1944 excess profits taxes as reflected in the taxpayer's return for 1944, and which it claims *accrued* in 1944. Since under (a) the 1943 excess profits taxes *paid* in 1944 ($759,916.50) exceeded by $175,049.69 the unadjusted net income for 1944 ($584,866.81) and under (b) the 1944 excess profits taxes *accrued* for that year ($625,561.59) exceeded by $40,694.78 such net income for 1944 ($584,866.81), the taxpayer claims that the entire 1946 net operating loss ($164,326.38) constitutes a "carry-back" to 1945. We cannot agree.

What we have already held as to the meaning of "paid or accrued" in §122(d)(6) in connection with the computation of the 1946 net operating loss equally applies to the §122(d)(6) adjustment to

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1944 net income, and disposes of the contention that for this purpose the taxpayer was entitled to deduct from such income the 1943 excess profits taxes *paid* in 1944.

The other contention must also fail. The excess profits taxes ultimately found by the Commissioner to be due in respect of the year 1944 were $280,540.33, and not $625,561.59, as originally reported in the taxpayer's 1944 return, and we think it was this figure rather than the uncorrected figure which represented the measure of the §122(d)(6) adjustment to 1944 net income. Section 122(d)(6) allows the deduction of "the amount" of excess profits taxes "imposed" and (in the case of an accrual taxpayer) "accrued within the taxable year." The tax which was "imposed" for 1944 was $280,540.33, and that in our opinion was "the amount" of the tax which "accrued" in 1944 for purposes of this adjustment. True, it has been held that when all the events necessary to determine the amount of a tax have occurred within a taxable year, the tax as reported in that year constitutes the tax "accrued" despite the occurrence of later events which change the amount of the tax ultimately found due. See *United States* v. *Detroit-Moulding Corp.*, 56 F. Supp. 754 (E. D. Mich. 1944). But if we are to follow this view we should also take the *income* as originally reported in the 1944 return, *viz.*, $827,852.99 instead of $584,866.81 as finally determined by the Commissioner. What the taxpayer is seeking to do is to have the benefit of both the *smaller* 1944 income as finally determined ($584,-

866.81) and the *larger* excess profits tax ($625,-561.59), based upon the income as originally reported. The taxpayer must match either the *returned* income ($827,852.99) against the *returned* excess profits tax based thereon ($625,561.59), or the *determined* income ($584,866.81) against the determined excess profits tax ($280,540.33). It cannot have it both ways at the same time by matching *determined* income against *returned* excess profits taxes. And we think it is *determined* income and excess profits taxes that represent the proper §122(d)(6) adjustment, since the manifest purpose of the "carry-back" and "carry-over" provisions of the statute, §122(b)(1), (2) is that the incidence of this kind of taxation upon a business enterprise shall in effect be looked at from the vantage point of a five year period, that is the current taxable year plus two "carry-back" and two "carry-over" taxable years.

In light of this wearisome discussion, we think that the correct situation as to the 1946 "carry-back" was this: The taxpayer's 1944 net income, before the §122(d)(6) and §23(s) adjustments, was $584,866.81. The excess profits taxes which accrued for 1944 were $280,540.33. After the §122(d)(6) adjustment ($584,866.81 *minus* $280,540.33), the balance of 1944 income was $304,326.48. Since this was greater than the net operating loss for 1946 ($164,326.38), this resulted, as the Commissioner and Tax Court determined, in there being nothing left from the 1946 net operating loss to "carry back" to 1945. It likewise resulted in there being taxable income for 1944.

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5. *Computation of 1945 Excess Profits Tax Deficiency*

In computing the excess profits tax deficiency for 1945, the Commissioner apparently gave no credit for the $108,437.36 remitted by the taxpayer on September 29, 1947. The taxpayer asserts this was an amount "collected without assessment" which under §271(a)(1)(B) the Commissioner was required to take into account in computing the 1945 deficiency. See *McConkey* v. *Comm'r,* 199 F. 2d 892 (4th Cir. 1952), *cert. denied* 345 U. S. 924 (1953); *Bendheim* v. *Comm'r,* 2d Cir., decided June 9, 1954.

For the reasons already discussed, we think that this would be so only if the remittance were made under circumstances which would constitute it a satisfaction of a tax liability in whole or in part. In the *McConkey* and *Bendheim* cases, *supra,* the taxpayers made remittances similar to that now under consideration. Each of those remittances was deposited in the Collector's "Suspense Account" and stood, under the authority of the *Rosenman* case, as "a cash bond for the payment of taxes thereafter found to be due," or, in effect, as a continuing offer by the taxpayer to the Collector that he apply the amount to the discharge of a tax liability in whole or in part. And in each of those cases the Collector, after these deposits with their implicit offers had been made, stated a proposed deficiency not in excess of the deposit, thereby indicating unequivocally an acceptance of the taxpayer's offer. Accordingly, the amounts became "col-

lected without assessment" within the meaning of §271(a)(1)(B), and the taxpayer's sole remedy remaining was an independent suit for refund.

Here, however, the Collector did not accept, explicitly or implicitly, the taxpayer's remittance as a discharge of its tax liability, in whole or in part, nor could he be forced to do so while that liability was still in dispute. Indeed, no deficiency had yet been proposed in 1947. But in 1948 the Revenue Agent proposed a deficiency in excess of the taxpayer's remittance, as to which the Commissioner issued his deficiency notice on February 16, 1950, and which the taxpayer was free to, and did, contest; and certainly the Commissioner for his part was not required to circumscribe his position in the ensuing litigation in the Tax Court by making application of such remittance to the asserted tax liability. In other words, until the Commissioner, with unequivocal authority of the taxpayer, applied or was required to apply the $108,437.36 remittance as a satisfaction, in whole or in part, of the asserted tax liability, this remittance did not constitute an amount "collected without assessment" within the meaning of §271, but continued as no more than a deposit voluntarily made by the taxpayer.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 10

THE UNITED STATES, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the Court of Claims and the dissenting opinion (R. 10-14) are reported in 108 F. Supp. 109. The opinion on rehearing (R. 16-19) is reported in 110 F. Supp. 600.

JURISDICTION

The judgment of the Court of Claims was entered November 4, 1952. (R. 10, 14.) On December 3, 1952, the Government filed a motion for rehearing (R. 14) which was denied on March 3, 1953 (R. 16).

The petition for a writ of certiorari was filed on May 29, 1953, and was granted on October 14, 1954. (R. 21.) The jurisdiction of this Court rests on 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether, under Section 122(d)(6) of the Internal Revenue Code, a taxpayer on the accrual basis can, in computing its net operating loss for one year, deduct the amount of excess profits taxes which were paid in that year but had accrued in an earlier year.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions (Sections 23(c)(1) and (s), 41, 43, 48(c), 122, 710(a)(1) and (b), 711(a)(1)(J) and (2)(L) of the Internal Revenue Code of 1939) [1] and Treasury Regulations (Treasury Regulations 111, Sections 29.41-1, 29.41-2, 29.43-1, 29.122-1, and 29.122-2) are set forth in Appendix A, *infra*, pp. 36-53.

STATEMENT

This case was submitted to the Court of Claims on motions for summary judgments filed by both parties, together with supporting affidavits. The facts, which are not in dispute, are as follows:

Taxpayer, a New York corporation, keeps its accounts and files its income and excess profits

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[1] All references to the "Internal Revenue Code" or "Code" are to the "Internal Revenue Code of 1939" unless otherwise expressly noted.

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tax returns on the accrual basis, using the calendar year as its accounting period. (R. 1.) It seeks to recover in this action the sum of $148,841.72, representing a portion of the excess profits tax for the year 1944 which it paid in 1945 in the total amount of $623,454.42. (R. 2, 3, 11.)

Taxpayer's income tax return for the year 1946 reflected a net operating loss of $324,844.23 which, upon audit by the Commissioner and with taxpayer's acquiescence, was reduced to $310,872.60. (R. 2.) The net operating loss of $310,872.60 was carried back and set off against taxpayer's excess profits net income for 1944, as permitted by law, and its excess profits tax for 1944 was adjusted in conformity with the resulting reduction in income. (R. 2, 5, 11.) This adjustment is not in controversy.

In the year 1946 taxpayer paid $263,272.80 on account of a reported excess profits tax liability of $346,643.22 for the year 1945. (R. 2, 9.) It contends that under Section 122(d)(6) of the Internal Revenue Code (Appendix A, *infra,* p. 42) the $263,272.80 so paid in 1946 should have been added to the admitted net operating loss of $310,872.60 for that year, and that the sum of these two figures ($574,145.40), instead of the second figure alone, should have been carried back as a net operating loss from 1946 to 1944 (R. 5, 11). If this had been done, the Court of Claims found, it would have further reduced the 1944 excess profits tax liability by $148,841.72, which is the amount claimed in this suit. (R. 11-12.)

Although, as stated above, taxpayer originally reported an excess profits tax liability of $346,643.22 for the year 1945, of which $263,272.80 was paid in 1946, the entire amount of the reported tax was subsequently refunded or credited to taxpayer as a result of a net operating loss carryback from 1947 to 1945. (R. 10.)

The Court of Claims sustained taxpayer's contention and held (Madden, J., with whom Jones, C. J., concurred, dissenting) that, in computing its net operating loss for 1946, taxpayer was entitled to include therein the amount of excess profits tax paid in 1946 on account of the liability shown on its return for the year 1945. (R. 10-14.) Judgment was entered in favor of taxpayer in the amount of $148,841.72 with interest. (R. 14.) On rehearing, the court adhered to its original decision. (R. 16-19.)

SUMMARY OF ARGUMENT

I

A. The applicable statutory definitions require the conclusion that Congress used the alternative verbs "paid or accrued" in Section 122(d)(6) to distinguish between taxpayers on a cash basis and taxpayers on an accrual basis (i. e., "paid," if on cash basis, and "accrued," if on accrual basis), and that a taxpayer has no option to take deductions on a basis inconsistent with the method of accounting which it employs. Thus, Section 48(c) explicitly directs that, when used in "this chapter" (Chapter 1, which includes Section 122), the

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"terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed. . ." The same principle is declared in the relevant accounting rules prescribed by the Code (Sections 41, 43) and in pertinent Treasury Regulations. As stated by the Second Circuit in *Lewyt Corp.* v. *Commissioner,* No. 417, there can be no "ignoring the plain mandate of the statute" (215 F. 2d 518, 526). There is particularly strong reason when a taxpayer is seeking the advantage of a deduction—a matter not of right but of legislative grace—that it be required to bring itself clearly within the statute.

In keeping with the above provisions, the courts have held, in a wide variety of situations, that one reporting income on an accrual basis is bound by the rule which requires such a taxpayer to take deductions only in the year of accrual. It is also significant that taxpayer does not suggest a recomputation of the whole of its operations on a cash basis consistent with its claim for taking subsection (d)(6) deductions on a cash basis.

Taxpayer is not aided by *Commissioner* v. *Clarion Oil Co.,* 148 F. 2d 671 (C.A. D.C.), and similar cases involving the imposition of a penalty surtax on the undistributed income of personal holding companies. Those cases hold that while the statutory definitions of "paid or accrued" in terms control the method of computing net income (see 148 F. 2d at 675), they need not be applied in determining the penalty tax on undistributed in-

come prescribed by subchapter A of chapter 2. The net operating loss deduction claimed in the instant case relates solely to the "computing [of] net income" (Section 23(s)) and, under the reasoning of *Clarion Oil*, the statutory definition of "paid or accrued" controls.

Taxpayer also urges a departure from the statutory definition on the ground that otherwise accrual basis taxpayers will get no substantial benefits from Section 122(d)(6). But there are situations in which excess profits taxes will "accrue" during a loss year and will cause or augment a net operating loss. See, *e.g., Robert Reis & Co.* v. *Commissioner,* 20 T.C. 294. And, in any event, the fact that cash basis taxpayers may as a practical matter derive more benefits from this provision than accrual basis taxpayers could not warrant a revision of the statute by the courts. Cf. *Crooks* v. *Harrelson,* 282 U.S. 55, 60.

B. Taxpayer asserts the right to augment its 1946 net operating loss by the amount of excess profits taxes, accrued in 1945, which it paid in 1946. Assuming, *arguendo,* contrary to our contention above, that the statute permits an accrual basis taxpayer to follow such a course, there is a further obstacle to the claimed deduction in the instant case. The amount paid in 1946 was subsequently refunded in full as a result of a carryback from 1947. Thus, no actual economic loss was suffered as a result of the 1946 payments and no net operating loss can be founded upon them. Section 122(d)(6) allows as a deduction the amount of excess profits taxes actually *imposed*

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in a given taxable year. There were not two excess profits taxes imposed for 1945; there was only one, and that was in the amount as finally determined.

II

The language of Section 122(d)(6) had its antecedent in Section 23(c)(2) as amended by the Revenue Act of 1941. Examination of the earlier section in its entirety shows that when Congress wished to treat cash basis and accrual basis taxpayers similarly for purposes of a particular deduction, it did so explicitly. Rule "A" of Section 23(c)(2) provided:

> The deduction shall be limited to the tax imposed for the taxable year, but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year; * * *

The failure to adopt a similar provision in Section 122(d)(6), added in 1942, supports the view that the words "paid or accrued", as there used, must be taken in their ordinary, statutory sense.

The specific Congressional purpose in adding Section 122(d)(6) is not unequivocally expressed in the legislative history. The underlying legislative policy can be gleaned, however, from the following:

(1) The language of the new subsection had its origin in Section 23(c)(2) as amended by the 1941 Act. In the framework of that Act, a taxpayer deducted its excess profits tax for purposes of computing its other corporate taxes (normal tax and

surtax). When this was altered by the 1942 Act, which authorized a different and larger deduction, and hence a new method of computing the normal tax and surtax, Section 23(c)(2), providing for deduction of excess profits tax, was repealed.

(2) The reappearance of this language in Section 122(d)(6), described as one of a "number of miscellaneous amendments" of a "technical" nature "made necessary by [the] change in base for corporate tax" and required "in order to make it all come out straight," hardly suggests that Congress contemplated a novel and far-reaching deduction of the kind which taxpayer urges—a deduction which would permit a corporation, whether on cash or accrual basis, to deduct all excess profits taxes, both paid and accrued within any taxable year, for purposes of determining its net operating loss.

Since it may be fairly stated that, whatever else was contemplated (or overlooked), there is no evidence of an express or implied intention to effect a drastic departure from familiar and accepted tax concepts, the legislative history, far from supporting the motion that (d)(6) should be construed to obliterate the statutory definition of "paid or accrued," emphasizes the wisdom of confining the amendment within the limits of its statutorily-defined terminology.

ARGUMENT

Section 23(s) of the Internal Revenue Code of 1939 provides that in computing net income there shall be allowed "the net operating loss deduction

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computed under section 122" (Appendix A, *infra*, p. 36). The "net operating loss deduction" for a taxable year is based on the "net operating losses" for the two preceding and two succeeding years, which, subject to certain adjustments, become available as "carry-overs" and "carry-backs" to the taxable year.[2] We are here concerned with the amount of the "net operating loss" for the year 1946 which may be carried back to the year 1944. Section 122(a) of the Code defines the term "net operating loss" to mean "the excess of the deductions allowed by this chapter [Income Tax] over the gross income, with the exceptions, additions, and limitations provided in subsection (d)." (Appendix A, *infra*, p. 38.) Section 122(d)(6) provides that "There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 [Excess Profits Tax] paid or accrued within the taxable year." (Appendix A, *infra*, p. 42.)[3]

The years 1944 and 1945 were years of profit for taxpayer, and were followed by years of loss

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[2] Determination of the net operating loss under Section 122 (a) is the first of the three steps involved in computation of the net operating loss deduction. The second involves determination of the amount and extent to which the net operating loss may be utilized as a two-year carry-back or carry-over, as set out in Section 122(b) (Appendix A, *infra*, pp. 38-40). The third step is conversion of the aggregate of permissible carry-overs and carry-backs under Section 122(c) (Appendix A, *infra*, pp. 40-41) into the net operating loss deduction. *Reo Motors* v. *Commissioner*, 338 U.S. 442, 446-447; Treasury Regulations 111, Section 29.122-1 (Appendix A, *infra*, pp. 49-50).

[3] This provision is subject to certain rules not here relevant.

in 1946 and 1947. (Statement, *supra,* pp. 3-4.) The court below (two judges dissenting) held that although taxpayer admittedly maintained its books and records and filed its tax returns on the accrual basis of accounting, and although its 1945 excess profits tax accordingly *accrued* in 1945, taxpayer might nonetheless, under Section 122(d)(6), augment its net operating loss for 1946 by including the sum of $263,272.80 *paid* in 1946 on account of its excess profits tax liability for 1945. (R. 11-14.) In reaching this result, which is diametrically opposed to the holding of the Court of Appeals for the Second Circuit in the companion case of *Lewyt Corp.* v. *Commissioner,* No. 417, this Term (see 215 F. 2d 518, 523-526, affirming the unanimous decision of the full Tax Court, 18 T.C. 1245), the majority of the court of claims conceded that its decision "does violence to the letter of the Act" but was of the view that the result was in keeping with the purpose of Congress. (R. 13.)[4]

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[4] The majority below noted its disagreement and the minority its concurrence with the Tax Court's decision in the *Lewyt* case. (R. 14.) Since the decision below, the Tax Court has repeatedly expressed adherence to its decision in *Lewyt*. *Hunter Manufacturing Corp.* v. *Commissioner,* 21 T.C. 424, appeal pending (C.A. 3d); *Wheeler Insulated Wire Co.* v. *Commissioner,* 22 T.C. 380, appeal pending (C.A. 2d); *W. L. Maxson Corp.* v. *Commissioner,* decided January 26, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,021), supplemental opinion June 17, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,174), appeal pending (C.A. 2d); *Byrne Doors, Inc.* v. *Commissioner,* decided April 8, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,107), appeal pending (C.A. 6th).

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It is the Government's position that in the light of the unambiguous provisions of the Internal Revenue Code, which are discussed in Point I, *infra,* it was not open to the court below to speculate concerning the possible purposes contemplated by Congress and to create opportunities for extensive deductions in circumstances where they are explicitly precluded by the statutory language. We shall urge additionally (Point II, *infra*) that the legislative history does not support the Court of Claims' position, but fairly indicates that Congress did not intend to change the meaning of "paid or accrued" explicitly defined in Chapter 1 of the Code.

I

The Explicit Mandate of the Statute Precludes Allowance of the Deduction for Which Taxpayer Contends

A. *Section 122(d)(6) denies an accrual basis taxpayer the right to deduct its excess profits tax in the year paid, if the tax accrued in another year.*

1. As stated above, Section 122(d)(6) permits deduction of the amount of excess profits tax "paid or accrued" in the taxable year. In our view, definitive provisions of the Internal Revenue Code, as well as implementing Treasury Regulations of long standing, require the conclusion that the alternative verbs "paid or accrued" serve to distinguish between taxpayers on a cash basis and taxpayers on an accrual basis (i.e., "paid," if on a cash basis, and "accrued," if on an accrual

basis) and do not provide the taxpayer an option to take deductions on a basis inconsistent with the method of accounting which it employs.

Section 41 (Appendix A, *infra,* p. 37) states the general rule that "net income shall be computed upon the basis of the taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer * * *."

Section 43, entitled "Period for Which Deductions and Credits Taken," provides (Appendix A, *infra,* pp. 37-38):

> The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

Even more pointedly, Section 48(c) specifically provides (Appendix A, *infra,* p. 38) that, when used in "this chapter" (i.e., Chapter 1, entitled "Income Tax," which *includes* Section 122)—

> The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed * * *.[5]

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[5] This language has been substantially incorporated in income tax legislation commencing with the Revenue Act of 1918, c. 18, 40 Stat. 1057, Section 200.

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Treasury Regulations 111, Section 29.41-2 (Appendix A, *infra*, pp. 47-48), referring to the definition in Section 48, declares that "A method of accounting will not * * * be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency." And Section 29.43-1(a) of the Regulations (Appendix A, *infra*, pp. 48-49) states:

> The terms "paid or incurred" and "paid or accrued" will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48(c).)

The above provisions are unequivocal. As stated by the court of appeals in the companion *Lewyt* case, No. 417, no argument rested on claim of hardship or legislative history which might be advanced in favor of a different result could justify "ignoring the plain mandate of the statute" (215 F. 2d at 526). To similar effect, see *Healy* v. *Commissioner*, 345 U.S. 278, 284-285; *Riley Co.* v. *Commissioner*, 311 U.S. 55, 59; *Crooks* v. *Harrelson*, 282 U.S. 55, 60; *United States* v. *Hill*, 248 U.S. 420. There is particularly strong reason when a taxpayer is seeking the advantage of a deduction—a matter not of right but of legislative grace—that it be required to bring itself clearly within the statutory provision. *Standard Paving Co.* v. *Commissioner*, 190 F. 2d 330, 333-334 (C.A. 10th); see also *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440; *White* v. *United States*, 305 U.S. 281, 292; *Deputy* v. *duPont*, 308 U.S. 488, 493.

2. In keeping with the statutory provisions discussed above, the courts have held, in a wide variety of situations, that one reporting income on an accrual basis may not evade the rule which requires such a taxpayer to take deductions in the year of accrual. See, *e.g.*, this Court's decisions in *Security Mills Co.* v. *Commissioner*, 321 U.S. 281; *Aluminum Castings Co.* v. *Routzahn*, 282 U.S. 92; *Niles Bement Pond Co.* v. *United States*, 281 U.S. 357; *United States* v. *Anderson*, 269 U.S. 422.[5a]

This Court's decision in *Reo Motors* v. *Commissioner*, 338 U.S. 442, is also closely in point, for there, as here, the taxpayer contended that language in Section 122 should bear a special interpretation different from the meaning accorded the same terms when used in other parts of Chapter 1. Rejecting this contention, the Court declared (p. 448):

> If, as petitioner contends, 1942 law governs although the loss occurred in 1941, it is difficult to see why the whole of its 1941 operations, and not merely the Reo Sales liquidation, should not be recomputed on the basis of the income and deduction provisions applicable in 1942. Petitioner does not suggest such a re-

[5a] It is to be noted that Section 23, which provides (subsection (s)) that in computing net income there shall be allowed "the net operating loss deduction computed under section 122," uses the words "paid or incurred" and "paid or accrued" in various subsections (subsections (a)(1) and (2) (expenses); (b) (interest); (p) (pension trust); (z)(1) (taxes and interest paid to cooperative apartments)). And see especially Section 23 (c) (1), relating to deduction of taxes (Appendix A, *infra*, p. 36). There appear to be no cases arising under these subsections in which the courts have treated the quoted words in any sense other than that specified by

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> computation, in spite of the fact that *the terms in which net operating loss is defined—"gross income" and "deductions allowed by this chapter"—are equally applicable in the computation of income taxes generally.* [Emphasis added.]

Nor does the taxpayer in the instant case suggest a recomputation of the tax for the whole of its operations for the pertinent years on a cash basis consistent with its claim for taking subsection (d)(6) deductions on a cash basis. Indeed, with the exception of the term "paid or accrued," taxpayer does not suggest that any of the numerous terms contained in Section 122 [6] should be interpreted differently for purposes of that section from the way in which they are understood throughout Chapter 1. [7] Yet, as observed above, it is explicitly directed in

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Section 48(c). See Mertens' comment (5 Mertens, *Law of Federal Income Taxation* (1953 ed.), Section 27.52), in relation to Section 23 (c)(1), that taxes are deductible "in the year of payment, and only in that year, by taxpayers on a cash basis and in the year of accrual, and only in that year, by taxpayers on an accrual basis."

[6] Examples of such terms, with which Section 122 is replete, are: "deductions allowed by this chapter," "gross income," "taxable year," "net income," "normal-tax net income," "discovery value," and in 122(d), in particular, "depletion," "percentage depletion," "interest paid or accrued," "capital assets," "operation of a trade or business," "consolidated return."

[7] It may be noted that the House Committee which originally recommended the enactment of Section 122 in the 1939 Act assumed that the definitions contained in Section 48 would be applicable to Section 122. Thus, referring to the term "taxable year" used in Section 122(b), the Committee stated (H. Rep. 855, 76th Cong., 1st Sess., p. 17 (1939-2 Cum. Bull., p. 517)):

> For the purpose of ascertaining the first, second, or third preceding taxable year, a fractional part of a year which

Section 48(c) that the term " 'paid or accrued' shall be construed" according to taxpayer's method of accounting.

The line of cases upon which the majority below relied (R. 13) is clearly distinguishable.[8] Those cases involved provisions of the Code imposing a penalty surtax on the undistributed profits of personal holding companies. In computing the amount of undistributed profits, Section 505(a) permitted, *inter alia,* the deduction of excess profits taxes "paid or accrued during the taxable year." The cases in question hold that for purposes of these penalty provisions, which are incorporated in the personal holding company surtax provisions of Sections 500 *et seq.,* Chapter 2, the definitions of "paid or accrued" contained in Chapter 1 (see Sections 43 and 48(c), discussed *supra,* pp. 12-13) need not be deemed controlling. Thus, speaking of Section 48(c), the court stated in the *Clarion Oil* case (148 F. 2d, p. 675):

> But, obviously, this definition was intended to apply to the method of computing *net income,* and has no reference or relevancy to the subject matter of what, for the purposes of the

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is a taxable year under section 48(a), is a preceding taxable year.

The governing regulation (Treasury Regulations 111, Section 29.122-1) makes the same reference.

[8] *Commissioner* v. *Clarion Oil Co.,* 148 F. 2d 671 (C.A. D.C.), certiorari denied, 325 U.S. 881; *Aramo-Stiftung* v. *Commissioner,* 172 F. 2d 896 (C.A. 2d); *Birmingham* v. *Loetscher Co.,* 188 F. 2d 78 (C.A. 8th); *Wm. J. Lemp Brewing Co.* v. *Commissioner,* 18 T.C. 586, 600-601, acquiesced in by the Commissioner, 1952-2 Cum. Bull. 2. The recent decision in *Harry M. Stevens, Inc.* v. *Johnson,* 115 F. Supp. 310 (S.D.

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> newly added provision in relation to personal holding companies, is taxable as *undistributed* income.

However, under Section 23(s), here involved, "the net operating loss deduction computed under section 122" is deductible *"in computing net income."* (Emphasis added.) Under the very reasoning of *Clarion Oil,* therefore, Chapter 1 definitions of "paid or accrued" control. To restate the point in the language of the court of appeals in the *Lewyt* case (215 F. 2d, p. 525):

> The Clarion and the other cases cited are inapplicable to the one before us. Here the meaning of "paid or accrued" in § 122(d)(6) is directly involved in the computation of *net income,* for § 23(s) allows as a deduction in "computing net income" under § 23 "the net operating loss deduction computed under section 122." In addition, to the extent that the meaning of "paid or accrued" is involved in the computation of the net operating loss itself by application of the § 122(d)(6) deduction, § 43 specifically gives it the same meaning as § 48(c) requires in connection with the computation of net income.

See, also, dissenting opinion of Judge Madden below. (R. 14.)

3. Respondent argues that the Government's construction should not be adopted because it would

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N.Y.), pending on appeal (C.A. 2d), involving surtax under Section 102 on corporations improperly accumulating surplus, is distinguishable on like grounds.

work an inequitable result. The contention is that while such a construction extends substantial benefits to a cash basis taxpayer, "it is almost impossible as a practical matter for an accrual basis taxpayer to incur a net operating loss under Chapter 1 * * * and in the same year incur an excess profits tax liability under Chapter 2E * * *." (Br. in Op. 11.)

We would point out, to begin with, that there are situations in which the statutory provision, as we construe it, will result in benefit to an accrual basis taxpayer. For example, an accrual basis taxpayer may derive benefit from Section 122(d)(6) if excess profits taxes for a given year are disputed and not settled until a later year.[9] Under the rule established by *Dixie Pine Co.* v. *Commissioner,* 320 U.S. 516, the disputed tax liability accrues in the year of settlement, which might, of course, be a loss year. It then becomes part of the net operating loss for that year. That was the precise situation before the Tax Court in *Robert Reis & Co.* v. *Commissioner,* 20 T.C. 294, 298-299, in which the court commented:

> In passing, we note that our holding refutes a contention made by the taxpayer in the *Lewyt* case. There it was argued that to construe "paid or accrued" as used in section 122(d)(6) as referring to the accounting system used by the taxpayer would deny ac-

[9] Originally, taxpayer claimed not only the 1945 tax paid in 1946 but also certain other taxes which accrued in 1946 as the result of a settlement in that year of disputed taxes for an earlier year. However, it subsequently abandoned its claim as to the accrued taxes (R. 5, 7.)

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> crual basis taxpayers any benefit under the section. We point out that the accrual taxpayer here does get a benefit.

See, also, the court of appeals opinion in *Lewyt*, 215 F. 2d at 526.

Another instance is that of an accrual basis taxpayer which, having derived abnormal income during a given taxable period, allocated part of that income, for excess profits tax purposes, to a later tax year, as authorized by Code Section 721. The later year could, of course, be a loss year.[10]

More broadly, we would emphasize that innumerable individual provisions in the complex structure of the tax laws will have a differing incidence depending on the method of accounting utilized by the taxpayer. Thus, in 1940, when the excess profits tax took effect, the cash basis taxpayer was obliged to pay the tax on goods or services sold and delivered in 1939 for which payment was received in 1940. In the case of the accrual basis taxpayer, identical transactions were free from excess profits taxation. This example might be multiplied many times over. Such results will inevitably occur unless Congress should require all taxpayers to employ the same system of accounting for tax purposes. The underlying assumption upon which the tax laws operate is that when a taxpayer adopts a method of accounting (a taxpayer whose transactions are many and complicated usually finds the accrual method more desirable be-

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[10] Example 3, Appendix B, *infra*, p. 55, illustrates such a case.

cause expenses are more likely to be deducted in the year in which the income to which they relate is reported), the disadvantages which attach to that method will not, over the long run, outweigh the advantages. In substance, Congress has said to the taxpayer: You may exercise the option to keep your books on a cash basis or an accrual basis; but you may not compute your income and your deductions on one basis for purposes of one provision of the income tax laws and on another basis for purposes of another provision of those laws.

In rejecting arguments similar to those made by respondent, based upon alleged hardships to individual taxpayers or classes of taxpayers, this Court stated (*Crooks* v. *Harrelson*, 282 U.S. 55, 60):

> It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

See also *Taft* v. *Commissioner*, 304 U.S. 351, 358-359; *Pillsbury* v. *United Eng. Co.*, 342 U.S. 197, 199-206.

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B. *In any event, a deduction under Section 122(d)(6) must reflect an excess profits tax actually imposed. Taxpayer's claim here lacks this foundation*

We have argued above that taxpayer could not add its 1945 excess profits tax, paid in 1946, to its 1946 net operating loss because, as an accrual basis taxpayer, its tax accrued in 1945. Assuming, *arguendo,* however, that taxpayer could hurdle this obstacle, there is a further barrier to allowance of taxpayer's claim.

As pointed out in the Statement (*supra,* p. 4), the 1945 excess profits tax paid by taxpayer was subsequently refunded or credited in full as a result of a net operating loss carry-back from 1947. Thus, the 1945 excess profits tax liability was wiped out. And since no economic loss was suffered, the foundation upon which taxpayer seeks to augment its 1946 net operating loss is destroyed.

We would emphasize that Section 122(d)(6) allows as a deduction "the amount of [excess profits] tax *imposed* . . ." (emphasis added). A sum which was paid in the loss year, but was subsequently refunded, does not represent an amount of tax actually imposed. Certainly, there were not two amounts imposed for 1945; there was only one, and that one was the amount which finally became determinable after application of the 1947 carry-back.

Essentially the same question (though arising in a somewhat different context) is before this Court

in *Lewyt*, No. 417. As Judge Harlan stated for the court of appeals in that case, "The excess profits taxes ultimately found by the Commissioner to be due in respect of the year 1944 . . . rather than the uncorrected figure . . ." constituted " 'the amount' of excess profits taxes 'imposed' " within the meaning of Section 122(d)(6). Application of this principle to the case at bar would require reversal of the Court of Claims' judgment here, entirely apart from the issue discussed in Point IA, *supra*.[10a]

II

The Legislative History Furnishes No Basis for a Departure from the Statutory Language

The discussion of the legislative history which follows is addressed to two questions: (a) Whether there is anything in the legislative antecedents and history of Section 122(d)(6) to show that the phrase "paid or accrued" used in that section was meant to have a meaning varying from the statutory definition of the term; and (b) whether the entire statutory scheme and history show that Congress proposed to extend to accrual basis taxpayers, through the deduction of excess profits taxes, benefits in addition to those which could be accorded them under the prevailing definitions of the statute.

A. The court below did not discuss taxpayer's argument, renewed in the brief in opposition to certiorari (pp. 7-9), based upon the legislative ante-

[10a] For a fuller discussion of this principle, we respectfully refer the Court to the Government's brief in No. 417.

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cedents and history of Section 122(d)(6)—a failure which suggests that it found no support there for its conclusion. In the *Lewyt* case, the taxpayer advanced a similar argument, both in the Tax Court and in the court of appeals. Those courts found that the history of Section 122(d)(6) and its antecedents was inconclusive and provided no warrant for rejecting the statutory definition of "paid or accrued." See 18 T.C. at 1251-1252; 215 F. 2d at 524-525.

The committee reports, themselves, are silent in respect to the meaning of "paid or accrued" as used in Section 122(d)(6), and taxpayer's argument rests upon inferences which it seeks to draw from the omission of language used in a different context in an earlier year. That argument (summarized by the Second Circuit in *Lewyt*, 215 F. 2d at 524), is as follows:

Section 202(a) of the Revenue Act of 1941 amended Section 23(c) of the Internal Revenue Code to permit deduction of Chapter 2E excess profits taxes "paid or accrued within the taxable year" in computing net income, subject to certain rules provided in Section 23(c)(2).[11] The following year, the Revenue Act of 1942, c. 619, 56 Stat. 798, eliminated Chapter 2E excess profits taxes as

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[11] (2) *Excess-Profits Tax Under Chapter 2E—Special Rules.* —For the purposes of this subsection, in the case of the excess-profits tax imposed by Subchapter E of Chapter 2—

(A) The deduction shall be limited to the tax imposed for the taxable year, but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;

(B) No reduction in such tax shall be made by reason

a deduction in computing net income, but added a new section (Section 122(d)(6)) permitting the deduction of such excess profits taxes from gross income in computing the net operating loss, and net operating loss "carry-backs" and "carry-overs."[12] This was subject to rules substantially the same as those formerly contained in Section 23(c)(2), as amended by the Revenue Act of 1941, except that rule "A" of that section, quoted above (note 11), was omitted.

Pointing out that the effect of rule "A" in Section 23(c)(2) was to place a cash basis taxpayer substantially on the accrual basis so far as the excess profits tax deduction was concerned, taxpayer argues that the omission of that rule in Section 122(d)(6) suggests that Congress did not intend to place all taxpayers on the accrual basis. Accepting this inference, however, it certainly does not follow that Congress meant to give either class of taxpayers (accrual basis or cash basis) an election to deduct its excess profits taxes on a basis inconsistent with the method of accounting to which that class was committed.

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of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

(C) Such tax shall be computed without regard to the adjustments provided in section 734; and

(D) Such tax, in the case of a consolidated return under section 730, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

[12] The elimination and the addition were accomplished by Sections 105(c) and 105(e)(3)(C) of the 1942 Act, respectively.

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Indeed, this phase of the legislative history tends to support the Government's position that Congress used "paid or accrued," in Section 122(d)(6), in its customary, statutorily-defined sense. Rule "A" of Section 23(c)(2), as added by the 1941 Act, appeared in a section allowing the deduction of taxes "paid or accrued." It cannot be denied that the phrase "paid or accrued" was there used as a term of art, i.e., in its long-accepted, statutory sense. The professed purpose of Congress in the enactment of Rule "A" was to place all taxpayers, cash and accrual, on the same basis in respect to the deduction for excess profits taxes.[13] Congress did so, however, not by giving a right of election or by stating that a cash basis taxpayer might deduct "accrued" taxes; it expressly provided that any portion of such tax "paid" after the taxable year "shall be considered as having been paid within the taxable year."[14] The manner

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[13] H. Rep. No. 1040, 77th Cong., 1st Sess., p. 46 (1941-2 Cum. Bull. 413, 450); S. Rep. No. 673 (Part 1), 77th Cong., 1st Sess., p. 37 (1941-2 Cum. Bull. 466, 495-496):

> It is provided that the deduction shall be allowed only in computing the income tax imposed for the taxable year for which the excess-profits tax is levied. By providing that any excess-profits tax paid after the taxable year shall be deemed to have been paid within the taxable year, the same treatment is accorded to taxpayers on the cash basis as is accorded to taxpayers on the accrual basis.

[14] Contrast Code Section 131(d), dealing with the credit for foreign taxes, which provides, subject to certain conditions, that the credits may, "at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books," be taken in the year in which the taxes of the foreign country "accrued."

of effecting, for this purpose, similarity of treatment of cash and accrual basis taxpayers reflects a recognition of the settled meaning of "paid or accrued." The inferences to be drawn from the enactment of Rule "A" of Section 23(c)(2), therefore, are: (1) That Congress was aware of its own statutory definition of "paid or accrued," and (2) that when Congress desired to have cash and accrual basis taxpayers treated alike for certain purposes it knew how to accomplish its purpose. Accordingly, the omission of Rule "A" in the enactment of Section 122(d)(6) in 1942 may reasonably be taken as a continued recognition by Congress of the statutory meaning of "paid or accrued" and as evidence of a Congressional purpose limited to withdrawal of the presumption contained in Rule "A", i.e., the presumption that all excess profits taxes paid by a cash basis taxpayer were paid within the taxable year to which they pertained though in fact paid after the taxable year.

B. As pointed out above, under the 1941 Act the amount of the excess profits tax constituted a deduction for purposes of computation of the normal tax and surtax. This deduction was expressly eliminated under the Revenue Act of 1942 when a larger deduction was allowed in its place. The taxpayer, in computing the normal tax and surtax, is authorized by the 1942 Act to use as a credit the base upon which the excess profits tax is computed, i.e., the amount of the adjusted excess profits net

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income.[15] Having thus allowed the base upon which the excess profits tax is computed as a credit, the further allowance of the tax itself as a deduction or credit grants *pro tanto* the same benefit twice over. There is no suggestion that such a double benefit is available to taxpayers with stable profits year in and year out. Yet the underlying purpose in the enactment of the net operating loss deduction was to avoid tax discrimination against businesses with alternating or fluctuating profit and loss years in favor of those with stable profits year in and year out.[16] Certainly, it was not to create a tax advantage in favor of the former; nor is it to be supposed that Congress, without saying that it was doing so, intentionally granted to taxpayers with fluctuating profits double benefits denied to taxpayers generally.

This conclusion is fortified by the fact that the 1942 Act was a war revenue measure notable for its increases in corporate income and excess profits taxes.[17] In the context of such a bill, it is particularly difficult to give credence to the notion that Congress proposed, in an incidental fashion and

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[15] Examples 1 and 2 (Appendix B, *infra*, pp. ~~53-54~~ 54-55) illustrate the differences in computation of the corporate income and excess profits tax between the years 1941 and 1942 resulting from this change of base accomplished by the 1942 Act.

[16] H. Rep. No. 855, 76th Cong., 1st Sess., pp. 9-10 (1939-2 Cum. Bull. 504, 510-511) which recommended the addition of Sections 23(s) and 122 to the Code by enactment of Section 211 of the Revenue Act of 1939, c. 247, 53 Stat. 862.

[17] Compare, *e.g.*, rates shown in Examples 1 and 2 (Appendix, B, *infra*, pp. ~~53-54~~ 54-55).

by an amendment which, as we show below, it characterized as "technical," to legislate a novel deduction authorizing the cancellation or refund of huge amounts of taxes.

The change effected by the 1942 Act in respect to the base for computation of corporate taxes was described in the pertinent Ways and Means Committee Report as follows (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 18 (1942-2 Cum. Bull. 372, 388):

> 1. Change in the Base for Corporate Tax
>
> Under the present law, the excess-profits tax is computed before the normal tax and surtax, being allowed as a deduction in determining the bases to which those taxes apply. Thus, the portion of the adjusted excess-profits net income not taken by the excess-profits tax is subjected to the normal tax and surtax.
>
> The bill changes this method of determining the tax base by dividing the net income into two portions, one of which is subject to excess-profits tax alone, and the other of which is subject only to normal tax and surtax. Instead of deducting the excess-profits tax itself in determining the normal and surtax bases, the bill deducts, through the form of a credit against net income, the adjusted excess-profits net income, the base upon which the excess-profits tax is computed.

This fundamental change was carried out by Section 105(a), (b) and (d) of the 1942 Act. Since the adjusted excess profits net income (and not the ex-

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cess profits tax) was thereafter to be deducted in determining corporate normal and surtax bases, Section 105(c) repealed Section 23(c)(2) of the Code (note 11, *supra,* pp. 23-24), as originally added by the 1941 Act, and amended Section 23(c)(1)(B) by including excess profits taxes among those denied deduction (Appendix A, *infra,* p. 36).

Subsection (e) of Section 105, entitled "Technical Amendments Made Necessary by Change in Base for Corporate Tax," in its subparagraph (3) [18] amended Section 122 of the Code by adding,

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[18] (3) *Computation of net operating loss deduction.*—Section 122 (relating to net operating loss) is amended as follows:

(A) Subsection (a) is amended to read as follows:

"(a) *Definition of Net Operating Loss.*—As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)."

(B) Subsection (c) is amended by striking out the parenthesis at the end thereof and inserting in lieu thereof the following: "and without the credit provided in section 26(e)".

(C) Subsection (d) is amended by striking out "exceptions and limitations" and inserting in lieu thereof "exceptions, additions, and limitations" and by inserting at the end thereof the following new paragraph:

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

"(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

"(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

"(C) Such tax, in the case of a consolidated return

inter alia, the (d) (6) provision here in question. Considered in context, it seems evident that Congress contemplated no major enlargement in the allowance of deductions in general or in the net operating loss deduction in particular. Indeed, in the language of the subsection's title, it contemplated only a "Technical Amendment [s] Made Necessary by Change in Base for Corporate Tax" in the "Computation of net operating loss deduction." This thought was expressed by John O'Brien, Office of Legislative Counsel, House of Representatives, who was called upon at the outset of the Senate hearings on the 1942 bill to explain the changes made by the House in the existing law (Senate Hearings before the Committee on Finance on H. R. 7378, 77th Cong., 2d Sess., p. 34). With respect to the language here under consideration, he stated (p. 41):

> Now, the rest of the amendments in this section are purely technical amendments relating to getting rid of the deduction for excess-profits tax which is in the present law, and various other amendments particularly in connection with the net operating loss, in order to make them come out right. You see, when you change the basis of corporate tax it involves any number of miscellaneous amend-

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for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary."

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ments throughout in order to make it all come out straight.

As shown by their reports,[19] the committees of

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[19] S. Rep. No. 1631, 77th Cong. 2d Sess. pp. 66-67 (1942-2 Cum. Bull., pp. 504, 556):

> The amendments made by this section of the bill, which corresponds to section 105 of the House bill, change both the base and the rates of the corporation income tax. The change in base is made in lieu of the deduction now granted with respect to the excess profits tax imposed by chapter 2E. Section 13(a)(2) of the Code is amended to allow the amount of the adjusted excess profits net income as a credit in computing normal tax net income. This credit, as specified in section 26(e) as amended, is likewise provided under section 15(a) in determining the amount of surtax net income.
>
> * * * * *
>
> Section 23(c)(1) of the Code is amended by this section of the bill to deny the deduction for excess profits taxes paid or accrued for those years in which a credit is allowed under section 26(e).
>
> This section makes *other technical amendments required as a result of the change in the base* of the corporation tax. * * * Section 122 of the Code, relating to computation of the net operating loss deduction allowed by section 23(s) of the Code, is amended so as to allow the excess profits tax paid or accrued within taxable years (subject to certain rules) as a deduction in computing net operating loss for, and net operating loss carry-over and carry-back from, such taxable years. [Emphasis added.]

The House Report was substantially the same except that it employs language appropriate only to carry-overs, since carry-backs were first introduced in the Senate bill. Hence, instead of the last paragraph of the Senate Report, the House Report (H. Rep. No. 2333, *supra*, p. 65 (1942-2 Cum. Bull., *supra*, p. 423) reads as follows:

> This section makes other technical amendments required as a result of the change in the base of the corporation tax. * * * Section 122 of the Code, relating to computation of the net operating loss deduction allowed by section 23(s) of the Code, is amended so as to allow the excess

both Houses plainly accepted this view of the limited extent of the change involved. [20]

It would not be accurate to state that the under-

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profits tax paid or accrued within preceding taxable years (subject to certain rules) as a deduction in computing net operating loss for, and net operating loss carry-over from, such preceding taxable years.

A leading commentator has stated with respect to subsection (d)(6) that "The purpose of this provision is a matter of conjecture and Congressional committee reports and other available data are of no assistance on the question of intent," 5 Mertens, *Law of Federal Income Taxation* (1953 ed.), Section 29.02, p. 364. Certainly, there is no suggestion that Congress contemplated the far-reaching consequences which would flow from taxpayer's contention that the language of (d)(6) ("paid or accrued") is to be read in a special sense.

[20] There is a further indication that the (d)(6) amendment was not meant to have more than limited scope. Senator George of the Finance Committee introduced on the floor of the Senate a new amendment to be inserted at the proper place in the bill, "intended to eliminate duplications in the section as it was written, and to clarify certain provisions of the section." 88 Cong. Record, Part 6, p. 8015. The amendment became Section 210 of the Revenue Act of 1942, adding a new subparagraph (J) to Section 711(a)(1) of the Code and a new subparagraph (L) to Section 711(a)(2) (Appendix A, *infra*, pp. 44-46). These new subparagraphs provide, as an adjustment to normal tax net income in arriving at excess profits net income, that in computing the net operating loss for any taxable year under Section 122(a) "no deduction shall be allowed for any excess profits tax imposed by this subchapter." The court below (R. 16-19) did not doubt that these provisions preclude the deduction of excess profits taxes paid or accrued in determining a net operating loss to be carried back for excess profits tax purposes, if the excess profits tax is computed upon excess profits net income under Section 710(a)(1)(A). (Appendix A, *infra*, p. 43). The court, however, thought that if the excess profits tax is computed under Section 710(a)(1)(B) (Appendix A, *infra*, pp. 43-44) the tax is not based on excess profits net income, and hence it held that the limitation imposed by subparagraph (J) of Section 711(a)(1) and subparagraph (L) of Section 711(a)(2) is not applicable.

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lying Congressional purpose in adding Section 122-(d)(6) is plainly expressed in the legislative history. See Mertens' comment, note 19, *supra,* p. 32. But, to recapitulate, what does emerge from the legislative history is the following:

(1) The language of the new subsection had its origin in Section 23(c)(2) as amended by the 1941 Act. In the framework of that Act, a taxpayer deducted its excess profits tax for purposes of computing its other corporate taxes (normal tax and surtax). When this was altered by the 1942 Act, which authorized a different and larger deduction, and hence a new method of computing the normal tax and surtax, Section 23(c)(2) providing for deduction of excess profits tax was repealed.

(2) The reappearance of this language in Section 122(d)(6), described as one of a "number of miscellaneous amendments" of a "technical" nature "made necessary by [the] change in base for corporate tax" and required "in order to make it all come out straight" (see *supra,* pp. 29-31), hardly suggests that Congress contemplated a novel and far-reaching deduction of the kind which taxpayer urges—a deduction which would permit a corporation, whether on cash or accrual basis, to deduct all excess profits taxes, both paid and accrued within any taxable year, for purposes of determining its net operating loss.

Since it may be fairly stated that, whatever else was contemplated (or overlooked), there is no evidence of an express or implied intention to work a

major change, the legislative history, far from supporting the view that (d)(6) should be construed without regard to the statutory definition of "paid or accrued," emphasizes the wisdom of confining the amendment within the limits of its statutorily-defined terminology.[21] The Court of Claims thus erred we believe, in concluding that it was justified in doing "violence to the letter of the Act." (R. 13.)

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[21] The court below adopted precisely the contrary approach. It refused to apply the phrase "paid or accrued" as used in Section 122(d)(6) with its established meaning and thus extended the operation of the section to cases not embraced within that meaning. On the other hand, it read Section 710(a)(1)(B) with literalness in order to give indirectly to the taxpayer here benefits expressly denied directly to taxpayer by Section 711(a)(1)(J) and 711(a)(2)(L). See note 20, *supra*, p. 32. The court further ignored the fact that a net operating loss carry-back from 1947 to 1945 resulted in a refund to taxpayer of the entire 1945 excess profits tax paid in 1946; yet, at the same time, it has here permitted the payment of the same 1945 excess profits tax in 1946 to be carried back as a net operating loss to 1944. Inconsistently with its refusal to consider the effect of the 1947 carryback, it has then employed the reduced 1944 corporation surtax resulting from the 1946 carry-back as constituting the base for computing the limit under Section 710(a)(1)(B) of the excess profits tax which might properly be imposed for 1944. These certainly are results never contemplated by Congress.

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CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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JANUARY, 1955

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) [As amended by Sec. 202(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Taxes Generally.*—

(1) *Allowance in General.*—Taxes paid or accrued within the taxable year, except—

(A) Federal income taxes;

(B) [As amended by Sec. 105 (c) (1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] war-profits and excess-profits taxes imposed by Title II of the Revenue Act of 1917, Title III of the Revenue Act of 1918, Title III of the Revenue Act of 1921, section 216 of the National Industrial Recovery Act, section 702 of the Revenue Act of 1934, or Subchapter E of Chapter 2, or by any such provisions as amended or supplemented;

* * * * *

(s) [As added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1952 ed. Sec. 23.)

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PART IV—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING

SEC. 41—GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1952 ed., Sec. 41.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred" dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deduc-

tions or credits should be taken as of a different period. * * *

(26 U. S. C. 1952 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * *

(c) *"Paid or Incurred," "Paid or Accrued."*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U. S. C. 1952 ed., Sec. 48.)

SEC. 122. [As added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) [As amended by Sec. 105 (e) (3) (A) of the Revenue Act of 1942, *supra*]. *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153(a) of the Revenue Act of 1942, *supra*]. *Amount of Carry-Back and Carry-Over.*—

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(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss

deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

(c) [As amended by Secs. 105(e) (3) (B) and 153(b) of the Revenue Act of 1942, *supra*] *Amount of Net Operating Loss Deduction.*— The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (com-

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puted without such deduction and without the credit provided in section 26(e));

(d) [As amended by Sec. 105(e) (3) (C) of the Revenue Act of 1942, *supra*] *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b) (2), (3), or (4);

(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23 (b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

(3) No net operating loss deduction shall be allowed;

(4) [As amended by Sec. 150(e) of the Revenue Act of 1942, *supra*] Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains;

(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * *

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(26 U. S. C. 1952 ed., Sec. 122.)

SEC. 710 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) [as amended by Sec. 201 of the Revenue Act of 1941, *supra*] *Imposition.*—

(1) [as amended by Sec. 202 of the Revenue Act of 1942, *supra*] *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) [as amended by Sec. 202 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] 95 per centum of the adjusted excess profits net income, or

(B) [as amended by Sec. 202(b) of the Revenue Act of 1943, *supra*] an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26 (e) (relating to income subject to the tax imposed by this subchapter), and without regard to 80 per centum of

the credit provided in section 26 (h) (relating to credit for dividends paid on certain preferred stock).

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.* As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [as amended by Sec. 204 of the Revenue Act of 1943, *supra*] *Specific exemption.*—A specific exemption of $10,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 2 (a) of the Excess-Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204 (a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

* * * * *

(26 U. S. C. 1952 ed., Sec. 710).

SEC. 711 [as added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. EXCESS PROFITS NET INCOME.

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(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13(a)(2), for such year except that the following adjustments shall be as follows:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [as added by Sec. 210(a) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122(a), and the net income for any taxable year under section 122(b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; * * *

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(L) [as added by Sec. 210(b) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122(a), and the net income for any taxable year under section 122(b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under subparagraph (B) of this paragraph for such taxable year: * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 711.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.41-1. *Computation of Net Income.*—

* * * * *

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* * * The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 29.41-2. *Bases of Computation and Changes in Accounting Methods.*—Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to

be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. * * *

* * * * *

Sec. 29.43-1. *"Paid or Incurred" and "Paid or Accrued."*—(a) The terms "paid or incurred" and "paid or accrued" will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48 (c).) The deductions and credits provided for in chapter 1 (other than the dividends paid credit provided in section 27) must be taken for the taxable year in which "paid or accrued" or "paid or incurred," unless in order clearly to reflect the income such deductions or credits should be taken as of a different period. If a taxpayer desires to claim a deduction or a credit as of a period other than the period in which it was "paid or accrued" or "paid or incurred," he shall attach to his return a statement setting forth his request for consideration of the case by the Commissioner together with a complete statement of the facts upon which he relies. However, in his income tax return he shall take the deduction or credit only for the taxable period in which it was actually "paid or incurred," or "paid or accrued," as the case may be. Upon the audit of the return, the Commissioner will decide whether the case is within the exception provided by the Internal Reve-

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nue Code, and the taxpayer will be advised as to the period for which the deduction or credit is properly allowable.

* * * * *

Sec. 29.122-1. *Net Operating Loss Deduction.*—(a) *General.*—Section 122 provides the rules for the computation of the net operating loss deduction allowed by section 23 (s). The net operating loss deduction is the aggregate of the net operating loss carry-overs and carry-backs to the taxable year, reduced by certain adjustments to prevent the deduction of losses absorbed by income not taxed.

* * * * *

A fractional part of a year which is a taxable year under section 48 (a) is a preceding or succeeding taxable year for the purpose of determining under section 122 the first, second, or third preceding taxable year or the first or second succeeding taxable year.

* * * * *

(b) *Steps in computation of net operating loss deduction.*—There are three steps in the ascertainment of the net operating loss deduction. The first step is the computation of the net operating loss, if any, for the two preceding taxable years and for the two succeeding taxable years. The second is the computation of the net operating loss carry-overs to the taxable year from such preceding tax-

able years and the computation of the net operating loss carry-backs to the taxable year from such succeeding taxable years. The third is the conversion of the aggregate of such net operating loss carry-overs and carry-backs into the net operating loss deduction.

* * * * *

Sec. 29.122-2. *Computation of Net Operating Loss In Case Of Corporation.*—A net operating loss is sustained by a corporation in any taxable year if and to the extent that, for such year, there is an excess of deductions allowed by chapter 1 over gross income, both computed with the following exceptions, additions, and limitations:

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b) (2), (3), or (4);

(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by chapter 1, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23 (b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

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(3) No net operating loss deduction shall be allowed;

(4) For any taxable year beginning after December 31, 1938, and before January 1, 1942, the amount deductible on account of long-term capital losses shall not exceed the amount includible on account of long-term capital gains, and the amount deductible on account of short-term capital losses shall not exceed the amount includible on account of short-term capital gains. For any taxable year beginning after December 31, 1941, the amount deductible on account of losses from sales or exchanges of capital assets shall not exceed the amount includible on account of gains from sales or exchanges of such assets; and

(5) For taxable years beginning after December 31, 1941, there shall be allowed as a deduction the amount of excess profits tax imposed by subchapter E of chapter 2 paid or accrued within the taxable year, subject, however, to the provisions of section 122 (d) (6) (A), (B), and (C).

The application of this section may be illustrated by the following example:

Example. For the year 1942 the X Corporation, which makes its income tax returns on the calendar year basis, has gross income as defined in section 22 of $400,000 and deductions allowed by section 23 of $600,000, ex-

clusive of any net operating loss deduction. Included in gross income are long-term capital gains of $50,000 and short-term capital gains of $25,000. The corporation had long-term capital losses of $60,000 and short-term capital losses of $35,000, which are deductible to the extent of the capital gains, or $75,000.

The X Corporation also deducted $75,000 for depletion on a percentage basis. If depletion had been computed without reference to percentage depletion, the amount of such deduction would have been $5,000. For 1942 the X Corporation also had $35,000 of wholly tax-exempt interest, and paid $15,000 in interest on indebtedness incurred to carry the obligations from which such tax-exempt interest was derived.

On the basis of these facts the X Corporation has a net operating loss for the year 1942 of $110,000, computed as follows:

(1)	Deductions for 1942		$600,000
	Less:		
(2)	Excess of percentage depletion over cost ($75,000 minus $5,000)		70,000
(3)	Deductions adjusted as required by section 122 (d) (item (1) minus item (2))		530,000
(4)	Gross income for 1942	$400,000	
(5)	Plus tax-exempt interest minus interest paid ($35,000 minus $15,000)	20,000	

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(6) Gross income adjusted as required by section 122 (d) (item (4) plus item (5))	420,000
(7) Net operating loss for 1942 (item (3) minus item (6))	110,000

APPENDIX B

Example 1

Illustration of

Computation of Corporate Income and Excess Profits Tax for Taxable Year Ended December 31, 1941

Income Tax

Net Income (also normal tax net income without deduction of excess profits tax)		$100,000.00
Less: Excess Profits Tax (last line below)		17,000.00
Normal tax net income		$ 83,000.00
Normal tax—24% of $83,000.00		19,920.00
Surtax net income	$83,000.00	
Surtax:		
On first $25,000.00 @ 6% of $25,000.00	$1,500	
On excess over $25,000 @ 7% of $58,000	4,060	5,560.00
Income Tax		$ 25,480.00

Excess Profits Tax

Excess Profits Net Income (same as first line above)			$100,000.00
Less:			
Specific Exemption		$ 5,000.00	
Excess Profits Credit (assumed)		50,000.00	55,000.00
Adjusted excess profits net income			$ 45,000.00
First $20,000 @ 35%	($20,000)		$ 7,000.00
Next $30,000 @ 40%	($25,000)		10,000.00
Excess Profits Tax			$ 17,000.00

Example 2

Illustration of

Computation of Corporate Income and Excess Profits Tax for Taxable Year Ended December 31, 1942

Income Tax

Net Income (without allowance of credit for income subject to excess profits tax (section 26(e))		$100,000.00
Less: Adjusted excess profits net income (line 4 below)		45,000.00
Normal tax net income		$ 55,000.00
Normal Tax—24%		13,200.00
Surtax—16%		8,800.00
Income Tax		$ 22,000.00

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Excess Profits Tax

Excess Profits Net Income (same as first line above)		$100,000.00
Less:		
Specific exemption	$ 5,000.00	
Excess Profits Credit	50,000.00	55,000.00
Adjusted excess profits net income		$ 45,000.00
90% of $45,000.00		40,500.00
Computation of the 80% Limitation:		
Surtax Net Income (prior to sec. 26(e) credit)	$100,000.00	
80% of $100,000.00	80,000.00	
Less: Chapter I Income tax (line 6 above)	22,000.00	
Limitation of excess profits tax	$ 58,000.00	
Excess Profits Tax ($58,000 or $40,500, whichever is lesser)		$ 40,500.00

Example 3

Illustration of Accrual of Excess Profits Tax in Year of Net Operating Loss During Which Abnormal Income Is Attributable under Section 721 (d).

A corporation is on the accrual basis.

A corporation's net income for the calendar year 1944 was $200,000.00. The excess profits net income was also $200,000.00 which included $100,000.00 abnormal income attributable to 1945. For the calendar year 1945, A corporation sustained a net operating loss of $5,000.00. A corporation's excess profits credit was $50,000.00 for the years 1944 and 1945. The limitation on the tax provided by section 721 (d) (1) is not applicable.

Computation of Tax for 1945

Income Tax

Normal tax net income	($ 5,000.00)
Normal tax and surtax	-0-

Excess Profits Tax

Normal tax net income		($ 5,000.00)
Abnormal income from 1944 attributable to 1945		100,000.00
Excess profits net income		$ 95,000.00
Less:		
Specific exemption	$ 10,000.00	
Excess profits credit	50,000.00	60,000.00
Adjusted excess profits net income		$ 35,000.00
95% of $35,000.00		$ 33,250.00
Computation of the 80% Limitation:		
Surtax net income	($ 5,000.00)	
Plus: Abnormal income	100,000.00	
Adjusted surtax net income	$ 95,000.00	
80% of $95,000.00	76,000.00	
Less: Actual income tax under Chapter I	-0-	
Limitation on excess profits tax	$ 76,000.00	
Excess profits tax (lesser of $76,000 or $33,250)		$ 33,250.00

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No. ~~100~~ 10

IN THE

Supreme Court of the United States

October Term 1953

THE UNITED STATES OF AMERICA, *Petitioner*

v.

OLYMPIC RADIO AND TELEVISION, INC., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Of Counsel:
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In The

Supreme Court of the United States

October Term 1953

No. 100

The United States of America, *Petitioner*

v.

Olympic Radio and Television, Inc., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims on plaintiff's and defendant's motions for summary judgment, and the dissenting opinions were entered November 4, 1952. Judgment was entered the same day. (R. 10-14). These opinions are reported at 108 F. Supp. 109. The opinion of the Court of Claims denying defendant's motion for rehearing, and the dissenting opinions were entered March 3, 1953. (R. 16-19). These opinions are reported at 110 F. Supp. 600.

JURISDICTION

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, the Government filed a motion for rehearing. On March 3, 1953, the court denied the motion. (R. 19.) On May 29, 1953, application for *writ of certiorari* was filed by the petitioner. Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Section 1255 (1). The respondent contends that jurisdiction does not lie in this proceeding for failure to file a timely petition within the meaning of 28 U.S.C., Section 2101 (c).

QUESTIONS PRESENTED

1. Was the petition for a *writ of certiorari* timely filed?

2. Did the Court of Claims err in construing the intent of Congress to be that the phrase "paid or accrued", appearing in Section 122(d)(6) of the Internal Revenue Code, did not refer to methods of accounting and, therefore, permits an accrual basis taxpayer to take as a deduction the amount of excess profits tax paid in 1946 in computing the net operating loss for that year?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code here applicable, are set forth in the Appendix, *infra,* pp. 17-20.

STATEMENT

This case was submitted to the Court of Claims on motions for summary judgment filed by both parties, together with supporting affidavits. The undisputed facts are briefly as follows:

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The taxpayer, a New York Corporation, was and is a manufacturer of television and radio receiving sets, with its office and principal place of business at 34-01 38th Avenue, Long Island City, New York. Plaintiff kept its books and accounts on the accrual basis and filed its Federal corporation tax returns on the same basis using a calendar year (R. 1).

The taxpayer's Federal corporation income tax return, filed for the calendar year 1946, disclosed no income tax liability and reflected a net operating loss for the year 1946 of $324,844.23. Upon audit of this tax return, the Bureau of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60, to which the taxpayer agreed. The latter amount neither included nor reflected any adjustment or addition on account of excess profits taxes paid by the taxpayer to the Collector of Internal Revenue in 1946, within the meaning of 122(d)(6) of the Internal Revenue Code. (R. 2, 11.)

Within the calendar year 1946, taxpayer paid a total of $263,272.80 in excess profits taxes to the Collector of Internal Revenue. (R. 2.)

On or about June 11, 1948, taxpayer filed a claim for refund of income and excess profits taxes for the year 1944 with the Collector of Internal Revenue, said claim being in the face amount of $191,004.04. That refund claim was based upon the provisions of Section 122(d)(6) of the Internal Revenue Code, and asserted the taxpayer's right, in computing the correct net operating loss for 1946, to include the sum of excess profits taxes actually paid by the taxpayer to the Collector of Internal Revenue within 1946. (R. 2, 3, 11.)

Upon the failure of the Collector of Internal Revenue to take any action with respect to said refund claim within six months after the filing of said claim, the tax-

payer filed petition in the United States Court of Claims on June 14, 1952 (R. 1-3).

On November 4, 1952, the Court of Claims promulgated its opinion granting the taxpayer's motion for summary judgment, and denying the defendant's motion for summary judgment. Judgment was thereupon entered on the same day in the taxpayer's favor in the sum of $148,-841.72, with interest as provided by law. The opinion of the Court of Claims held that the taxpayer was entitled to include as a deduction in computing its 1946 net operating loss, the amount of excess profits taxes paid in 1946 under the provisions of Section 122(d)(6) of the Internal Revenue Code. (R. 10-14.)

REASONS FOR DENYING THE WRIT

The respondent advances the following contentions as reasons for denying the writ: 1) the petition for *writ of certiorari* was not timely filed; 2) the decision below is clearly correct; 3) there is no conflict of decision; and 4) there is no important issue involved.

I

PETITION FOR A WRIT OF CERTIORARI WAS NOT TIMELY FILED

The issue of timeliness of a petition for *certiorari* is not a new one in this Court. A recent decision of this Court, *Federal Trade Commission v. Minneapolis Honeywell Regulator Company*, (1952) 344 U. S. 205, contains a pertinent discussion of this problem by the Chief Justice.

After observing that the petitioner's interpretation of this Court's prior decisions was too liberal, the Chief Justice stated:

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> "While it may be true that the Court of Appeals had the power to supersede the judgment of July 5, with a new one, it is also true, as that court itself has recognized, that the time within which a losing party must seek review, cannot be enlarged just because the lower court in its decision thinks it should be enlarged. Thus the mere fact that a judgment previously entered, has been re-entered or revised in an immaterial way, does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered, should the period within which an appeal must be taken, or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order has disturbed or revised legal rights and obligations, which by its prior judgment had been plainly and properly settled with finality."

The opinion in the cited case, closes with the admonition to heed the principle that "litigation must at some definite point be brought to an end."

Applying the principles just stated to the present proceeding, the opinion of the Court of Claims was rendered on November 4, 1952. On that date judgment was also entered, as ordered, in the plaintiff's favor against the defendant in the amount of $148,871.72, with interest. That opinion and decision is the one from which the petitioner here seeks to appeal. On December 3, 1952, the defendant below filed motion for re-hearing with the Court of Claims. That motion was opposed by the plaintiff below, in part based upon the averment that the defendant's brief in support of its motion for re-hearing failed to advance any significantly new and different arguments from those already presented to the Court of Claims.

On February 3, 1953, the motion for re-hearing was argued. On March 3, 1953, the Court of Claims rendered its opinion on defendant's motion for re-hearing. That

opinion concluded with the statement "The judgment heretofore entered in the sum of $148,841.72 will stand."

A reading of the opinion of March 3, 1953, discloses that it is confined to the very narrow question of whether or not the distinction which had been made by the taxpayer between Section 710(a)(1)(B) and Section 710(a)(1)(A) was valid. The same point had been argued in the original briefs, and reply briefs in the Court of Claims proceeding, and also had been raised during oral argument. While it is true that the opinion of the Court of Claims of November 4, 1952, is silent on this matter and that its opinion of March 3, 1953, treats it in detail, the fact remains that the opinion of March 3, 1953, does *not* "change matters of substance." Nor does it resolve a genuine ambiguity. It is obvious that the Court of Claims' second opinion, neither disturbed nor revised any legal rights or obligations, settled by its prior opinion and judgment. See also *Department of Banking v. Pink*, (1952) 317 U.S. 264.

The principle enunciated in *Federal Trade Commission v. Minneapolis Honeywell Regulator Company, supra,* should apply in this instance. The 90-day period within which the defendant below could have applied for a *writ of certiorari* expired on February 2, 1953. 28 U.S.C. Sec. 2101(c). Petition for *writ of certiorari* was filed on May 29, 1953.

Recognition of the respondent's argument on this point would not mean that a losing party in the Court of Claims, in a situation such as this would be left without a remedy. The defendant below could have applied for an extension of time from a Judge of this Court, 28 U.S.C., Sec. 2101(c), or it could have filed a timely petition for a *writ of certiorari* as a protective measure.

The fact that the application for *certiorari* under consideration was filed on May 29, 1953, requires the conclusion that such application was not timely filed.

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II

DECISION BELOW IS CLEARLY CORRECT

The Court of Claims proceeding involving this taxpayer presented a novel tax issue to that court. At the nub of the problem presented, was the necessity of construing the phrase "paid or accrued", appearing in Section 122 (d)(6) of the Internal Revenue Code. The taxpayer contended that these words should receive their usual commercial sense.[1] That is, "paid" meant liquidation of an outstanding tax liability by actual payment and "accrued" meant the coming into existence of such a liability. The respondent below contended that these words referred to methods of accounting. The Court of Claims accepted the former contention and found for the taxpayer.

Three fundamental lines of reasoning support the result reached by the Court of Claims. These are: First, the legislative antecedents and history of Section 122(d)(6) lead to that conclusion; second, the same result has been reached in an analogous situation[1]; and third, the contention of the defendant below leads to such incongruous and inequitable results that such results could not have been intended by Congress.

With reference to the first proposition, Section 122(d)(6) was inserted in the Internal Revenue Code by Section 105(c)(3) of the 1942 Revenue Act. It was made effective for taxable years beginning after December 31, 1941.

In 1940, Section 23(c) of the Internal Revenue Code as it then read, permitted a direct deduction against net income for taxes paid or accrued within the taxable year, with certain exceptions. Included among those exceptions, were excess profits taxes. Section 202(a) of the

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[1] See *Commissioner v. Clarion Oil Company*, (CCA DC 1945), 148 F. (2d) 671, cert. den. 325 U.S. 881.

Revenue Act of 1941, removed excess profits taxes under Chapter 2E, from the list of exceptions to the general deduction rule contained in Section 23(c) of the Code. Simultaneously, the Revenue Act of 1941 added new subparagraph (2) to Section 23(c), which permitted a direct deduction in computing net income for excess profits taxes paid or accrued within the taxable year, subject to certain limiting rules. Rule A of subparagraph (2) effectively placed all taxpayers on the accrual basis of accounting with respect to the excess profits tax payments described.[2]

The Revenue Act of 1942, by Section 105(c), repealed Internal Revenue Code, Section 23(c)(2), and, simultaneously, restored excess profits taxes to the list of exceptions to the deduction rule permitted by Section 23(c). Thus, the right of deduction formerly accorded to excess profits taxes paid or accrued was withdrawn by the 1942 Revenue Act.

The very same section of the 1942 Revenue Act, which restored excess profits taxes to the list of exceptions to the tax deduction provision, added the new provision—Section 122(d)(6)—to the Internal Revenue Code.

The only pertinent Congressional language is the following:[3]

> "Section 122 of the Code relating to computation of the net operating loss deduction allowed by 122(c) of the Code is amended so as to allow excess profits tax paid or accrued within taxable years (subject to certain rules) as a deduction in computing net oper-

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[2] Rule (A) read as follows: "(A) The deductions shall be limited to the tax imposed for the taxable year but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;"

[3] Senate Report No. 1631, 77th Congress, 2nd Session, page 67, and House Report No. 2333, 77th Congress, 2nd Session, page 65.

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ating loss for, and net operating loss carry over and carry back from, such taxable years."

Rules (A), (B) and (C) in Section 122(d)(6) are almost verbatim copies of Rules (B), (C) and (D) formerly appearing in Section 23(e)(2). Significantly, Rule (A) under the latter section, which had effectively placed all taxpayers on the accrual basis, does not appear as a Rule under Section 122(d)(6). The question thus arises as to the significance of the apparently deliberate omission of Rule (A) of Section 23(e)(2) from the Rules contained under Section 122(d)(6). The maxim, *inclusio unius est exclusio alterius* suggests that the Congress, by the enactment of Section 122(d)(6) omitting Rule (A), did *not* intend to place all taxpayers on the accrual basis.

Can it be validly assumed that by the omission of Rule (A), Congress intended to place each taxpayer upon the basis of its own method of accounting? At first blush, it might appear that such meaning would be in accord with the definition of "paid or accrued" contained in Section 48(e) and hence the deduction would be controlled by Section 43. However, both sections have reference to "net income" and Section 43 refers to "deductions." Technically, neither concept is here involved.

Subparagraph 6 of Section 122(d) as well as the other 5 adjustments under Section 122(d) are all designed to convert net income or net operating loss, respectively, into economic net income, or economic net loss, as the case may be.[4] When Section 122(d)(6) is read in conjunction with Section 122(a), the effect is that a net operating loss becomes economic net loss. The payment of excess profits taxes in 1946 by the taxpayer was a true economic loss to the taxpayer in that year.

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[4] See 5 Mertens, Law of Federal Income Taxation, 305-6, Sec. 29.02.

After a net operating loss (Section 122(a)) has been converted into economic net loss (Section 122(d)), that economic net loss is what is carried back and applied to prior years. When that loss is carried back and converted into a net operating loss deduction (Section 122 (c)), the net income of the year of application itself first must be converted into economic net income. Section 122(c). Thus net income, as such, is *not* ultimately involved either in the loss year or year of deduction. That this distinction between net income and some other statutory concept such as economic net income is not a super-refined legalism is illustrated in a parallel situation involving the distinction between net income and subchapter A net income. Compare *Commissioner v. Clarion Oil Company, supra.*

One other point is significant in this regard. Conventional deductions, as such, are not involved. What is involved is a *tax.* The coming into existence of a liability for a tax is referred to by the word "accrued." The liquidation of a pre-existing tax liability by actual payment is referred to by the word "paid." The heading of Section 122(d) refers to "Exceptions, additions and limitations", not "deductions." The only one of these three words which could be applicable in the computation of a net operating loss where Section 122(d)(6) is involved is the word "additions." This refers to the amount of excess profits taxes "paid or accrued" which are to be *added* to the net operating loss otherwise computed.

The parallel type of situation referred to above, is illustrated by such cases as *Commissioner v. Clarion Oil Company, supra; Birmingham et al, Exrs. v. The Loetscher Company,* (C.C.A. 8 1951) 188 F. (2d) 78; *Aramo Siftima v. Commissioner,* (C.C.A. 2 1949) 172 F. (2d) 896; *Wm. J. Lemp Brewing Company,* (1952) 18 T.C. ....., No. 70. All of these cases demonstrate that where "net

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income" is not specifically involved, Sections 43 and 48(c) of the Internal Revenue Code are not controlling. They, therefore, also stand for the proposition that in such a case the phrase "paid or accrued" does not refer to accounting methods but rather refers to the liquidation of a tax liability or the coming into existence of such a liability. In these respects, the cited cases closely parallel the present proceeding.

The final reason for the correctness of the Court of Claims decision becomes apparent from a brief consideration of the effect of the petitioner's argument with respect to the proper meaning of the quoted phrases. This will illustrate the inequitable and discriminatory results flowing from the petitioner's construction of "paid or accrued." Fundamentally, every corporate taxpayer regardless of its method of accounting, must file its return within 2½ months after the close of its taxable year. The liability for tax reflected on such return is required to be paid in four quarterly installments during the year following the return year. This is the usual or conventional way in which a corporate taxpayer liquidates its liabilities for tax, regardless of accounting methods. A cash basis corporation, paying its prior year's excess profits tax liability in a loss year would, under the petitioner's theory, always would be entitled to make the Section 122(d)(6) adjustment while an accrual basis taxpayer in the identical situation would not.

If, as contended for by the petitioner, the phrase "paid or accrued" refers to accounting methods then it follows that it is virtually impossible for any accrual basis taxpayer to derive benefit from Section 122(d)(6) in such a situation. While it is mathematically possible it is almost impossible as a practical matter for an accrual basis taxpayer to incur a net operating loss under Chapter I of the Internal Revenue Code, and in the same year incur an excess profits tax liability under Chapter 2E of the

Internal Revenue Code to be accrued. Nearly all corporate taxpayers compute net income on the accrual basis of accounting. They would be foreclosed in a normal situation while the very few cash basis taxpayers would all benefit.[5] It can scarcely be argued that Congress intended such a discriminatory and inequitable result. The taxpayer's interpretation of the words in question, would benefit either a cash basis or an accrual basis taxpayer equally where either had a loss year following a profit year in which an excess profits tax liability arose. It was this basic equitable consideration which apparently weighed heavily in the Court of Claims and induced it to find for the taxpayer.

The Court of Claims chose to premise its findings on the ground that it was necessary to make an exception in this case to the general rule prohibiting the shifting from the "paid" to the "accrued" basis or vice versa. The Court of Claims, in taking that position, did so in order to reach a result giving effect to the plain "intention of Congress."

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[5] There is an unusual type of situation which can also arise. That is where *additional* taxes, deficiencies, are involved. If there is a dispute as to the liability for these additional taxes which postpones accrual and such dispute continues to and is settled in a loss year then, under either party's theory of "accrued," the result would be the same for an accrual basis taxpayer. Compare GCM 25298, 1947-2 Cum. Bull. 39.

If a cash basis taxpayer were involved, and no payment was made in the settlement year then under the respondent's theory there would be no proper Section 122(d)(6) adjustment; under the taxpayer's theory the tax would "accrue" and be a proper adjustment.

If the additional tax liability settled was also *paid* to the Collector in the same year settled, then under either theory Section 122(d)(6) would apply. The payment as well as the settlement would fix the time of accrual under respondent's accounting method theory. *Robert Reis & Co.*, (1953) 20 T.C. — No. 36, and, under taxpayer's theory, both actual liquidation of a liability and the coming into existence of a liability would have occurred.

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There would appear to be another equally valid rationalization supporting the Court of Claims' result which would avoid the necessity of ignoring the rule against shifting bases. That alternative, as contended for by the taxpayer, is that the phrase "paid or accrued" is ambiguous, being susceptible of the two different constructions previously mentioned. In the presence of such ambiguity, the Court of Claims properly exercised its judicial prerogative and resolved the ambiguity, by ascertaining the Congressional intent. That intent was that the taxpayer should be permitted to carry back a net operating loss to a former year, and that to this loss there should be added excess profits taxes "paid or accrued" in the loss year. As previously shown, the payment of an excess profits tax is an economic loss, which increases the loss permitted to be carried back under Section 122(d)(6).

III

THERE IS NO CONFLICT OF DECISION

The petitioner here makes the point that the decision of the Court of Claims involving this taxpayer is directly in conflict with certain decisions of the Tax Court of the United States. That being so, such a situation does not create that kind of a conflict in which this court normally grants a *writ of certiorari*. Nowhere in this Court's Rule 38(5) is there any reference to a conflict between the Court of Claims and The Tax Court of the United States. The latter court is, of course, only an administrative agency, a part of the Executive Branch of the Government. *Edward D. Whitehead v. U. S.*, decided January 13, 1953, Court of Claims No. 49572.

While it is clear that a *writ of certiorari* can issue where there is a direct conflict of decisions between a Court of Appeals and the Court of Claims, *Helvering v.*

the International Life Insurance Company, (1935) 294 U.S. 686, 689, the respondent has been unable, despite diligent search, to find a single case in which a conflict between the Tax Court of the United States on the one hand, and the Court of Claims or a Court of Appeals on the other has resulted in the issuance of a *writ of certiorari* by this Court.

The Circuit Courts of Appeal, and the United States Court of Appeals for the District of Columbia have exclusive jurisdiction to review decisions of the Tax Court of the United States. Title 26 U.S.C., Section 1141. There is a theoretical possibility in the future that a *bona fide* conflict might develop, which might warrant an exercise of this Court's discretion in issuing a *writ of certiorari.* That might occur should the taxpayers against whom decisions were rendered in the Tax Court involving Section 122(d)(6) appeal to some Circuit Court of Appeals and that court sustained the Tax Court. However, an attempt at this time to invoke the authority of this Court appears to be premature.

Even if it be assumed that the conflict between the Tax Court of the United States and the Court of Claims is that kind of conflict in which *certiorari* may issue, then that fact, in and of itself, does not warrant the inevitable conclusion that this court must grant *certiorari.* See *Robert L. Stern, Denial of Certiorari Despite a Conflict, Harvard Law Review,* January, 1953.

This proceeding does not involve that kind of matter in which the Court of Claims has exclusive jurisdiction over some unique type of statutory proceeding. Tax matters are certainly not unique, and the Court of Claims does not have exclusive jurisdiction thereof.

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IV

THERE IS NO IMPORTANT ISSUE INVOLVED

The petitioner states (p. 5), that it is informed by the Treasury Department, that the same issue is presented in at least 35 (and probably more) other cases, now pending before various courts and the Treasury Department, involving $27 million in taxes, plus interest. Aside from the fact that this unsupported allegation should receive no consideration, it seems clear that under this court's previous decisions, such facts, even if true, do not furnish adequate grounds for *certiorari*.

Where large amounts of money are involved, such a fact may be persuasive for *certiorari* although normally not so unless the amount is enormous. See *U. S. v. Zazove*, (1948) 334 U. S. 602, 613-14, Note 17. The principle at issue in that case could have involved billions of dollars. The number of individuals affected by a decision may be persuasive. One example of this type of situation is *Patterson v. Lamb*, (1947) 329 U. S. 539. In that case thousands of World War I draftees were directly affected. There is in this case no such pressure of equity.

Where a lower court's decision is at variance with well established administrative construction, *certiorari* may issue. *U. S. v. Ruzicka*, (1946) 329 U. S., 287. There a review was granted where a lower court's decision upset 25 years of consistent rulings and practice by the War Department. Here there is no well established administrative construction such as existed in the case cited.

If the Court of Claims decision be assumed to be in error as a matter of law, then that fact alone would not warrant the issue of the writ. This Court is not primarily concerned with the correction of errors in lower

court decisions. Hence, it generally will not grant *certiorari* just because the decision below may be erroneous. See *Supreme Court Practice*, Robert L. Stern, Eugene Gressman, Bureau of International Affairs, Inc., 1950, p. 113.

Section 304(e) of the Excess Profits Tax Act of 1950 made Internal Revenue Code Section 122(d)(6) inapplicable with respect to taxable years ending after June 30, 1950. Therefore, the present issue is not a recurring one and can involve only the years ending prior to June 30, 1950. The significance of the highly technical issue here involved has only a comparatively narrow scope even in its broadest implications.

CONCLUSION

For the reasons above stated, the petition for *writ of certiorari* to the United States Court of Claims in this proceeding should be denied.

Respectfully submitted

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APPENDIX

Internal Revenue Code:

Sec. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

(c) TAXES GENERALLY.—

• • •

"(2) Excess-profits tax under Chapter 2E—special rules.—For the purposes of this subsection, in the case of the excess-profits tax imposed by Subchapter E of Chapter 2—

"(A) The deduction shall be limited to the tax imposed for the taxable year, but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year;

"(B) No reduction in such tax shall be made by reason of the credit for income war-profits or excess-profits taxes paid to any foreign country or possession of the United States;

"(C) Such tax shall be computed without regard to the adjustments provided in section 734; and

"(D) Such tax, in the case of a consolidated return under section 730, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary."

(Effective under Sec. 205 of the Revenue Act of 1941, for taxable years beginning after December 30, 1940. Repealed by Sec. 105(c)(2) of the 1942 Revenue Act, effective for taxable years beginning after December 31, 1941.)

• • • •

Sec. 43 [as amended by Sec. 134 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN. The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting

upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death. (26 U.S.C. 1946 ed., Sec. 43.)

Sec. 48. DEFINITIONS.

When used in this chapter—

* * * *

(c) "Paid or Incurred," "Paid or accrued."—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * *

(26 U.S.C. 1946 ed., Sec. 48.)

Sec. 122 [as added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) [as amended by Sec. 105 (e) (3) (A) of the Revenue Act of 1942, *supra*] Definition of Net Operating Loss.—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 153(a) of the Revenue Act of 1942, *supra*] Amount of Carry-Back and Carry-Over.—

(1) Net operating loss carry-back.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first

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preceding taxable years shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * *

(c) [as amended by Secs. 105(e)(3)(B) and 153(b) of the Revenue Act of 1942, *supra*] Amount of Net Operating Loss Deduction.—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d)(1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26(e));

(d) [as amended by Sec. 105(e)(3)(C) of the Revenue Act of 1942, *supra*] Exceptions, Additions, and Limitations.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * *

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * *

(26 U.S.C. 1946 ed., Sec. 122.)

Sec. 505. SUBCHAPTER A NET INCOME.

For the purposes of this subchapter the term "Subchapter A Net Income" means the net income with the following adjustments:

(a) Additional Deductions.—There shall be allowed as deductions—

(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 500, or a section of a prior income-tax law corresponding to either of such sections.

* * * *

(26 U.S.C. 1946 ed., Sec. 505.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 10

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

OLYMPIC RADIO AND TELEVISION, INC., *Respondent*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The original Opinion of the Court of Claims together with the dissenting opinion (R. 10-14) is reported in 108 F. Supp. 109. The supplemental Opinion with dissent (R. 16-19) is reported in 110 F. Supp. 600.

JURISDICTION

The Court of Claims' judgment was entered November 4, 1952 (R. 10, 14). The Government filed a motion for rehearing on December 3, 1952 (R. 14) which was denied in the supplemental Opinion decided March 3, 1953 (R. 16). On May 29, 1953, the Government filed a petition for

writ of certiorari which was allowed October 14, 1954 (R. 21). The Court's jurisdiction of this controversy is founded on 28 U. S. C., Section 1255(1).

QUESTION PRESENTED

In 1946, the taxpayer's deductions exceeded its gross income by $310,872.60. It paid the Collector of Internal Revenue $263,272.80 in excess profits taxes within the year 1946. Taxpayer added the latter amount to the $310,872.60 under Section 122(d)(6) of the Internal Revenue Code[1] and carried-back the aggregate of $574,145.40 to the year 1944 as a net operating loss deduction[2] in the latter year. Section 122(d)(6) required the addition of excess profits taxes "paid or accrued"[3] within 1946 to the excess of deductions over gross income in that year in determining the amount of the 1946 net operating loss. The question is: Should the taxpayer be denied the right to take into account excess profits taxes *paid* in 1946 in computing the amount of the 1946 net operating loss under Section 122 (d)(6) because: (a) it used the accrual method of accounting or because, (b) the taxpayer happened to incur a net operating loss in 1947 which, when carried back to 1945, resulted in refunds or credits to the taxpayer of the excess profits taxes for the year 1945 paid in 1946.

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[1] Unless otherwise noted references to the "Code" or the "Internal Revenue Code" relate to the "Internal Revenue Code of 1939".

[2] There is no dispute as to the carry-back of the $310,872.60. and its allowance as a deduction in 1944; credits or refunds of a portion of the 1944 taxes were made as a result of the allowance of such a deduction. The dispute relates only to the tax effect of the additional amount of $263,270.80 included by the taxpayer in the gross amount of net operating loss claimed under Section 122 (d) (6). If allowed, the net operating loss carry-back and finally the deduction will be increased *pro tanto.*

[3] In this proceeding there is only a "paid" issue; there is no present issue involving taxes "accrued". See R. 5.

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STATUTES INVOLVED

Pertinent Code Provisions are printed in full in Appendix A, pp. 47 to 60.

Provisions of certain Revenue Acts and prior Code provisions are also printed in Appendix A.

STATEMENT

This Federal tax refund suit was submitted to the Court of Claims on motions for summary judgment together with supporting affidavits filed by both parties. The undisputed facts are briefly as follows:

The taxpayer, a corporation chartered in New York State and engaged in the manufacture of radio and television receiving sets, kept its books and accounts on the accrual basis and filed its Federal corporation tax returns on the same basis, using a calendar year (R. 1, 3).

The taxpayer's Federal corporation income tax return filed for the year 1946 disclosed no tax liability, reflecting instead a net operating loss of $324,844.23. Subsequent audit of this return by the Bureau of Internal Revenue reduced this loss to $310,872.60 to which the taxpayer agreed. (R. 2, 3, 11)

As provided by statute, the loss of $310,872.60 was carried back to the year 1944 where, allowed as a net operating loss deduction in that year, it produced overpayments of tax which were credited or refunded to the taxpayer (R. 5, 11).

In the year 1946 taxpayer had paid $263,272.80 in excess profits taxes with respect to its excess profits tax liability for the year 1945 (R. 2, 9). In June, 1948, taxpayer filed a claim for refund of additional income and excess profits taxes for the year 1944 based upon the provisions of Section 122(d)(6) of the Internal Revenue Code. That claim was predicated on the contention that the taxpayer was entitled to include the sum of excess profits taxes actually paid within 1946 in determining the amount of net operat-

ing loss for 1946 and the corresponding deduction in 1944. (R. 2, 3, 11)

Failure of the Commissioner of Internal Revenue to take action with respect to said refund claim for more than six months after the filing thereof authorized the taxpayer to file petition in the United States Court of Claims on June 14, 1952 (R. 1-3). In that Court, the taxpayer abandoned some of its contentions[4] and sued for a refund of $148,841.72[5] in excess profits tax for 1944 with interest as provided by law. (R. 5, 10,14)

The Court of Claims held for the taxpayer and found that it was entitled to include the amount of excess profits taxes paid in 1946 in computing the amount of its 1946 net operating loss under the provisions of Section 122(d)(6) of the Internal Revenue Code (R. 10-14.) In so holding the Court ruled that "paid or accrued" used in that Section must be construed as permitting a deduction for excess profits taxes paid even though the taxpayer used the accrual basis. (R. 12-13, 16) The majority of the Court of Claims (with two dissents) found that this construction of Section 122(d)(6) was in accord with the clear intention of Congress (R. 10-14). On rehearing the same majority of the Court of Claims (with the same dissents) adhered to its original decision (R. 16-19).

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[4] The abandoned contention related to an argument that $86,333.74 of excess profits tax accrued in the year 1946, arising out of the settlement of a dispute by agreement to a deficiency in excess profits tax in that amount. (R. 5, 7)

[5] This amount was based upon a "paid" theory only and is the amount stated in the petition to the Court of Claims. Actually, that amount is less than the proper amount refundable to the taxpayer on the basis of the holding by the Court of Claims. Due to an inadvertent error in the arithmetic computation of the effect of the additional deduction in 1944 the amount recoverable was understated in the petition. As recomputed by the taxpayer, the proper result in 1944 is an overpayment of excess profits tax of $116,425.80 and an overpayment of income tax of $53,729.41, or an aggregate overpayment of $170,155.21.

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SUMMARY OF ARGUMENT

How should "paid or accrued" formerly appearing in Section 122(d)(6) of the Code be construed? Did the words connote accounting methods? Or did they refer to tax transactions, namely, actual tax payment, or that a liability for tax had arisen?

I

As a first method the taxpayer takes a practical approach, letting the results under the opposing theories point the way to the legislative purpose and proper construction. The taxpayer construes "paid or accrued" to refer to transactions involving either payment or the arise of a liability while the Government construes the words to refer to accounting methods. Under the Government's construction, of course, "paid" relates to a cash basis taxpayer and "accrued" relates to an accrual basis taxpayer.

Excess profits tax liabilities for 1945 were conventionally paid during the following year regardless of accounting methods. If 1945 was a profit year and was followed by a loss year then excess profits taxes would be paid in a loss year. Taxpayer regards this as the situation envisaged by Section 122(d)(6); it would apply to any taxpayer regardless of accounting methods. This is the ordinary case.

Unlike this equitable result the Government's construction results in gross discrimination against the bulk of corporate taxpayers who report on the accrual basis and favors the comparatively few cash basis taxpayers. If "paid" is confined to a method of accounting then obviously the cash basis taxpayer could pay its tax in a loss year. Conversely, an accrual basis taxpayer under identical circumstances would derive no benefit as its taxes would have accrued in the prior (tax) year and payment would be meaningless. Nor could the accrual basis taxpayer accrue an excess profits tax liability for the loss year itself. As a practical matter it was impossible to have a net operating loss under Chapter 1 (income tax) and at the same

time have an excess profits tax liability under Chapter 2. The unusual type of situation was one where a tax deficiency was contested postponing accrual and settlement occurred in a loss year. Under those circumstances an excess profits tax liability could accrue in a loss year under either party's theory. This, however, it must be emphasized was an unusual type of situation of limited applicability whereas the payment situation was ordinary for all taxpayers.

The Court below and even the Second Circuit have recognized the inequitable situation inherent in the Government's argument. This type of inequity is to be distinguished from the ordinary differences found between taxpayers arising from different accounting methods. Those disadvantages were temporary while the discrimination here was permanent. Recalling that the net operating loss provisions were essentially relief provisions designed to help taxpayers by permitting them to spread losses, it is inconceivable that Congress in that process deliberately intended to discriminate against the great bulk of corporate taxpayers in an ordinary situation. Congress must be presumed to have intended "equality among taxpayers", and only the taxpayer's transactional concept achieves such a result.

II

Congress did not define the words "paid or accrued" when used in Section 122(d)(6). The meaning of these words, however, may be gleaned by analyzing the provisions of the statute themselves, by analyzing the legislative history to determine legislative intent, and finally on the authority of a related line of cases. The foregoing sources lead to the conclusion that Section 122(d)(6) was designed to permit corporate taxpayers regardless of accounting methods to take as a deduction the amount of excess profits tax paid in a loss year in determining the amount of the net operating loss.

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Of all the adjustments under Section 122(d), the (6) adjustment, the one here involved, was the only one intended to help a taxpayer where a net operating loss had been incurred. All of the others tended to reduce the amount of the loss. The (6) adjustment was the "addition" referred to in the caption of Section 122(d) as it "added to" the amount of the loss.

Although Congress used the word "deduction" in Section 122(d)(6) it is clear that the word as used there was not used in a conventional sense, as under Section 23, for example. Section 23(c)(1)(B) of the Code specifically made excess profits taxes non-deductible in determining net income in 1946. This provision had been added by the same section of the Revenue Act of 1942 which added 122(d)(6) to the Code.

Taxpayer concludes, therefore, that as a conventional deduction was not intended, Congress must have designed the adjustment to permit the "addition" of excess profits taxes either paid or accrued in the loss year to the amount of the net operating loss just as if they had been deductions for this limited purpose. This renders the Government's argument on deduction wholly inapposite.

The technique used in Section 122(d)(6), while somewhat out of the ordinary, was similar to a technique used by Congress in a number of other Code provisions in effect at the same time. The other Code provisions were those relating to foreign personal holding companies, domestic personal holding companies, improper accumulations of surplus and even the excess profits tax itself. Each of these "super-surtaxes" plugging loopholes was levied upon a tax base derived from but different from net income. Conventionally, a number of adjustments were made, differing among the various sections, to convert net income to the respective tax base concerned in each of the differing sections. In both of the personal holding company sections as well as the one involving improper accumulations of surplus, otherwise non-deductible Federal taxes were re-

quired to reduce net income under language which in each case described such taxes as "paid or accrued during the taxable year". Those cases construing these provisions such as *Commissioner* v. *Clarion Oil Company,* 148 F. (2d) 671, in the case of personal holding companies, have uniformly held that "paid or accrued" referred to transactions and not accounting methods. In each case the rationale was that accounting methods were connoted by paid or accrued under Section 48(c) only where net income was involved. Adjustments made to net income after it had been determined were not controlled by these terms which were to receive their ordinary meaning.

The parallel between these types of adjustments and that involved under 122(d)(6) is striking. In the situation here involved net loss (excess of deductions over gross income or negative net income) was to be adjusted for the "exceptions, additions and limitations" of subsection 122(d). These adjustments converted "net loss" into net operating loss. The (d)(6) adjustment, a negative type of factor, tended to increase a net loss or reduce net income. Though not a base for imposing tax it was a base for a refund of tax. The identity of language and structure used in the two situations require the conclusion that what Congress intended in the other situations it must have intended here as well.

In spite of the Government's implication that Congress "overlooked" many things in connection with Section 122(d)(6) and that, therefore, this Court should legislate what was overlooked and deny the benefit of that section to accrual basis taxpayers, it is demonstrable that Congress devoted close and detailed attention to the section. It is also clear that duplication of benefit was deliberately prevented.

Among the examples of Congressional interest in the section are:

(a) The three qualifying Rules under (d)(6) applying to widely diverse situations.

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(b) The fact that a Section 26(e) credit never appeared under Section 122 where a (d)(6) adjustment was allowed. The Section 26(e) credit against net income was one allowed in the amount of income subject to excess profits tax.

(c) Adjustments under Section 122(b) involving the (d)(6) factor were in harmony with the Congressional concept that the payment of such tax was an economic loss.

(d) Sections 711(a)(1)(J) and (a)(2)(L) were restrictive provisions confining the operation of Section 122(d)(6). They indicated a Congressional consideration of the very question of double benefit and deliberately prevented it. It would be unwarranted to go beyond the limitation imposed by Congress itself without express authority.

(e) Section 26(c)(2), while incorporating the (d)(1), (2) and (3) adjustments carefully omitted the (d)(6) adjustment in a section of very narrow technical application.

It would be unreasonable to suppose that Congress drafted these complicated provisions to achieve nothing. For if paid or accrued were given the meaning the Government urges, that meaning inevitably would emasculate the section. Could Congress intend such a result?

A line of cases starting with *Commissioner* v. *Clarion Oil Co., supra,* has repeatedly held in the personal holding company context that "paid or accrued" need not necessarily refer to accounting methods as required by Section 48(c) and that where some statutory concept beyond net income was involved "paid or accrued" may receive their ordinary transactional meaning with reference to tax payments or tax accruals. This line of cases, therefore, distinguished those cases dealing with ordinary tax deductions from net income as inapposite. Three Circuit Courts, the Court of Claims, a District Court, and the Tax Court of the United States have all followed the *Clarion Oil* principle. It has recently been extended into the analogous situation

of Section 102 where a construction similar to *Clarion Oil Co.* was given. Whether personal holding company surtax or improper accumulations of surplus were involved, these similar type of adjustments, just like the (d)(6) adjustment, helped taxpayers by reducing the base for the surtax.

The legislative history of Section 122(d)(6) and related provisions reveals that paid or accrued were intended to refer to transactions and not accounting methods. Two significant omissions under Section 122(d)(6) enacted by the Revenue Act of 1942, bear this out. The two omissions were, respectively, Rule (A), formerly appearing under Section 23(c)(2) and the absence of the Section 26(e) credit.

The 1941 Revenue Act allowed excess profits taxes as a deduction in computing net income (Code Section 23(c)(2)). That allowance was qualified by four rules, the first of which placed cash basis taxpayers on the same basis as accrual basis taxpayers by considering taxes paid after a taxable year as though paid within the taxable year. When Section 122(d)(6) was enacted by the Revenue Act of 1942, Rules (B), (C) and (D) formerly under Section 23(c)(2) became Rules (A), (B) and (C) under (d)(6). Why was Rule (A) omitted?

The answer is that the rule would have been meaningless in a loss year. No tax liability could arise or be imposed in the loss year. Thus, the words "paid or accrued" could not have related to the loss year but must have related to transactions dealing with taxes of *prior* years. In any other context "paid or accrued" were inapposite.

The second omission, that relating to Section 26(e), occurred for the same reason and warrants the same conclusion. The same section of the Revenue Act of 1942 which enacted Section 122(d)(6) dealt also with credit for dividends received and computation of Section 102 net income. Each of these sections contained specific reference to the new 26(e) credit yet no reference was made

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in Section 122(d)(6) with respect to that credit. Again the reason is attributable to the loss year. Where there was a loss there was no excess profits net income and hence no Section 26(e) credit. This omission likewise leads to the conclusion that "paid or accrued" related to prior year's taxes.

Committee reports indicate clearly that the purpose of the Section 122(d) adjustments, including (d)(6), was to sterilize net loss of non-economic factors and convert it into economic loss. Where the factors were used with a profit year (as in Section 122(b) or (c)) the effect was to convert net income into economic net income. These various adjustments at every stage of the computation from operating losses, through carry-back, to deduction made the connection between a (d)(6) adjustment and the final deduction very indirect. Moreover, the amount of the net operating loss deduction was derived from loss carry-overs and carry-backs from *other* years. Hence, Sections 43 and 48(c) did not apply as these items were not paid or accrued *in* the year of deduction.

In passing it should be noted that every attack made by the Government upon the taxpayer's contentions would, if valid, apply with equal vigor against a cash basis taxpayer in the identical situation and yet under the logic of the Government's theory a cash basis taxpayer who paid a tax in a loss year should benefit. Such inconsistency reveals the Government's real argument to be that it does not agree with the Congress and therefore Section 122(d)(6) should not apply to accrual basis taxpayers.

Even if it be held that "paid or accrued" technically and literally refers to methods of accounting as described in Section 48(c), then this Court should construe the quoted words in accordance with the Congressional intention already demonstrated. Where language is at odds with the purpose of the statute as demonstrated by an absurd or even unreasonable result arising from the words used, then this Court should follow the policy of the legislation as

a whole. Applying that rule here the transactional meaning should be given to paid or accrued under Section 122(d)(6).

III

The fortuitous occurrence of another loss in 1947 resulted in the taxpayer having a net operating loss carry-back to and deduction in 1945 thereby recovering for the taxpayer the excess profits taxes for that year paid in 1946. The Government cites this as showing that no economic loss resulted from the payment of tax in 1946.

This argument, also made below, was not even adverted to there.

The Government contends that only the tax as finally determined *after* carry-back was "imposed," and only the tax "imposed" could be an economic loss.

Aside from the fact that the payment of money undoubtedly was an economic loss the fact is that the original tax for 1945 was imposed. This is indicated by Section 56(a) of the Code and the rationale of *Manning* v. *Seeley Tube & Box Co., Inc.*, (1950) 338 U.S. 561.

That subsequent losses should not affect previously deducted taxes is also accepted by the Commissioner as indicated by two recent rulings.

The Government's argument tends to negative the annual accounting concept.

ARGUMENT

Introduction

The statutory provision the construction of which is in dispute is Section 122(d)(6)[6] of the Internal Revenue Code relating to net operating losses. To the extent here material that section provided:

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[6] This section of the Code has no present application. Enacted by the Revenue Act of 1942, it was never repealed but was simply made inapplicable with respect to any taxable years ending after June 30, 1950. See Section 304 (e) of the Excess Profits Tax Act of 1950.

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> "There shall be allowed as a deduction the amount of tax imposed by subchapter E of Chapter 2[7] paid or accrued within the taxable year, * * *."

More specifically, the dispute centers about the words "paid or accrued." The problem is to determine the proper connotation of the quoted words when read in conjunction with Section 122(a) of the Code which defined the net operating loss to be:

> "* * * the excess of the deductions allowed by this Chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d)."

The taxpayer's position is that the words "paid or accrued" were disjunctives referring to tax transactions. The terms connoted respectively either the discharge of a liability for tax by payment or that a liability for tax had arisen.[8] These were the ordinary and usual meanings of these words. Inasmuch as the taxpayer actually "paid" or discharged its 1945 excess profits tax liability during the loss year 1946, it follows that under the statute the amount of such payment should be allowed as a deduction in computing the amount of net operating loss.

The Government reads the two words together and interprets "paid or accrued" to distinguish between taxpayers' methods of accounting. That is, "paid" refers to a payment if a taxpayer was on a cash receipts and disbursements basis and "accrued" refers to an accrual if a taxpayer was on the accrual basis. The Government argues that because the taxpayer was on the accrual basis it could not take into account the excess profits tax admittedly paid in 1946 because it had "accrued" in 1945.

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[7] Subchapter E of Chapter 2 related to excess profits tax.

[8] To distinguish the taxpayer's conceptual approach from that of the Government, the taxpayer's meanings may be regarded as "transactional" in nature while the Government adheres to an "accounting method" theory.

The taxpayer's position is supported in principle and reasoning by the language of the statute itself, by an analogous line of authority and is confirmed by the Congressional intent as manifested through the legislative history of the disputed section and related provisions.

I.

Only the Transactional Meaning of "Paid or Accrued" Permits Fair and Equal Treatment of All Corporate Taxpayers Regardless of Accounting Methods, as Intended by Congress

Before probing legislative history to discover Congressional intent, the nature of the problem suggests a practical approach; let the results under the opposing theories point the way to the legislative purpose and the proper construction. The taxpayer reads "paid or accrued" in the ordinary[9] or "transactional" sense while the Government construes "accounting methods." What are the practical effects of these opposed arguments? First the usual situation.

In the year 1945, every corporate[10] taxpayer was required to pay its excess profits tax in full on the fifteenth day of the third month following the close of its taxable year or in four quarterly installments during the year following the taxable year.[11] This was the usual or conventional way

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[9] In addition to the holding of the Court below on this point, a similar rule appears in a number of cases involving personal holding company situations. See *Commissioner* v. *Clarion Oil Co.* (CCA DC, 1945) 148 F. (2d) 671, 677; cert. den. 325 U. S. 881; *Birmingham et al., Exrs.* v. *The Loetscher Company* (CCA-8, 1951) 188 F. (2d) 78, 79; *Aramo-Stiftung* v. *Commissioner* (CCA-2, 1949) 172 F. (2d) 896, 897; *Wm. J. Lemp Brewing Co.* (1952) 18 T.C. 586, 600 and 601. The same rule also has been adopted in another situation, namely, improper accumulations of surplus arising under Chapter 1. See *Harry M. Stevens, Inc.* v. *Johnson* (DC SD NY, 1953) 115 F. Supp. 310, 312, (now pending before CCA-2).

[10] The excess profits tax imposed by Section 710 of the Code was levied only upon corporations.

[11] Sections 56 (a) and (b) of the Code.

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in which corporate taxpayers liquidated tax return liabilities and this was so *regardless of accounting methods.*

Where a corporate taxpayer had a profit year in which it incurred an excess profits tax liability and the year following was a year of loss, then the excess profits tax liability for the profit year was routinely discharged by payment in the loss year. Under such circumstances, whether the taxpayer was on the cash or the accrual method of accounting, it met the requirements of Section 122(d)(6) under the taxpayer's theory. It had "paid" an excess profits tax within a loss year.

The "accounting method" sense the Government would place upon the words "paid or accrued," unlike this equitable result, produces a gross discrimination against the many accrual basis taxpayers and in favor of the few cash basis[12] taxpayers. A cash basis taxpayer, conventionally paying its liability for excess profits taxes in a loss year following a profit year, would obviously benefit under Section 122(d)(6). Its cash basis of accounting would recognize the payment as a "disbursement." In contrast, an accrual basis taxpayer *under identical circumstances* necessarily would be denied the benefit of the adjustment, under the Government's theory. For it, the taxes would have "accrued" in the year imposed and payment in the later year would have no effect under Section 122(d)(6).

Nor could the accrual basis taxpayer qualify under the Government's theory for an accrual in a loss year itself. To do so an accrual basis taxpayer would have had to incur an excess profits tax liability under Chapter 2 in a given year (based on taxable excess profits net income) and at the same time and for the same year incur a net operating loss (a negative net income figure) under Chapter 1. To state this is to indicate the answer. Ordinarily,

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[12] It is a commonly accepted truism that the great bulk of corporate taxpayers utilized the accrual method of accounting rather than the cash receipts and disbursements method.

therefore, it was obviously impossible to accrue both an excess profits tax liability and a net operating loss in the same year. The necessary result is that under the Government's theory the cash basis taxpayer could under ordinary circumstances qualify under Section 122(d)(6) while the much more significant class of corporate taxpayers—accrual basis—would automatically be disqualified. As to them, the benefits of the section would be "largely illusory." (See opinion below.)

There was also an unusual type of situation. Where liability for an additional (deficiency) tax was contested, such a contest would postpone the accrual of such a tax liability under well-recognized principles.[13] Termination of the dispute would fix the time of accrual and this could occur in a loss year.[14] Under such circumstances an excess profits tax liability "accrued" benefiting equally the cash or the accrual basis taxpayer under Section 122(d)(6).[15]

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[13] *Dixie Pine Products Co.* v. *Commissioner* (1944) 320 U. S. 516; at 519; *Security Flour Mills Co.* v. *Commissioner* (1944) 321 U. S. 281, 284-6.

[14] See *G.C.M. 25298*, 1947-2 Cum. Bull., 39, 43. Compare *Robert Reis & Co.* (1953) 20 T.C. 294, where an accrual basis taxpayer had a dispute as to deficiencies, there was a consequent postponement of accrual and finally *settlement and payment.* The latter two events both occurred in the loss year and both factors were cited by the Court. Under either party's theory here, the taxpayer should have prevailed in the *Reis* case.

[15] It must be emphasized again, however, that the accrual case was an *unusual* type of situation. It is described as unusual to distinguish it from the situation where taxes were paid on liabilities reflected on returns. The latter were the more usual and much more important category. Dollarwise, collections of additional taxes are not nearly as significant as tax collections based on return liabilities. For example, the *Annual Report of the Commissioner of Internal Revenue* for the fiscal year ending June 30, 1953 discloses on page 4 that corporate income and profits taxes collected for that fiscal year aggregated $21.6 *billions* (789,984 returns filed—p. 6). In the same fiscal year additional corporate income and profits taxes including interest and penalties assessed as a

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This would be so under either theory. The Government cites this rare situation to show that its theory is not entirely inequitable. Note, however, that even this situation involved a discrimination favoring taxpayers with tax troubles over those without them.

The Court of Claims below recognized the force of the inequities inherent in the strained construction of the Government, particularly in the usual situation. Therefore, it rejected the Government's argument in favor of the taxpayer, convinced as it was of the intentions of Congress in this regard. (R. 12, 13.) Even the Second Circuit Court of Appeals in the companion case of *Lewyt Corporation* v. *Commissioner,* 215 F. (2d) 518 at 526, candidly recognized the force of this argument although it refused to act upon it.[16]

The inequitable and discriminatory results inherent in the Government's theory must be distinguished from that type of inevitable difference in tax effect occurring where,

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direct result of audit aggregated only $386 *millions* as shown on page 27 of the Report, or approximately 1.79 percent of the total (corporate returns examined totaled 110,996—p. 9). A similar Report for the fiscal year ending June 30, 1946 discloses total corporate tax collections of $7,822,488,154 on page 20 thereof. Additional assessments of corporate taxes for that year were not published but the taxpayer was advised by the office of the Commissioner of Internal Revenue on February 10, 1955 that additional corporate taxes assessed had aggregated $274,546,554 or less than 3 percent of the total. The conclusion seems inescapable that in comparison with total tax payments deficiency payments were comparatively very small. The Section 721 type of situation also cited by the Government was even rarer.

[16] The Second Circuit recognizing these equities, nevertheless, felt bound by the supposed mandate of Section 48 (c). That Section defined "paid or accrued" (where the computation of *net income* was involved) to refer to methods of accounting. As later demonstrated, Section 48 (c) does *not* control in the case of the Section 122 (d) (6) adjustment. Neither net income nor its negative equivalent (net loss) were directly involved; economic loss was the result of the adjustment.

due to accounting method used, a taxpayer was at a temporary disadvantage.[17] This is a situation where in the course of corporate operations losses were admittedly incurred. Congress in its plenary taxing power afforded relief[18] to taxpayers incurring losses by permitting them to spread the tax effect of such losses over adjacent years.[19] What the

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[17] The latter usually occurred in transition periods—for example when excess profits taxes were repealed in 1945 the accrual basis taxpayer was taxed on sales accruals not actually received until after repeal, while the cash basis taxpayer escaped high taxes on comparable income. The discrimination inherent in the Government's theory, on the other hand, always existed and always worked against the same class of taxpayer.

[18] In a very real sense Section 122 (d) (6) was a war relief measure. At the time the Revenue Act of 1942 was enacted many corporations not in war production were already experiencing declining profits and at the close of the war economy many other corporations were expected to experience declining profits. The provisions of Section 122 afforded in effect the same type of relief in periods of declining profits which the two-year carry-forward provisions afforded in periods of increasing profits. *5 Mertens, Law of Federal Income Taxation,* 1953 Ed., pp. 358-539.

During the war economy many normally deductible expenses were held down to a bare minimum by priorities, rationing, labor shortages and other factors beyond the control of the taxpayer. See Report No. 1631 of the Senate Finance Committee, 77th Cong., 2d Sess., p. 52. This situation was heightened by the operation of the excess profits tax law, which, because of the inability of taxpayers to take deductions for normal repairs and replacements would cause excessive net income which would be taxed as excess profits at a very high rate. *Mertens, Ibid.* See also *Diamond A Cattle Co.* (1953) 21 T.C. 1 at 7.

[19] The net operating loss deduction provision in taxing statutes and under the Code has had a checkered career. "In all its variations it has represented a response of Congress to the hardships caused by the taxable year as the measuring unit of time for determining tax liability, and in its inception in 1919 and its revival in 1939 was intended to favor taxpayers whose income was apt to fluctuate from year to year as well as those taxpayers whose business was in a period of development." *Mertens, Ibid.,* p. 355.

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Government suggests was a deliberate Congressional intent to discriminate against the great bulk of corporate taxpayers in that process. It should require the most unequivocal expression of Congressional intent to justify a deviation from the ordinary meaning of "paid or accrued" to warrant such a position. A somewhat similar attempt by the Government to attribute to the Congress an intent to discriminate[20] against cash basis taxpayers was rejected in *Commissioner* v. *Clarion Oil Company,* 148 F. (2d) 671, where it was said (at p. 676):

> "Nor did Congress intend that the taxpayer on an accrual basis who entered in his books an arbitrary amount as a 'reserve for taxes' should be in a better position than the taxpayer on a cash basis, * * *."

Congress must be presumed to have intended "equality among taxpayers."[21] The taxpayer's interpretation of the disputed phrase results in fair and equal treatment of corporate taxpayers regardless of accounting methods; the theory of the Government renders the section virtually inoperative for accrual basis taxpayers. Only the taxpayer's interpretation can be in harmony with the presumed purpose of Congress.

II.

Section 122(d)(6) Was Designed (Among Other Things) to Allow Corporate Taxpayers, Regardless of Accounting Methods, to take as a Deduction the Amount of Excess Profits Tax Actually Paid In A Loss Year in Determining the Amount of a Net Operating Loss.

It must be emphasized at the outset that Section 122(d)(6) applied if, and only if, a taxpayer incurred a net operating loss; where a taxpayer enjoyed profit years the

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[20] That the purpose of a taxing statute would be frustrated by denial of equal tax treatment because of mere difference in accounting is also indicated by *Commissioner* v. *The Hecht Co.* (CCA-4, 1947) 163 F. (2d) 194, 196 and 199.

[21] *Colgate-Palmolive-Peet Co.* v. *U. S.* (1943) 320 U. S. 422, 425.

section did not apply. The provision involved, therefore, a limited type of situation.

Congress did not define in the staute or in its Reports the meaning of the terms "paid or accrued" when used in Section 122(d)(6).[22] Their meaning must, therefore, be gleaned from an analysis of the words of the statute itself in the light of the legislative purpose as disclosed by the legislative history and corroborated by a collateral line of cases involving a similar principle in a similar type situation.

A. The language of the Code itself proves this by necessary inference.

1. Section 122(d)(6) provided the principal adjustment which could benefit a taxpayer in a loss situation.

Section 122 was captioned, "Net Operating Loss Deduction." Subsection (a) thereof defined a net operating *loss;* subsection (b) described how to convert a net operating loss into a net operating loss carry-back or carry-over and how to determine the amounts thereof; subsection (c) provided rules for converting the carry-backs and carry-overs into a net operating loss deduction and for determining the amount thereof.[23] Sub-section (d) was captioned, "Exceptions, additions and limitations" and was not designed to stand alone. It merely tabulated six adjustments various of which were specifically referred to by subsections (a), (b) and (c). Section 122(a) referred broadly to all the exceptions, additions and limitations

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[22] The words were "ambiguous" as they were capable of being understood in either of two or more possible senses. See *Webster's New International Dictionary,* 2nd Ed. (1940) p. 81.

[23] This was the "plainly established trichotomy" referred to in *Reo Motors, Inc.* v. *Commissioner* (1950) 338 U. S. 442 at 446-447. The case is otherwise not in point. It stands for the rule that "net operating loss" must be determined under the law in effect in the loss year, not the law in effect in the year of the net operating loss *deduction.*

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provided in subsection (d). Section 122(b) and its various subparagraphs referred only to adjustments numbered (1), (2), (4) and (6). Section 122(c) referred only to adjustments (1), (2) (3) and (4). Only subsections (a) and (b), therefore, involved the (d)(6) adjustment.

Of the six adjustments listed under section 122(d), four of them—numbers (1), (3), (4) and (5)—either eliminated or reduced specific deductions claimed on returns. One of them—(d)(2)—required the inclusion of tax-exempt interest income less non-deductible interest on debts incurred to buy tax-exempt obligations. The first five adjustments[24] together constituted the "exceptions" and "limitations" re-

[24] The first five adjustments provided as follows:

"(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114(b), (2), (3), or (4);

"(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23(b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

"(3) No net operating loss deduction shall be allowed;

"(4) Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains."

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection."

ferred to in the caption. The sixth adjustment—the one here involved—allowed as a deduction the amount of excess profits tax imposed paid or accrued within the taxable year. This adjustment was the "addition" [25] referred to in the caption of Section 122(d) because it allowed an amount not deductible[26] on a return to be "added to" the excess of deductions over gross income.[27]

Of all the adjustments under (d), number (6) here involved was the *only one beneficial* to taxpayers once a loss had been incurred.[28] It tended to increase that loss by providing an additional deduction, thereby increasing the amount of the carry-back and the net operating loss deduction. This, of course, could result in a refund of overpayments for a prior year.

2. The excess profits tax paid under Section 122(d)(6) was not a *conventional* deduction under Section 23; therefore "paid or accrued" did not necessarily refer to accounting methods and Section 48(c) was inapposite. A question arises as to the exact significance of the phrase appearing in Section 122(d)(6), "there shall be allowed as

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[25] Note that the word "additions" was added to the caption of Section 122(d) by the same section of 1942 Revenue Act which enacted Section 122(d)(6).

[26] As subsequently explained, excess profits tax could not be deducted in computing corporate net income per return in 1946.

[27] The simple excess of deductions over gross income referred to in Section 122(a) was not named in the Code. It may be referred to by the non-technical term "net loss" to distinguish it from "net operating loss" which contained in addition the adjustments provided in subsection (d).

[28] This is not surprising in view of the fact that the (d)(6) adjustment was a statutory descendant of former Section 23(c)(2). Congressional benevolence which formerly had permitted a deduction under that section for excess profits tax had, by the 1942 Revenue Act, discontinued the deduction for technical reasons and allowed instead the Section 122(d)(6) adjustment and a Section 26(e) credit. These two did not duplicate but rather tended to complement each other; one applying in loss and the other in profit years.

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a deduction," with reference to excess profits tax "paid or accrued." The Government contends that this language required that the adjustment for excess profits tax paid or accrued be regarded as a conventional deduction, subject to the usual rules of statutory construction. *Yet Section 23(c)(1)(B) specifically excepted excess profits tax paid or accrued from those which were deductible generally in 1946.* Excess profits tax was placed among the *exceptions* by the identical section of the Revenue Act of 1942 which added Section 122(d)(6) to the Code.[29]

The taxpayer concludes, therefore, that Congress could not have intended the word "deduction" in Section 122(d)(6) to be the conventional, Section 23,[30] type of deduction.

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[29] Section 105(d) of the Revenue Act of 1942 amended Section 23(c)(1)(B) of the Code by adding excess profits tax to the non-deductible ones. Section 105(e)(3) added subparagraph (6) to subsection 122(d) of the Code.

[30] This is expressly demonstrated by the following situation. Under Section 102(d)(1)(A), net income was required to be reduced by "excess profits taxes * * * paid or accrued during the taxable year, to the extent not allowed as a deduction by Section 23". In the absence of a saving clause, this language obviously would have included taxes under Chapter 2E which were not allowed as a deduction by Section 23(c)(1)(B). Therefore, to accomplish Congress' purpose of non-deductibility of Chapter 2E tax under Section 102, a parenthetic phrase appeared after the word "taxes" quoted above, couched in the following language:

> "(other than the tax imposed by Subchapter E of Chapter 2 for a taxable year beginning after December 31, 1940)".

This illustrates that taxes under Chapter 2E were *not* Section 23 "deductions" otherwise there was no need for the words in parenthesis.

Compare the situation under Section 505(a)(1) where net income was also required to be reduced by "excess profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under Section 23". Here, no parenthetic exception appeared and Chapter 2E taxes were, therefore, proper adjustments.

What may have been intended was that "the *amount*[31] of tax imposed" (either paid or accrued) should be "added to" the excess of deductions over gross income thereby tending to increase the amount of the net operating loss just as if it actually had been an additional deduction for this limited purpose.[32] The fact that conventional Section 23 "deductions" were *not* involved renders the Government's Argument I aside from the point. Sections 41, 43 and 48(c) are inapposite, therefore, as are the cases cited on pp. 13-14 of the Government's Brief. "Paid or accrued," therefore, were not controlled by these sections. This is not to deny, of course, that *conventional* deductions should be treated as the Government argues.

3. Other sections of the Code reveal a well-established Congressional technique of making tax "paid or accrued" adjustments *to* net income not controlled by Section 48(c). While somewhat out of the ordinary, the adjustments provided by Section 122(d) to be made to Section 122(a) bore a family resemblance to several other Code provisions in effect in mid-1940. Among such cousins were Sections 102(d)(1), 336(a), 505(a) and 711(a)(1) and (2). Although these sections related to such dissimilar corporate loopholes as improper accumulation of surplus, foreign and do-

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[31] Perhaps this was Congress' way of permitting the adjustment under Section 122(d)(6) even though excess profits taxes were technically non-deductible. That is, only the "amount" of tax imposed was allowed to be "added" to the loss; the tax itself was not to be deducted. Whatever the rationalization, the non-deductibility is clear.

[32] The Court below felt that it would have to make an exception to the general rule prohibiting "shifting" from one method of accounting to another to "give effect to the plain intention of Congress". The taxpayer believes that such intent can be given effect without taking that position, simply by relying on the distinction here noted. This also disposes of the Government's suggestion that taxpayer is inconsistently seeking to shift some but not all of its operations to a cash basis. Bases of accounting have no place in this problem.

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mestic personal holding companies and excess profits, they did have a common feature. This was the fact that each related to a "super-surtax"[33] or a tax imposed above and beyond normal taxes. In each case, the base upon which the "surtax" was levied was not ordinary net income but a different statutory concept above and beyond net income.[34]

Various adjustments were specified in the respective sections to convert net income in each case to the new base for tax. The adjustments themselves tended to differ between sections depending upon considerations germane to the particular legislative purpose in each case. Yet one similar type of adjustment was found in both of the personal holding company sections as well as Section 102. It was for Federal taxes paid or accrued.

In these three sections, otherwise non-deductible Federal taxes were allowed to *reduce* net income (the personal holding company provisions referred to "additional deductions" and Section 102 used a "minus"). And in each instance the taxes were described as "paid or accrued during the taxable year". In every case construing these provisions[35] it has been held uniformly that "paid or accrued" referred to transactions, not accounting methods; a tax base beyond net income was being computed and Section 48(c) did not apply.

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[33] See *7A Mertens, supra,* (1943 Ed.) 5 *et seq.* The term is Mertens'. He lists, in addition to those named, the declared value excess profits tax, the unjust enrichment tax and the tax on excess profits on Navy contracts.

[34] The respective terms were:

Section 102(d)(1)—net income into "section 102 net income"

Section 336—net income into "Supplement P net income"

Section 505—net income into "Subchapter A net income"

Section 711(a)—normal tax net income into excess profits net income

[35] Section 102(d)(1) was thus construed in *Harry M. Stevens, Inc.* v. *Johnson, supra.*

Section 505(a)(1) was construed in *Wm. J. Lemp Brewing Co., supra, Aramo-Stiftung* v. *Commissioner, supra,* and *Birmingham* v. *The Loetscher Company, supra.*

The parallel between these provisions and Section 122(a) and (d)(6) is striking. Net loss (excess of deductions over gross income—negative net income) under Section 122(a) had to be adjusted for the "exceptions, additions and limitations" provided in subsection 122(d). These adjustments converted "net loss" into "net operating loss". The (d)(6) adjustment was a deduction for excess profits taxes "paid or accrued within the taxable year." As a negative (or deduction) factor it tended to *reduce* net income or, in a loss year, *increase* net loss. While the "net operating loss" was not a base for a surtax it was a negative base for the negative of tax—a refund (from carry-back and deduction).

From the foregoing, it is discernible why Congress used the technique it did in Section 122; from 1934[36] to the present time[37] Congress has used the type of device described. It is not surprising therefore, that Congress, in legislating on a matter involving payment or accrual of a non-deductible excess profits tax (a super-surtax itself), should follow its own pattern and adopt almost identical language used before appropriately adapted, however, to the requirements of a loss rather than a surtax situation. The Congressional intent in using "paid or accrued" in the similar provisions was firmly established. What was intended there must have been intended here.

4. Congress quite apparently devoted a considerable amount of time and attention in drafting detailed provisions regulating the implications and ramifications of Section 122(d)(6) and to avoid duplication of benefit to taxpayers by that provision; any further restriction by Courts

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[36] See Section 351(b)(1)(A) of the Revenue Act of 1934 relating to personal holding company "adjusted net income."

[37] See Section 545(b)(1) of the Internal Revenue Code of 1954 where, in a personal holding company situation, certain excess profits taxes are allowed as a deduction from "taxable income" when paid (if previously reported on a "when paid" basis) unless by irrevocable election they are to be reported hereafter when "accrued."

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through a narrower construction of "paid or accrued" than intended by Congress would be unwarranted.

The general flavor of the Government's Brief is that the Congress "overlooked" a lot of things in connection with Section 122(d)(6). The facts are to the contrary. The implication, however, is that this Court should legislate that which was overlooked and, presumably, hold the Section inapplicable to accrual basis taxpayers (with rare exceptions).

The following examples from the Code of detailed Congressional interest in Section 122(d)(6) may be cited:

(a) Congress provided three qualifying rules under (d)(6) dealing with matters as diverse as allowance of the full amount of excess profits tax paid unreduced by the foreign tax credit, the non-applicability of a technical loophole-plugging provision involving adjustments in the case of inconsistent positions and allocation of tax in the case of a consolidated return;

(b) Wherever the (d)(6) adjustment was referred to in Section 122 no reference was made to a Section 26(e) credit (for example, subsections (a), (b) and (d)); conversely, where reference to the Section 26(e) credit was made, the (d)(6) adjustment did not appear (as in Section 122(c)). The (d)(6) adjustment, therefore, was to apply in such a way that there would be no duplication of benefits[38] by having a Section 26(e) credit allowed in the same year;

(c) Sections 122(b)(1)(A) and (b)(2)(A),[39] allowed the

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[38] Wherever there was a Section 26(e) credit, that indicated a profit year, such as the year of *deduction* of a net operating loss. In a loss year under 122(a) there could be no Section 26(e) credit (there being no adjusted excess profits net income). Even under Section 122(b)(1) where the (d)(6) adjustment occurred in a profit year (second year preceding the loss year) *only* the (d)(6) adjustment was allowed and not the Section 26(e) credit.

[39] These sections related to the net operating loss carry-back and carry-over types of situation. For example, in determining the amount of the carry-back to the year *first* preceding the year of

(d)(6) adjustment in harmony with the Congressional concept that payment of an excess profits tax was an "economic loss";

(d) The insertion of Sections 711(a)(1)(J) and (a)(2)(L) in the Code (by the 1942 Revenue Act) indicated Congressional preoccupation with the area of impact of Section 122(d)(6) and further indicated a deliberate attempt to curtail its operation. It would be unwarranted, therefore, to go beyond the limits Congress itself placed on the section[40] and add a significantly greater limitation by applying Section 48(c);

(e) Section 26(c)(2) carefully avoided an adjustment comparable to Section 122(d)(6) (although adopting the (d)(1), (2) and (3) adjustments) in a section of very narrow application controlling net operating loss carry-over credits in matters relating to Section 102 net income, Supplement P net income and Subchapter A net income.

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loss, the net operating loss had subtracted *from it* the net income of the *second* preceding year after it had been adjusted for the 122(d)(1), (2), (4) and (6) factors. As the payment (or accrual but not *both*) of an excess profits tax in the second year preceding the loss year was an economic loss in that year, the statute permitted the amount of such payment (or accrual) to *reduce* net income at that time thereby *increasing pro tanto* the amount of the carry-back "overflow" to the year first preceding the loss year.

[40] It may be noted that while Section 122(d)(6) was a part of the original 1942 Revenue Bill as originally introduced in the House, the subsections of 711 referred to were first introduced as Senate floor amendments and were in turn amended by the Conference Committee. These provisions had been suggested by the Congressional legislative drafting staff and had been submitted to the Treasury where they had been approved. Apparently, they were inserted solely for the purpose of eliminating duplications and other imperfections in the net operating loss carry-over provisions as they applied to the computation of excess profits net income. See 88 *Congressional Record* 8015—discussion by Mr. George; H. R. No. 2586, 77th Cong., 2d Sess., Amendment No. 291.

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It scarcely seems reasonable to suppose that the Congress drafted these complicated provisions using "paid or accrued" in an accounting sense in Section 122(d)(6) which would have the inevitable effect of virtually emasculating that section and the other mentioned. Yet that is what Congress intended, the Government insists[41]).

B. The Clarion Oil Company line of cases has established the rule: "Paid or accrued" may have different meanings under the Code; where necessary to produce a new statutory concept beyond net income these words may be given their ordinary meaning and not that of Section 48(c).

The *Clarion Oil* case, 148 F. (2d) 671, involved a cash basis taxpayer which paid its 1937 income and excess profits taxes in 1938. The question involved was the taxpayer's right to compute its "undistributed net income" for 1937 by subtracting from its net income for that year the amounts of income and excess profits taxes which "accrued" in 1937 but which were "paid" in 1938. The United States Court of Appeals for the District of Columbia refused to follow the Tax Court in holding that the word "accrued" had to be construed with reference to the manner in which the taxpayer kept its accounts; it held that accounting methods were connoted by the terms "paid or accrued" *only when* net income was being determined. Speaking with reference to the definition of "paid or accrued" used in Section 48(c) (also relied on in this case by the Government) the Court of Appeals said at 675:

> "But obviously, this definition was intended to apply to the method of computing *net income*, and has no

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[41] The Government's construction of the disputed words suggests analogy to the classical: "When I use a word," Humpty-Dumpty said, "it means just what I choose it to mean—neither more nor less." *Through the Looking Glass and What Alice Found There*, "Lewis Carroll."

> reference or relevancy to the subject matter of what, for the purpose of the newly added provision in relation to personal holding companies, is taxable as undistributed income.[14] In other words, having determined 'net income' in accordance with the accounting methods of the taxpayer, there is no need to question whether an ordinary income tax was 'paid' or whether it was 'accrued', since in either event it was a deductible item and no longer represented accumulations of income, which it was the intent of this tax to force out of the 'incorporated pocketbook' and into the hands of individual taxpayers." (Emphasis in the original.)

Footnote 14 referred to in the quote held that cases dealing with the deduction of Federal taxes for purposes of "net income" were inapposite, citing as an example *U. S.* v. *Anderson* (1926), 269 U.S. 422. This case and related cases relied on by the Government there (p. 14 of its Brief) are inapposite for the reason indicated.

In discussing the inapplicability of the taxpayer's method of accounting the Court pointed out in *Clarion* that it was enough if the taxes were *either* paid *or* accrued in the taxable year. There was absent the administrative need for uniformity in computing "undistributed net income" (under Section 356(a)(1) of the Revenue Act of 1937) which was essential in the computation of net income.

The Eighth Circuit,[42] the Second Circuit,[43] the Court of Claims,[44] a District Court,[45] and the Tax Court[46] have all agreed with and followed the rationale of the *Clarion Oil* case in construing Section 48(c).

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[42] *Birmingham et al., Exrs.* v. *The Loetscher Company*, 188 F. (2d) 78 at 79.

[43] *Aramo-Stiftung* v. *Commissioner*, 172 F. (2d) 896 at 897.

[44] This case in the court below.

[45] *Reliance Feed & Grain Co., Inc.* v. *Shaughnessy* (DC ND NY, 1949) 84 Fed. Supp. 389 at 390.

[46] *Wm. J. Lemp Brewing Co.*, 18 T.C. 586 at 608.

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That construction also has been extended in a recent case[47] to Section 102(d)(1)(A) of the Code involving adjustments to net income to produce "Section 102 net income" by deducting *inter alia* Federal income tax "paid or accrued during the taxable year * * *."

It is true, of course, that Section 122 was a relief provision tending to favor taxpayers by virtue of allowance of net operating loss deductions while the *Clarion Oil* case involved the personal holding company penalty surtax. However, in both situations the adjustments themselves were favorable to taxpayers[48] and there was, moreover, the conceptual affinity of the way in which the adjustments were made. In both cases adjustments were made after the "administrative need for uniformity" had already been satisfied.

The *Clarion Oil* case by analogy also supports the taxpayer's position that adjustments *to* (not deductions used in computing) net loss produced a new statutory concept notably dissimilar—net operating loss. In *Clarion* the new concept was "undistributed net income"; here it was "net operating loss". There the purpose of the adjustments was to create a fair base for a penalty surtax; here the purpose was to create economic loss to be carried back.

C. As disclosed by the legislative history the Congressional intent in using the phrase "paid or accrued" in Section 122(d)(6) was to refer to transactions, not accounting methods.

1. The Revenue Act of 1942 made two significant omissions under Section 122(d)(6), both indicating that Congress referred to *taxes of other years* when it used "paid or accrued" and, therefore, did not intend to refer to

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[47] *Harry M. Stevens, Inc.* v. *Johnson*, 115 Fed. Supp. 310 at 312.

[48] The Section 122(d)(6) adjustment tend to *increase* the amount of a net operating *loss* and hence the amount of the carry-back and resulting deduction. In the case of the penalty surtax the adjustment *reduced* the tax base subject to the penalty tax.

accounting methods. These omissions were, respectively, the non-appearance of Rule (A) which had formerly qualified Section 23(c)(2) in a related situation and the absence of the Section 26(e) credit.

Of what significance was the omission of Rule (A)? Congress first enacted an excess profits tax in the general period here under consideration when it passed the Second Revenue Act of 1940 adding Subchapter E to Chapter 2 of the Internal Revenue Code. This Act was approved October 8, 1940, and applied to taxable years beginning after December 31, 1939. For 1940, Section 23(c) of the Internal Revenue Code as it then read permitted a direct deduction of taxes paid or accrued[49] within the taxable year (with certain exceptions) in determining net income. Included among the exceptions were the Chapter 2E excess profits taxes.[50]

Section 202(a) of the Revenue Act of 1941 (approved September 20, 1941) removed excess profits taxes (under Chapter 2E) from the list of exceptions to the general deduction rule and simultaneously added new subparagraph 2 to Section 23(c) which specifically permitted a direct deduction of imposed excess profits taxes in computing net income, subject however to four limiting rules. These provisions were effective as to taxable years beginning after December 31, 1940 or later years. Rule (A) of subparagraph 2 of Section 23(c) effectively placed all taxpayers on the accrual basis of accounting with respect to the excess profits tax payments for a taxable year. Rule (A) read:

> "The deduction shall be limited to the tax imposed for the taxable year but any portion of such tax paid after the taxable year shall be considered as having been paid within the taxable year; * * *."

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[49] In this context "paid or accrued" admittedly related to accounting methods.

[50] See Section 506(b) of the Second Revenue Act of 1940 amending Code Section 23(c)(1).

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The Revenue Act of 1942[51] (approved October 21, 1942), by Section 105(c) thereof, repealed Section 23(c)(2) of the Code and simultaneously restored excess profits taxes to the list of exceptions to the deduction rule. The very same section[52] of the 1942 Revenue Act which restored excess profits to the list of exceptions to the tax deduction provisions added the new provision—Section 122(d)(6)—to the Internal Revenue Code. Pertinent language in the Senate Report[53] was as follows:

> "Section 122 of the Code relating to computation of the net operating loss deduction allowed by section 23(s) of the Code, is amended so as to *allow* the excess profits taxes paid or accrued within taxable years (subject to certain rules) as a deduction in computing net operating loss for, and net operating loss carry-over and carry-back from, such taxable years."[54] (Emphasis supplied)

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[51] This Act effected a major revision of the tax laws during the war period. Of importance here is the fact that it altered significantly the method of computing excess profits tax liability. Prior thereto the excess profits tax had been computed like an additional surtax and had been reflected on the income tax return form. Under the new act, separate tax bases were provided for the computation of the two taxes, the so-called "two-basket" principle. See H. R. No. 2333, 77th Cong., 2d Sess., p. 18.

[52] Section 105.

[53] No. 1631, 77th Cong., 2d Sess., p. 67; see also H. R. No. 2333, 77th Cong., 2d Sess., p. 65.

[54] It may be observed that this language indicated a clear intention to *allow* the adjustment enacted as Section 122(d)(6). This emphasis should be unnecessary but in view of the impression given by the Government Brief it must be made. That Brief implies that Congress wrote the section to *disallow* the adjustment. See Argument I and I.A.

Rules (A), (B) and (C) qualifying Section 122(d)(6) were almost verbatim copies of Rules (B), (C) and (D) formerly appearing in Section 23(c)(2).[55] Significantly, Rule (A) which had appeared under Section 23(c)(2) did not reappear under Section 122(d)(6). This was the rule which had effectively placed all taxpayers on the accrual basis with respect to excess profits tax *payments*.

Recalling that the professed purpose of Congress in enacting Rule (A) under Section 23(c)(2) had been to accord all taxpayers, cash and accrual, the *same treatment*[56] with respect to the deduction of payments for excess profits tax, a question arises as to the significance of the apparently deliberate omission of Rule (A) from Section 122(d)(6). Maxims[57] of judicial construction suggest that the deliberate omission of Rule (A) indicates as a minimum that Congress did *not* thereby intend to have all taxpayers on the accrual basis under Section 122(d)(6) as they had been under Section 23(c)(2).

Another conclusion also seems warranted. As Congress intended in 1941 to accord both cash and accrual taxpayers the *same* treatment with respect to the adjustment for excess profits tax, it can scarcely be supposed that Congress by the enactment in 1942 of Section 122(d)(6) omitting Rule (A) intended to accord cash and accrual taxpayers a *dissimilar* treatment simply because of a change in the base for corporate tax. Certainly it should require a clear expression of intent to warrant a conclusion that

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[55] A word-by-word comparison of the related rules leads to the conclusion that the legislative draftsmen must have had the prior language before them in drafting the rules under Section 122(d)(6).

[56] This was flatly stated in H. R. No. 1040, 77th Cong., 1st Sess., p. 46 and S. R. No. 673 (Part 1) 77th Cong., 1st Sess., p. 37.

[57] *Inclusio unius est exclusio alterius*, for example.

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Congress was abandoning equality[58] for discrimination, and the taxpayer can find none.

This much seems self-evident. What more may be inferred? The answer is found by considering the effect of Rule (A) *if* it had been enacted under Section 122(d)(6). That Rule under Section 23(c)(2) required a cash basis taxpayer to consider an excess profits tax paid *after* a taxable year as having been paid within the taxable year, the deduction being limited to the tax imposed in a profit year. This placed the cash and accrual basis taxpayers upon the same exact footing. While such a result was desirable and necessary, under Section 122(d)(6) such a Rule would have been meaningless.

In the first place, the taxable year would have been a *loss* year. Therefore, the cash basis taxpayer could have had *no* excess profits tax *liability* in the taxable year. But this would not have placed the cash basis taxpayer at a disadvantage for the accrual basis taxpayer likewise would have had no "accrued" tax liability in a loss year. These facts explain the absence of Rule (A) as unnecessary. They also warrant another conclusion.

When Congress left out Rule (A) it must have done so on the basis of the foregoing analysis. That analysis, of course, implicitly recognized that where the *taxable* year was a *loss* year, neither a cash nor an accrual basis taxpayer ordinarily could "accrue" an excess profits tax *"within the taxable year"*. Nor would a tax be paid in the year imposed.

It is apparent, therefore, that neither "paid" nor "accrued" used in Section 122(d)(6) could have been intended to refer to methods of accounting. "Paid or

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[58] "A desire for equality among taxpayers is to be attributed to Congress rather than the reverse." *Colgate-Palmolive-Peet Co.* v. *U.S.* (1943) 320 U. S. 422, 425.

accrued" in such a context would have been as inapposite as Rule (A). These terms must have referred of necessity to taxes of *prior* years[59] which were discharged by payment (paid) or which arose (accrued) in the taxable (loss) year. These are "transactional" meanings not "accounting methods" ones for these results would have been the same regardless of accounting methods.

The other omission occurred for the same reason and warrants the same conclusion. Section 105(e) of the Revenue Act of 1942 was captioned, "Technical Amend-

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[59] There is an earlier example of this type of construction. Under the 1936 Revenue Act personal holding companies were allowed deductions in computing adjusted net income of "not only ordinary Federal income and profits tax paid during the taxable year but also the special tax under Section 102." (H.R. No. 1546, 75th Cong., 1st Sess., p. 711-2. See S. R. No. 1242, same session) Thus, where a company paid during a current year, Section 102 taxes assessed for prior years, a benefit was gained, the Report explained. But Congress had not intended that Section 102 surtaxes should be paid out of current earnings. It had been intended that they should have been paid out of accumulations. Therefore, it was proposed that the 1937 Revenue Act amend Section 351 (of the 1936 Revenue Act) by making the Section 102 taxes specifically non-deductible.

Of significance is the fact that the amendment was made, not because of any question of accounting methods, but rather on the basis of Congressional policy as to Section 102. But more important is the fact that while Section 48(c) (defining paid or accrued to mean accounting methods) appeared in the 1936 Revenue Act as well as the 1937 Revenue Act it was flatly stated that taxes "paid during the taxable year" were deductible with no reference to accounting methods. While the amendment affected Section 102, no attempt was made to change the provisions allowing deductions for income and profits taxes "paid or accrued".

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ments[60] Made Necessary By Change in Base for Corporate Tax." Section 105(e)(3) added Section 122(d)(6) to the Code. Sections 105(e)(1) and (2) related, respectively, to the credit for dividends received and to the computation of Section 102 net income. These two subparagraphs contained specific references to the newly added Section 26(e) credit (amount subject to excess profits tax). In each case, that credit was allowed as a reduction. But no reference to the Section 26(e) credit appeared in Section 105(e)(3) of the 1942 Revenue Act relating to Section 122(a) and (d)(6)—although Section 122(c) was amended by that Act to require a normal tax net income computation "without" such credit.

The reason is obvious. As there could be no excess profits net income in a loss year by definition[61] the 26(e) credit would always be naught in such a context. For the same reason, no excess profits tax liability could arise to be "accrued" in a loss year. Taxes were not paid in the

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[60] The Government makes an argument based upon the phrase "technical amendments", the substance of which is that there was something mutually exclusive in the concept of "technical amendments" on the one hand and a significant change in the law on the other. Assuming but not conceding that Section 122(d)(6) was a significant change, the basis of the Government's argument is not correct. The two subsections of Section 105(e) of the Revenue Act of 1942 immediately preceding subsection (3), which added the operating loss provisions here in issue, deal respectively with the credit for dividends received and computation of Section 102 net income. It can scarcely be considered that these provisions are any less significant than those relating to the occasional impact of a net operating loss. Moreover, other legislation bearing the caption of "technical" has dealt with more than narrow technical matters. See as a recent illustration the Technical Changes Act of 1953, 67 Stat. 615.

[61] See footnote 38, *supra*.

year imposed but in the subsequent year and none would be "imposed" in a loss year. It must be concluded, therefore, that the absence of the Section 26(e) credit in Section 122(a) or (d)(6) meant that the excess profits tax "paid or accrued" could not have referred to the tax *for* the loss year but must have related to the tax of a prior year. That being so, "paid or accrued" must have been used in a transactional sense.

2. The purpose of the Section 122(d) adjustments and (d)(6) in particular was to help convert net loss into economic loss. The frame of reference for this problem must take cognizance of the fact that the Revenue Act of 1942 amended the excess profits tax law so as to make the rates high enough to be confiscatory in nature.[62] It is not surprising therefore that Congress, to alleviate some hardship in such circumstances, liberalized certain pre-existing relief provisions[63] and enacted new ones.[64]. Among

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[62] The Congressional intention was stated to be a "desire that the rearmament program should furnish no opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons." The provisions were applicable to all corporations whether or not directly engaged in the defense program. This Act increased the tax rates from a graduated scale ranging from 35 to 60 percent to a 90 percent rate, however, with an over-all limitation of 80 percent subject to a postwar credit of 10 percent. Compare H. R. No. 2894, 76th Cong., 3d Sess., p. 2.

[63] "The 1942 Act amendments substantially broadened the relief provisions, increasing their elasticity." See *7A Mertens, Law of Federal Income Taxation*, (1943 Ed.) 18. One illustration bearing a close analogy to the provisions here in question was the allowance of a two-year carry-back of unused excess profits credits under Section 710(c)(3)(A). That provision was added by Section 204(b) of the Revenue Act of 1942 and was made retroactive to 1941.

[64] Perhaps the most important was Section 710(a)(1)(B) permitting an alternative computation of excess profits tax liability based upon 80 percent of corporation surtax net income less income tax liability.

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the existing relief provisions which were expanded were those relating to net operating losses here involved.[65]

It is clear that Congress intended all six adjustments under Section 122(d) to have the effect of sterilizing net income or net loss as the case might be of all non-economic factors. Stated otherwise, the purpose was to convert net loss (excess of deductions over gross income) into economic loss[66] called "net operating loss".

Where a taxpayer "paid" an excess profits tax that transaction had an operational aspect and parting with cash was certainly an economic loss. By the same token the coming-into-existence of an excess profits tax liability by settlement of a dispute, for example, met the same tests.

As already indicated, the adjustments under Section 122(d) were variously referred to by subsections (a), (b), and (c). It follows, therefore, that the Congress not only provided that a net operating loss as defined should be sterilized of all non-economic loss elements but it applied the same concept in the computation of the amount of the net operating loss carry-backs and carry-overs, as well as in the computation of the amount of the net operating loss deduction itself. In the latter situations net income (not net loss) was converted into economic net income. Thus, even though the net operating loss *deduction* as finally determined under Section 122(c) was allowed as a deduction in computing net income by Section 23(s), it is inaccurate to describe and imply, as the Government does, that the adjustment provided by Section 122(d)(6) was a conventional deduction and *directly* involved in computing net income.

A number of convolutions were involved in going from the payment of an excess profits tax in a loss year to the

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[65] Significantly, the 1942 Revenue Act for the first time since the 1918 Revenue Act permitted a two-year carry-*back* of a net operating loss. See Section 122(b)(1).

[66] See House Ways and Means Committee Report No. 855, 76th Cong., 1st Sess., p. 17.

allowance of a deduction for a net operating loss in a prior year. During the course thereof it was quite possible that the (d)(6) adjustment could have been offset, consumed or otherwise altered so as to give no direct benefit as a deduction. The somewhat complicated computations required by Sections 122(b) and (c) in particular suggest a remote rather than a direct relationship.

More important, the amount of the net operating loss *deduction* depended primarily upon the amount of net operating loss carry-overs and carry-backs from *other years*. Necessarily, therefore, the deduction itself was not controlled by Sections 43 or 48(c) of the Code, for the deduction obviously was neither paid nor accrued *in* the year the deduction was sought. Only in the years where the net operating *losses* were incurred could the "paid or accrued" question really arise, and in those years, as already indicated, Section 48(c) does not apply.

Summarizing Argument II thus far, it has been established that:

The (d)(6) adjustment, enacted by Congress in an era of high taxes but in a spirit of tax relief, tended to benefit taxpayers who incurred losses. The adjustment itself was not a conventional deduction but involved treating an excess profits tax either paid or accrued "as if" it were a deduction. This adjustment, coming as it did after the prior determination of net income (or net loss) was not controlled by Section 48(c) and served to produce a new statutory concept, economic loss, which was typical of a number of similar concepts frequently used by the Congress.

Congress did not expressly define "paid or accrued" when used in Section 122(d)(6). It did, nevertheless, devote considerable attention and statutory language to the problems related to and created by Section 122(d)(6) which indicates the Congressional intent in this respect. The most significant deduction warranted is that Congress was

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not referring to taxes of the loss year itself when using the language "taxes paid or accrued within the taxable year." That this would have been an anomaly was indicated by the deliberate omission of both Rule (A) and the Section 26(e) credit from Section 122(d)(6). Because the taxes referred to as "paid or accrued" could not have related to the taxable year itself, they must have related to a prior taxable year. That being so, the only plausible meaning of the words would be in the transactional sense, the accounting method sense being inapposite.

Ironically, every attack which the Government makes on the taxpayer's position would, if valid, apply with equal force where a cash basis taxpayer paid an excess profits tax in a loss year. Yet the necessary logic of the Government's accounting method argument is that a cash basis taxpayer should benefit in such a situation. Such an inconsistent and untenable position suggests that the Government's real argument is that it does not agree with the Congress and, therefore, Section 122(d)(6) should not apply.

D. Even if it be held that "paid or accrued" literally referred to methods of accounting described in Section 48(c) when used in Section 122(d)(6), this Court may construe the quoted words to refer to transactions rather than accounting methods, if the former was the purpose even though not the literal meaning of the provision.

The supremacy of purpose over language was stated in *U. S.* v. *American Trucking Associations*, (1940) 310 U. S. 534, 543. Where words have a perfectly plain meaning that should be followed; however, where that meaning has led to absurd or futile results, this Court has looked beyond the words to the purposes of the act. This has been done even where the plain meaning did not produce absurd results but merely unreasonable ones which were, however, plainly at variance with the policy of the legislation

as a whole.[67] As previously pointed out, the Government's argument produces gross inequities which are far beyond mere "unreasonable" results. Moreover, the taxpayer has demonstrated that the purpose of the legislation was to grant relief to taxpayers incurring losses by permitting excess profits tax paid in the loss year to be treated as a deduction in converting to economic loss. This was the purpose. If the result is otherwise because of literal meaning, then the purpose has not prevailed.

III.

The Fortuitous Occurrence of a Net Operating Loss in 1947 Which Produced a Net Operating Loss Deduction for 1945 and Hence Resulted in a Refund or Credit of That Year's Taxes Including the Excess Profits Tax Paid in 1946 Does Not, as a Matter of Law, Prevent the Deduction of Excess Profits Tax Paid in the Year 1946.

It was a sad fact that the taxpayer incurred a net operating loss in 1947 as well as in 1946. This fortuitous and unpleasant occurrence produced a net operating loss carryback from 1947 to 1945 where, after conversion into a net operating loss deduction, the 1945 excess profits tax liability was eliminated. The result was that refunds or credits were made to the taxpayer in 1947 and 1948[68] of the excess profits taxes for 1945 which had been paid in 1946. The Government concludes, therefore, that the taxpayer suffered no economic loss in 1946 by virtue of payment in 1946 of the 1945 excess profits tax liability.

Emphasizing the word "imposed" in Section 122(d)(6), the Government argues that because the excess profits taxes

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[67] See also *Helvering* v. *Morgan's Inc.* (1934) 293 U. S. 121, 125; *Markham* v. *Cabell* (1945) 326 U. S. 404 at 409; *Farmers' Reservoir & Irrigation Co.* v. *McComb* (1949) 337 U. S. 755 at 764 and *Takao Ozawa* v. *U.S.* (1922) 260 U. S. 178 at 194.

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were subsequently refunded they did not represent an amount of tax actually imposd; only one excess profits tax was imposed for 1945 and that was the amount which was *finally* determined after application of the 1947 carry-back. The Government then cites some language out of context from the companion case of *Lewyt Corporation* in the Second Circuit Opinion and refers to a brief to be filed in Docket No. 417, the *Lewyt Corporation* case before this Court on certiorari. The same argument was raised by the Government in the proceeding below but was not even adverted to by the Court of Claims in either of two majority opinions or two dissenting opinions.

The taxpayer's position is that the payment of excess profits taxes in 1946 was, in a very real sense, an economic loss as the taxpayer was thereupon deprived of the use of $263,272.80.[69] The fact that the taxpayer recovered this amount by credit or payment several years later cannot obscure the fact that the taxpayer did suffer an economic loss by payment in the year 1946. That tax had been "imposed"; it had accrued in 1945 and had been paid in 1946.

A contrary view would be incompatible with this Court's opinion in *Manning* v. *Seeley Tube & Box Co., supra.* The "deficiency" referred to in that case, as computed under Section 271 of the Code, meant the amount "by which the *tax imposed*" exceeded the tax shown on the return. Necessarily, therefore, that opinion holds that a tax originally due for a taxable year was imposed even though a subse-

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[69] There is a reverse analogy between this situation and that in *Manning* v. *Seeley Tube and Box Co.* (1950) 338 U. S. 561. In that case this Court regarded as significant the fact that a taxpayer had retained the use of tax funds which rightfully should have been in the possession of the United States. The Government was properly entitled to have and to use the mony owed to it during the period it was owed. Thus, interest on the tax deficiency was properly payable regardless of later elimination of such a deficiency by a subsequently incurred net operating loss.

quent net operating loss carry-back might eliminate tax liability for that year.[70]

Section 56(a) of the Code required a taxpayer to pay "the tax imposed by this Chapter" in the year following the taxable year. Necessarily, that tax "imposed" must have been prior to any net operating loss carry-back as no carry-*back* could have existed at such a time. Moreover, Section 122(d)(6) speaks of a tax imposed "paid or accrued *within* the taxable year" and not to events in a subsequent taxable year. The Government reads the quoted phrase as though it referred to taxes "finally imposed for

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[70] With respect to this matter this Court stated at 566 and 567:

"The enactment of the carry-back provision in 1942 did not change this policy of the statute requiring prompt payment. This section was intended to afford taxpayers an opportunity to present for tax purposes a realistic, balanced picture of their profits and losses. It permits a taxpayer to add a net operating loss for one year to the deductions for the two previous taxable years. The Report of the Senate Committee on Finance states that the purpose of the section was to afford relief to cases where maintenance and upkeep expenses were deferred to peacetime years because of wartime restrictions. S. Rep. No. 1631, 77th Cong., 2d Sess., 51-52 (1942). But there is no indication that Congress intended to encourage taxpayers to cease prompt payment of taxes. The same Report, explaining the operation of the section which became the present carry-back provision, states, 'A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit . . . will not be able to determine the deduction on account of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit. *He must therefore file his return and pay his tax without regard to such deduction,* and must file his claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back.' S. Rep. No. 1631 at 123-124. (Italics added) We can imagine no clearer indication of a Congressional understanding and intent that the carry-back was not to be interpreted as deferring or delaying the prompt payment of taxes properly due."

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the taxable year". Since subsequent events may not be taken into account in determining payment or accrual,[71] the only tax imposed, which was paid or accrued within the taxable year 1946, was the tax *paid* in 1946, no tax liability having arisen with respect to the year 1946.

It does seem apparent, however, that the word "imposed" should not necessarily have been confined either to the initial or the ultimate tax liability; it had an ambulatory meaning appropriate in either case. As used here it was only descriptive of a statutory liability for tax and not designed as a limitation.

The Commissioner of Internal Revenue apparently regards the word in the same light as does the taxpayer and in a similar context. A recent ruling relating to Section 102(d)(1)(A) of the Code, which permitted a deduction from "Section 102 net income" for "income, war profits, and excess profits taxes * * * paid or accrued during the taxable year * * * but not including the tax imposed by this section * * *." held that even though such taxes were ultimately refunded as a result of a subsequent net operating loss carry-back, nevertheless the above deduction was to be determined without regard to such carry-back.[72]

The effect of the Government's argument is to nullify the annual accounting concept embedded in the tax system for many years.[73] The Government here reads the word

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[71] *Security Flour Mills Co.* v. *Commissioner* (1944) 321 U. S. 281 at 285 and 286; *Stanard-Tilton Milling Co.* (1944) 3 T.C. 1026 at 1029 and 1030, Acq., 1944-1 Cum. Bull. 3.

[72] Rev. Rul. 6, 1953-1 Cum. Bull., 120; see also Rev. Rul. 55-28, Int. Rev. Bull. No. 3, January 17, 1955, p. 65.

[73] This Court stated in *Edwin E. Healy* v. *Commissioner* (1953) 345 U. S. 278 at 284:

> "Congress has enacted an annual accounting system under which income is counted up at the end of each year. It would be disruptive of an orderly collection of the revenue to rule that the counting must be done over again to reflect events occurring after the year for which the count is made, and would

"imposed" as though it had some magic significance. The term has not been specifically defined in any statute so far as the taxpayer can determine. However, some indication of the Congressional understanding of the meaning of that word appears in the language of the House Ways and Means Committee Report filed in connection with the Revenue Code of 1954 which stated:[74]

> "The use of the word 'imposed' rather than 'levied, collected, and paid' is only a modernization of language."

CONCLUSION

For the reasons above-stated, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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violate the spirit of the annual accounting system. This basic principle cannot be changed simply because it is of advantage to a taxpayer or to the government in a particular case that a different rule be followed."

While it is true that net operating loss carry-back provisions are in themselves something of a modification of the annual accounting concept, this is not to concede tha a simple paymen of tax occurring in a loss year is anything but an economic loss. The effect of the Government's argument is to admit that a payment in 1946 was an economic loss at that time but to deny that it was an economic loss in 1948.

[74] H. R. No. 1337, p. A9, accompanying H. R. 8300. (83 Cong., 2nd Sess.)

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APPENDIX A

INTERNAL REVENUE CODE OF 1939*

* The Code provisions cited are those which were in effect in 1944 or 1946 as the case might be as last amended.

"SEC. 13. NORMAL TAX ON CORPORATIONS.

"(a) Definitions.—For the purposes of this chapter—

* * * * *

"(2) NORMAL-TAX NET INCOME.—The term 'normal-tax net income' means the adjusted net income minus the credit for income subject to the tax imposed by subchapter E of Chapter 2 provided in section 26(e) and minus the credit for dividends received provided in section 26(b)."

(As amended by Section 105 (a)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798.)

* * * * *

"SEC. 15. SURTAX ON CORPORATIONS.

"(a) CORPORATION SURTAX NET INCOME.—For the purposes of this chapter, the term 'corporation surtax net income' means the net income minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26(e) and minus the credit for dividends received provided in section 26(b) (computed by limiting such credit to 85 per centum of the net income reduced by the credit for income subject to the tax imposed by Subchapter E of Chapter 2 in lieu of 85 per centum of the adjusted net income so reduced), and minus, in the case of a public utility, the credit for dividends paid on its preferred stock provided in section 26(h). For the purposes of this subsection dividends received on the preferred stock of a public utility shall be disregarded in computing the credit for dividends received provided in section 26(b)."

(As amended by Section 105 (b) of the Revenue Act of 1942, *supra.*)

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NOTE: Code Sections can be found in Volume 26 U.S.C., 1952 ed., at corresponding section numbers.

"SEC. 21. NET INCOME.

"(a) DEFINITION.—'Net income' means the gross income computed under section 22, less the deductions allowed by section 23.

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"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

* * * * * *

"(c) TAXES GENERALLY.—

"(1) ALLOWANCE IN GENERAL.—Taxes paid or accrued within the taxable year, except—

* * * * * *

"(B) war-profits and excess-profits taxes imposed by Title II of the Revenue Act of 1917, Title III of the Revenue Act of 1918, Title III of the Revenue Act of 1921, section 216 of the National Industrial Recovery Act, or section 702 of the Revenue Act of 1934, or Subchapter E of Chapter 2, or by any such provisions as amended or supplemented;

(As amended by Section 105 (c) (1) of the Revenue Act of 1942, *supra.*)

* * * * * *

"(s) NET OPERATING LOSS DEDUCTION.—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * * *

"SEC. 26. CREDITS OF CORPORATIONS.

* * * * * *

"(c) Net Operating Loss of Preceding Year.—

"(1) Amount of Credit.—The amount of net operating loss (as defined in paragraph (2)) of the corporation for the preceding taxable year (if beginning after December 31, 1937) but not in excess of (A) the section 102 net income for the taxable year, in the case of the tax imposed by section 102; (B) the Supplement P net income for the taxable year, in the case of the computations required under Supplement P; or (C) the Sub-

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chapter A net income for the taxable year, in the case of the tax imposed under Subchapter A.

"(2) Definition.—As used in this section the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the following exceptions and limitations—

"(A) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under Section 114 (b) (2), (3), or (4);

"(B) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23 (b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations.

"(C) For the purposes of this paragraph, the net operating loss deduction provided in section 122 shall not be allowed.

"In the case of a taxable year beginning after December 31, 1937, and before January 1, 1939, the term 'net operating loss' means net operating loss as defined in section 26 (c) of the Revenue Act of 1938, 52 Stat. 467."

(As amended by Section 132 (a) of the Revenue Act of 1942, *supra.*)

* * * * * *

"(e) Income Subject to Excess-Profits Tax.—In the case of any corporation subject to the tax imposed by Subchapter E of Chapter 2, an amount equal to its adjusted excess-profits net income (as defined in section 710 (b)). In the case of any corporation computing such tax under section 721 (relating to abnormalities in income in the taxable period), section 726 (relating to corporations completing contracts under the Merchant Marine Act of 1936), section 731 (relating to corporations engaged in mining strategic minerals), or section 736 (b) (relating to corporations with income from long-term contracts), the credit shall be the amount of which the tax imposed by such subchapter is 95 per centum. For the purpose of the preceding sentence the

term 'tax imposed by Subchapter E of Chapter 2' means the tax computed without regard to the limitation provided in section 710 (a) (1) (B) (the 80 per centum limitation), without regard to the credit provided in section 729 (c) and (d) for foreign taxes paid, and without regard to the adjustments provided in section 734. This subsection shall not apply to any corporation exempt from such tax under section 725 or section 727."

(Code section 26 (e) was added by Section 105 (d) of the Revenue Act of 1942; it was repealed by Sec. 122 (g) (1), 1945 Act, effective for taxable years beginning after December 31, 1945)

"SEC. 41. GENERAL RULE.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

"For use of inventories, see section 22 (c)."

"SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

"The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the

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death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

(As amended by Section 134 (b) of the Revenue Act of 1942, *supra.*)

* * * * * *

"SEC. 48. DEFINITIONS.

"When used in this chapter—

* * * * * *

"(c) 'PAID OR INCURRED', 'PAID OR ACCRUED'.—The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part."

* * * * * *

"SECTION 56. PAYMENT OF TAX.

"(a) TIME OF PAYMENT.—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year."

"(b) INSTALLMENT PAYMENTS.—Except in the case of an individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in Section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable), the taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth monh, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector."

* * * * * *

(As amended by Section 5 (d) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.)

"SEC. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

* * * * * *

"(d) DEFINITIONS.—As used in this chapter—

"(1) SECTION 102 NET INCOME.—The term 'section 102 net income' means the net income, computed without the benefit of the capital loss carry-over provided in section 117(e) from a taxable year which begins after December 31, 1940, and computed without the net operating loss deduction provided in section 23 (s), minus the sum of—

"(A) Taxes.—Federal income, war-profits, and excess-profits taxes (other than the tax imposed by Subchapter E of Chapter 2 for a taxable year beginning after December 31, 1940), paid or accrued during the taxable year, to the extent not allowed as a deduction by section 23, but not including the tax imposed by this section or a corresponding section of a prior income-tax law.

* * * * * *

(As amended by Section 138 of the Revenue Act of 1942, *supra.*)

"(D) Income subject to excess profits tax.—The credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26 (e)."

(As amended by Sec. 105 (e) (2) of the Revenue Act of 1942, *supra.*)

"SEC. 122. NET OPERATING LOSS DEDUCTION.

"(a) DEFINITION OF NET OPERATING LOSS.—As used in this section, the term 'net operating loss' means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(As amended by Section 105 (e) (3) (A) of the Revenue Act of 1942, *supra.*)

"(b) AMOUNT OF CARRY-BACK AND CARRY-OVER.—

"(1) NET OPERATING LOSS CARRY-BACK.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each

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of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitation s provided in subsection (d) (1), (2), (4) and (6), and (B) by determining the net operating loss deduction for such second preceding taxable years without regard to such net operating loss."

(As amended by Section 153 (a) of the Revenue Act of 1942, *supra.*)

* * * * * *

"(c) AMOUNT OF NET OPERATING LOSS DEDUCTION.—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d), (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e);

(As amended by Sections 105 (e) (3) (B) and 153 (b) of the Revenue Act of 1942, *supra.*)

"(d) EXCEPTIONS, ADDITIONS, AND LIMITATIONS.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

"(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114 (b), (2), (3), or (4);

"(2) There shall be included in computing gross income the amount of interest received which is wholly exempt from the taxes imposed by this chapter, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23 (b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations;

"(3) No net operating loss deduction shall be allowed;

"(4) Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section 117(b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains.

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business. For the purposes of this paragraph deductions and gross income shall be computed with the exceptions and limitations specified in paragraphs (1) to (4) of this subsection.

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

"(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

"(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

"(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

(As amended by Sections 105 (e) (3) (C) and 150 (e) of the Revenue Act of 1942. Section 304 (e) of the Excess Profit Tax Act of 1950 made Code Sec. 122 (d) (6) inapplicable with respect to any taxable year ending after June 30, 1950.)

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"SEC. 271. DEFINITION OF DEFICIENCY.

"(a) IN GENERAL.—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

"(1) The sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b) (2), made."

(As amended by Section 14 (a) of the Individual Income Tax Act of 1944.)

"SEC. 336. SUPPLEMENT P NET INCOME.

"For the purposes of this chapter the term 'Supplement P net income' means the net income with the following adjustments:

"(a) ADDITIONAL DEDUCTIONS.—There shall be allowed as deductions—

"(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 500, or a section of a prior income-tax law corresponding to either of such sections.

* * * * * *

(As amended by section 3 (b) of Public Law 378, 81st Congress.)

"SEC. 505. SUBCHAPTER A NET INCOME.

"For the purposes of this subchapter the term 'Subchapter A Net Income' means the net income with the following adjustments:

"(a) ADDITIONAL DEDUCTIONS.—There shall be allowed as deductions.—

"(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the

extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 500, or a section of a prior income-tax law corresponding to either of such sections.

• • • • • •

"SEC. 507. MEANING OF TERMS USED.

"(a) GENERAL RULE.—The terms used in this subchapter shall have the same meaning as when used in chapter 1.

• • • • • •

"SEC. 710. IMPOSITION OF TAX.

[As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974.]

"(a) Imposition.—

(As amended by Sec. 201 of the Revenue Act of 1941.)

"(1) General Rule.—There shall be levied, collected and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(As amended by Sec. 202 of the Revenue Act of 1942.)

"(A) 95 per centum of the adjusted excess profits net income, or

(As amended by Sec. 202 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.)

"(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26 (e) (relating to income subject to the tax imposed by this subchapter), and without regard to 80 per centum of the credit provided in section 26 (h) (relating to credit for dividends paid on certain preferred stock.

(As amended by Sec. 202 (b) of the Revenue Act of 1943.)

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"(b) Definition of Adjusted Excess Profits Net Income. As used in this section, the term 'adjusted excess profits net income' in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

"(1) Specific exemption.—A specific exemption of $10,000, * * *

(As amended by Sec. 204 of the Revenue Act of 1943.)

"(2) Excess profits credit.—The amount of the excess profits credit allowed under section 712; and

"(3) Unused excess profits credit.—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(As amended by Sec. 2 (a) of the Excess-Profits Tax Amendments of 1941, c. 10, 55 Stat. 17 and Sec. 204 (a) of the Revenue Act of 1942.)

"SEC. 711. EXCESS PROFITS NET INCOME.

(As added by Sec. 201 of the Second Revenue Act of 1940.)

"(a) Taxable Years Beginning After December 31, 1939.—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be as follows:

"(1) Excess profits credit computed under income credit.—If the excess profits credit is computed under section 713 the adjustments shall be as follows:

"(A) INCOME SUBJECT TO EXCESS PROFITS TAX.—In computing such normal-tax net income the credit provided in section 26 (e) (relating to income subject to the tax imposed by this subchapter) shall not be allowed;

(As amended by Sec. 206 (a) (1) of the Revenue Act of 1942.)

* * * * * * *

"(J) Net Operating Loss Deduction Adjustment.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a) and the net income

for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; * * *

"(ii) In lieu of the reduction provided in section 122 (c) such reduction shall be in the amount by which the excess profits net income computed with the exceptions and limitations specified in section 122 (d) (1), (2), (3), and (4) and computed without regard to subparagraph (B), without regard to any credit for dividends received, and without regard to any credit for interest received provided in section 26 (a) exceeds the excess profits net income (computed without the net operating loss deduction).

(As amended by Sec. 210 (a) of the Revenue Act of 1942.)

"(2) Excess profits credit computed under invested capital credit.—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * * *

"(L) Net Operating Loss Deduction Adjustment.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under subparagraph (B) of this paragraph for such taxable year; and

"(ii) In lieu of the reduction provided in section 122 (c), such reduction shall be in the amount by which the excess profits net income computed with the exceptions and limitations provided in section 122 (d) (1), (2), (3), and (4) and computed without regard to subparagraph (D), without regard to any credit for dividends received, and without regard to

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any credit for interest received provided in section 26 (a) exceeds the excess profits net income (computed without the net operating loss deduction).

(As amended by Sec. 210 (b) of the Revenue Act of 1942.)

PRIOR INTERNAL REVENUE CODE PROVISIONS

"SEC. 23 (c). TAXES GENERALLY.—Taxes paid or accrued within the taxable year, except—

"(1) Federal income, war-profits, and excess-profits taxes (other than the excess-profits tax imposed by section 106 of the Revenue Act of 1935 (49 Stat. 1019), or by section 602 of the Revenue Act of 1938 (52 Stat. 567), and other than the declared value excess-profits tax imposed by section 600);"

(As amended by Section 506 (b) of the Second Revenue Act of 1940, c. 757, 54 Stat. 974.)

REVENUE ACT OF 1937 [c. 815, 50 Stat. 813]

"TITLE IA—ADDITIONAL INCOME TAXES

"SEC. 356. ADJUSTED NET INCOME.

"For the purposes of this title the term 'adjusted net income' means the net income with the following adjustments:

"(a) Additional Deductions.—There shall be allowed as deductions—

"(1) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent now allowed as a deduction under section 23; but not including the tax imposed by section 102, section 351 (either before or after its amendment by the Revenue Act of 1937), or a section of a prior income tax law corresponding to either of such sections.

* * * * * *

"SEC. 357. MEANING OF TERMS USED.

"The terms used in this title shall have the same meaning as when used in Title I."

"TITLE II—FOREIGN PERSONAL HOLDING COMPANIES

"SEC. 336. SUPPLEMENT P NET INCOME.

"For the purposes of this title the term 'Supplement P net income' means the net income with the following adjustments:

"(a) Additional Deductions.—There shall be allowed as deductions—

"(1) Federal income, war-profits, and excess profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction under section 23; but not including the tax imposed by section 102, section 351 (either before or after its amendment by the Revenue Act of 1937), or a section of a prior income-tax law corresponding to either of such sections."

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BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Argued December 9, 1952.—Reargued December 8, 1953.—Decided May 17, 1954.

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486–496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489–490.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492–493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 493–494.

(e) The "separate but equal" doctrine adopted in *Plessy* v. *Ferguson*, 163 U. S. 537, has no place in the field of public education. P. 495.

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*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495–496.

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple*.

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J. Lindsay Almond, Jr., Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch. James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris*

for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admis-

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In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

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sion to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22–221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance in-

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they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

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volved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U. S. 1, 141, 891.

[3] 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

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Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, sup-

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War

ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of

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virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but

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"separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson, supra,* involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education,* 175 U. S. 528, and *Gong Lum* v. *Rice,* 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school

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declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."
See also *Virginia* v. *Rives,* 100 U. S. 313, 318 (1880); *Ex parte Virginia,* 100 U. S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston,* 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky,* 211 U. S. 45 (1908).

[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Oklahoma*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter, supra*, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

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the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." [10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any lan-

[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of

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guage in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General

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Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the

of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

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